Case Number: 3220444/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr G Handley**

Respondent: **Lick Creative Limited**

Heard at: **East London Hearing Centre**

On: **4 June 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **In Person**
Respondent: **Ms V Brown (Counsel)**

JUDGMENT

1. **The name of the Respondent is amended to Lick Creative Limited.**

2. **The claim of unfair dismissal fails and is dismissed.**

REASONS

1. By a claim form presented to the Employment Tribunal on 8 December 2020, the Claimant brings a claim of unfair dismissal from his employment with the Respondent as the Head of Creative Services. The Respondent resists all claims.

2. It is not in dispute that there was a genuine redundancy situation. The Claimant submits that his dismissal was unfair because the Respondent failed to follow the correct procedure with regard to pool, consultation and alternative employment.

3. The Tribunal heard evidence from the Claimant on his own behalf and, for the Respondent, from Mr Kevin Pritchard (Group Innovation and Transformation Director) and Mr Mark Weatherbed (Group Commercial Procurement Director). I was provided with an agreed bundle and read those pages to which I was taken in the course of evidence.

Findings of Fact

4. The Respondent is a company specialising in multi-channel marketing: supporting customers in creating, producing and delivering marketing campaigns and product launches. These can be marketing campaigns in retail establishments such as supermarkets or in large-scale entertainment venues such as multiplex cinemas. The Respondent operates through several departments, including creative, production and account management. The Creative Department is divided into specific sector-related activity, including films, entertainment, fast moving consumer goods and retail.

5. The Claimant commenced employment with the Respondent on 7 August 2018, although his continuous employment dated to 6 May 2014. His job title was Head of Creative Services - Film and Entertainment although he could be required to carry out any other reasonably allocated tasks. His duties included overseeing all creative direction for film and entertainment clients. The Claimant would work with an Account Director and senior designers or art workers to produce a campaign which met the client's needs. On many occasions, the Claimant would carry out the creative, design and artwork himself. Unlike designers, however, the Claimant also managed the client relationship and had materially greater responsibility for oversight of a campaign's strategy. In evidence, the Claimant estimated that about two thirds of his time was spent working with film clients (mostly creating content but with some client management and strategy); for the non-film clients he was largely undertaking design work. On balance, I reject the Claimant's evidence that his job title was out of date and did not reflect the work which he undertook. I find that although he would work closely with other departments and worked on some accounts for non-film clients, I find that the Claimant was specifically assigned to the film and entertainment sector of the Creative Department, undertaking predominantly film campaigns.

6. I had regard to the photographs provided by the Claimant in the appendix to his statement showing examples of the work which he had produced and comparing it to similar work created by the Creative Director, Art Director or Senior Designer. The Claimant relies on this as evidence of the transferability of skills and work across the teams and roles. On the face of it, the similarities between the Claimant's work and that of others from different teams do look significant. However, I accepted Mr Pritchard's evidence that also important is the context of the work (an in-store point of sale being different to a much larger experiential stand in cinema foyers or at events). It is not evident from the photographs whether the work compared is of the same size, scale or product material or over what time period they were produced. In any event, it is not in dispute that the Claimant had on occasion undertaken work outside of film campaigns and in design. The photographs do no more than support this undisputed fact and do not prove that the Claimant was doing the same work as others and so should have been pooled with them.

7. After the Client Director, Mr Curness, left in early 2020 the Claimant was managed by Mr Ballard, the newly appointed Creative Director. The Claimant's case is that he was regarded with some suspicion and excluded from a meeting to discuss the future management of the team as he was perceived to have close professional links with Mr Curness. However, there is no other evidence to support his belief. To the contrary, internal performance appraisals show that the Claimant was highly regarded, overall performance was rated as outstanding and consistently exceeding the required standard.

8. As is well known, at the beginning of 2020 the Covid-19 pandemic began to affect the United Kingdom and a lock down was announced with effect from 23 March 2020. The pandemic had a significant impact upon the Respondent's business. The newly appointed Managing Director was made redundant only 8 weeks after commencing employment. A large number of clients either ceased operations or took work in-house to save cost. This had a particularly significant impact in the film and entertainment sector. Unlike supermarkets and essential retail which remained open throughout the lockdown, film and entertainment was seriously affected with film releases delayed in the weeks immediately beforehand and the subsequent closure of cinemas and theatres. The result was that there was no need for promotional campaigns for new films or events.

9. On 30 March 2020, the HR Director for the Respondent wrote to employees, including the Claimant, to inform them that they would be put on the newly introduced furlough scheme. The furlough leave period was extended on 18 May 2020 and again on 17 July 2020.

10. By summer 2020, it was anticipated that the furlough scheme would end in October 2020. Due to the downturn in business and financial impact of the pandemic, the Respondent began to consider a restructure which would be implemented in phases. Given the large number of employees at risk of redundancy, the Respondent began collective consultation with the Employee Consultation Committee in June 2020. At a meeting on 22 July 2020, they discussed the proposed structural changes required, the consultation and selection process and agreed a timescale whereby individual consultation would begin in the week commencing 27 July 2020, with the first redundancies being confirmed on 1 August 2020.

11. The Claimant was temporarily brought back from furlough from 3 August 2020 until 7 August 2020 inclusive. During that period the Claimant was working as an art worker and senior designer on promotions for a number of well-known consumer brands. In or around late August 2020 the Claimant was told by Mr Ballard that his position may be at risk. This was not a formal warning but part of the ongoing keeping in touch discussions that they had.

12. Phase 2 of the restructure commenced in September 2020 and included the Creative Department in which the Claimant worked. The PowerPoint slides giving an overview of the phase 2 restructure of the Creative Department identifies the role of "Head of Creative Services Film & Events" as one proposed for removal. I accept that this is a typographical error and that it refers to the Claimant's job as Head of Creative Services - Film and Entertainment. This is consistent with the post-restructure organisation chart which gave the Claimant's name next to the deleted role, there was no evidence that there had ever been a separate "Film & Events" role and the Claimant was the only Head of Creative Services in the team. Also proposed for removal from the Creative Department were the jobs of Senior Creative, 3D Designer and Events Administrator; the role of Creative Head undertaken by Mr D Keep was not proposed for removal. It was agreed that affected employees would be notified and individual consultation would commence.

13. The Claimant was told that he was at risk of redundancy by Mr Pritchard in a telephone conversation on 14 September 2020. I accept as credible and reliable Mr Pritchard's evidence that he selected the Claimant's role because the creative work in the specialist film and entertainment industries had begun to reduce before the pandemic and, by April 2020, had stopped altogether. Even as work was anticipated to improve generally

in September 2020 as the economy felt the effect of easing restrictions, there was no sign of any material improvement in the Creative Department and in film in particular. Mr Pritchard discussed the Claimant's work with his line manager, Mr Ballard, and asked lots of questions before making any decision. He also had discussions with other managers to understand the work of other members of the Creative Department.

14. I find that Mr Pritchard was an appropriate person to carry out the selection and consultation process as he had been managing the Creative Department overall. Mr Pritchard was aware of the Claimant's work and his wide and varied experience. I do not accept that Mr Pritchard selected the Claimant based on job title and salary alone.

15. The Claimant's case is that he should at the very least have been pooled with Mr Keep, if not retained and Mr Keep made redundant. Mr Pritchard gave a credible explanation in evidence, which I accepted, that Mr Keep had not been pooled with the Claimant as he was doing a very specific task for a very different set of clients, who were still very busy. Mr Pritchard concluded that they were very different roles. Mr Keep really only worked on the design phase whereas the Claimant liaised directly with the client about the project aim and idea, converted it to a brief for the designer and, on occasion, undertook the design work himself. Whilst the Claimant disagrees, I find that this was Mr Pritchard's genuine belief based upon his knowledge of the work each man was undertaking as well as the nature of their clients.

16. The collective consultation meeting on 21 September 2020 considered the effect of anticipated changes to the furlough scheme, which the Respondent had been using to avoid large scale redundancies to date. The individual consultation process would provide the rationale and business case for the restructure, the reason why the specific role was affected, the selection methods and outcomes if appropriate, options to avoid redundancy such as redeployment and the provision of redundancy payment illustrations. It was anticipated that there would be two meetings, the first in the week of 21 September and the second in the week of 28 September. There were some vacancies within the benches team which it was agreed could be offered as a short-term redeployment measure for those who wanted it until other work became available. In discussion about the Creative Department, further review of the art team was likely in a later phase. The Respondent explained its view that roles could be deleted without placing undue pressure upon the remaining team by using closer alignment of teams and consideration of the skills and resources in each team. Longer term planning would occur when normal trading resumed, although it was not known when that may be.

17. The formal "at risk" letter was sent to the Claimant on 22 September 2020; it referred to the "Head of Creative Service – Film & Ents". This is consistent with my finding that there was a typographical error in the restructure proposal slides where the abbreviation "Ents" was mis-stated as "Events" rather than "Entertainment". The letter explained that fewer employees were needed due to reduced customer spend and projected loss of revenue and workload because of the pandemic.

18. The Claimant was invited to attend an individual consultation meeting with Mr Pritchard on 24 September 2020. Mr Pritchard's contemporaneous preparatory notes for the first consultation meeting are consistent with a genuine redundancy situation, identifying the effect of the pandemic on customer demand and the continued uncertainty about workloads. In advance of the meeting, the Claimant sent a detailed email setting out the reasons why he believed he should not be made redundant just because cinemas

remained closed. The Claimant argued that his previous experience and skill-set and his work as furlough cover with retail customers showed that he could work well in other areas, working directly with clients to create concepts, receiving the brief and dealing directly with the print team when Account Directors were not available. The Claimant described the artwork and installation work undertaken prior to lockdown as evidence that he worked beyond the apparent limits of his job title. In summary, the Claimant's case was that he was more than capable of, and was in fact, undertaking work beyond film and entertainment.

19. Contemporaneous minutes of the meeting were included in the bundle and I am satisfied that they are a reliable record of what was discussed. The reasons for the redundancy situation and collective consultation process were all explained to the Claimant. The Claimant was asked whether he had any comments, questions or suggestions relating to the proposed restructure and the changes impacting on his role. The Claimant thought that Mr Pritchard was not aware of what his job entailed, suggesting that his job title was deceiving and that he had a varied background which gave him particular skills and experience. As set out in his earlier email, the Claimant relied on the cover work undertaken during furlough as evidence that he had experience in sectors beyond cinemas and in artwork. The Claimant emphasised those parts of his role which were client facing and suggested that even if cinema was currently "a bit dead", he would be an asset to help the Respondent generate client business and aid recovery when circumstances changed.

20. Mr Pritchard acknowledged the Claimant's skills and experience but maintained that the Claimant had mainly worked in film and entertainment and that there was simply not enough revenue coming in to sustain that role. When the Claimant said that he would be able to undertake the role of a Senior Designer, as he had done during the furlough cover period, Mr Pritchard agreed to look into it. When put to him that as a manager his role was more senior than a designer or artworker (even at senior levels), the Claimant said **"yeah, I get that, but I do not have to have a certain hat on, I just do whatever I need to do"**. This is consistent with my finding that the Claimant would on occasion produce artwork but that his job was nevertheless significantly different in terms of content and seniority. The HR representative at the meeting expressed concern at the suggestion of bumping a more junior employee to accommodate the Claimant.

21. The Claimant was advised that there were only vacancies as a temporary Retail Account Executive and on the benches in the warehouse and that these would be shared with all employees at risk of redundancy. The Claimant suggested using the flexible furlough scheme which at the time was being mooted by the Government. The Claimant was told that there would be a second consultation meeting the following week and that he should let the Respondent know of any alternative proposals or options to avoid redundancy. The Claimant's redundancy pay was calculated as £4,304, notice pay at £18,207 and he had 2.12 days of holiday outstanding.

22. Following the consultation meeting, Mr Tingey sent an email to Mr Pritchard setting out his response to the points made by the Claimant. In his view, the future remained uncertain, recovery would not occur in the short to medium term and the need for a cost effective structure required the reduction of staff in many roles. He did not dispute that the Claimant had built up good relationships and had gone the extra mile for the client, however the redundancy was not a personal reflection on the Claimant but about having an efficient and cost effective team structure. The film side of the business

was struggling and would do so for some time. Although the Claimant had the skills and experience to cover other roles, Mr Tingey's concern was that as it was shrinking in size, the Respondent could not support the current number of senior managers. Mr Tingey concluded: "**Andrew also mentioned that he needs an Account Manager at Lidl on the client service side, you still would not use Graham due to his salary and level of seniority**".

23. Mr Pritchard replied to say he totally agreed and that the Claimant "**definitely would be the right skill set and salary level for the AM role**". I accepted Mr Pritchard's evidence that this was a typographical error and that the word "**not**" had been omitted in error. This is consistent with his agreement with Mr Tingey's email generally and the fact that the Account Manager salary would have been £30,000 to £35,000 per annum where the Claimant's salary at the time was £72,000 per annum. In the event, nobody was recruited to the Lidl Account Manager role as there was no budget.

24. The second consultation meeting took place on 9 October 2020. The pre-prepared script covered proposals to avoid redundancy and redeployment opportunities. There are no notes of the second consultation meeting in the bundle but, given that the first consultation meeting followed the script strictly, I accept Mr Pritchard's evidence and find that these were discussed.

25. On 12 October 2020, the Claimant was informed that his employment would be terminated by reason of redundancy with effect that day. The letter again set out the reasons for the restructuring exercise and the consequent deletion of the Claimant's role. Mr Tingey acknowledged the points made by the Claimant about the extent of his role, client relationships and broad range of skills, as well as his flexibility and commitment. Again, the Claimant was assured that his redundancy was not in any way a reflection on his commitment or performance but was due to the significant impact of the pandemic and the need to reduce head count in the face of current and projected declines in revenue and workload. The letter records that the Claimant did not want to apply for the roles on the vacancy list and that there were no other redeployment opportunities. The Claimant was advised of his right of appeal.

26. By letter dated 14 October 2020, the Claimant appealed against his dismissal. It is a detailed letter with the principal point that he should have been pooled with other employees rather than treated as a unique role and/or selected based upon the level of his salary. The Claimant relied on the work in fact done and which he was capable of doing which went over and beyond that suggested in his job title, listing seven specific areas of the business to which he had previously provided cover. The Claimant's case on appeal, as at this Tribunal, was that he should have been pooled with Account Managers for film and publishing clients, Senior Designer, Art Creative Director, Art Worker and Project Managers as he had covered each area during his time with the Respondent. The Claimant set out his experience outside of film clients, including work on retail brands.

27. Mr Weatherbed was appointed to hear the appeal and was provided with the grounds of appeal, documents from the consultation process and an updated structure chart showing the reduction in headcount and the need for as many senior managers. The revised organisation chart shows that seven employees in the Creative Department were made redundant and one resigned and was not replaced. These included an Account Director, a Senior Account Manager and a Project Manager. Mr D Keep, the Creative Head, was not made redundant.

28. The appeal hearing took place on 23 October 2020 and there are contemporaneous notes in the bundle which I am satisfied are an accurate record of matters discussed. Mr Weatherbed explained that about 45 employees had been made redundant across the business and again set out the reasons for the restructuring exercise. The Claimant made clear his view that he had been selected based upon his job title and salary, based on an incorrect assumption that he worked only on film, rather than looking at the work he had in fact been undertaking and that which he was potentially capable of doing. Mr Weatherbed acknowledged the Claimant's abilities and the breadth of his ability, which he said was not in question, and assured the Claimant that the decision was not based on job titles but was taken by senior managers who knew the Claimant's actual role. I accept Mr Weatherbed's evidence and explanation in the appeal hearing that the decision was made by colleagues who knew the Claimant's work and with HR input. He considered that the Creative Department was too "top heavy" with senior employees as were the warehouse and transport where there had also been redundancies.

29. When discussing the pool, Mr Weatherbed stated that the Respondent had made the selection based upon the Claimant's current role and not the work which he felt that he would be able to undertake or had previously covered. It is clear that the Claimant was very keen to retain his job and went to great lengths to persuade Mr Weatherbed that he would be able to take work either at a lower level or indeed to cover the work of others, stating: "**I step up, down, left, right. I want to know why those people were not in the pool as well, why wasn't redundancy bumping looked at?**". The Respondent did not agree that the entire Creative Department should be placed in a pool when it was a specific role being made redundant. There was specific discussion of the people on the Claimant's level in the Creative Department: the Art Director and three Senior Designers. The Claimant described their work as similar, if anything he was more client facing. Mr Weatherbed agreed to consider the points raised by the Claimant.

30. Contemporaneous emails with HR confirm that Mr Weatherbed did indeed investigate the points raised by the Claimant following the appeal hearing, however he was not persuaded.

31. By letter dated 28 October 2020, the Claimant was advised that his appeal had not been successful. Of the 45 employees selected for redundancy, 25% were in the film and entertainments team. In the letter, Mr Weatherbed addressed the points made by the Claimant in the appeal, consistent with the investigation which I have found he undertook. The decision to restructure was taken by the Executive Board but it was senior managers in the departments, with HR support, who identified the roles which would be removed. The Respondent had never used bumping as a method of selection, he did not agree that the Claimant should be retained by displacing somebody else not least as the Claimant's role was unique. As for the nature of the Claimant's work, Mr Weatherbed concluded that being asked to provide holiday cover for staff on a lower grade was not sufficient to be placed into the redundancy pool with those employees. Whilst his time and work had been greatly appreciated, taking on additional responsibilities and offering to cover annual leave of others did not affect the fact that his current role was non-essential in the foreseeable future.

Law

32. It is for the employer to show the reason for dismissal and to satisfy the Tribunal that it is a potentially fair reason, section 98(1) Employment Rights Act 1996 ('ERA'). Redundancy is a potentially fair reason for dismissal, section 98(2)(c) ERA.

33. Section 139 ERA states that:

> **(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."**

34. In considering whether the Respondent has established that there was a redundancy situation, the Tribunal must consider whether there was (i) cessation of the business; and/or (ii) cessation or diminution in the Respondent's requirement for an employee to do the work of the kind done by the Claimant. A need to save cost, alone, will not amount to a redundancy within s.139 ERA.

35. In **Williams –v- Compair Maxam Ltd** [1982] IRLR 83, the EAT set out guidelines for considering the fairness of a dismissal by reason of redundancy. These are guidelines only and are not principles of law. The guidelines provide *inter alia* that there should be: (i) as much warning as possible and (ii) consultation about ways of avoiding redundancy, such as the possibility of alternative employment.

36. An employer's choice of pool is to be judged by the Tribunal in terms of whether it fell within a range of reasonable responses. Where the employer has genuinely applied its mind to the selection of a pool, its definition is primarily for the employer and not for the Tribunal will be difficult (but not impossible) to challenge, **Capita Hartshead Limited v Byard** [2012] ICR 1256 at paragraph 31.

37. The obligation to consult requires the Respondent to give a fair and proper opportunity to understand the matters about which consultation is taking place to express views and have those views properly and genuinely considered, **Crown v British Coal Corporation, ex parte Price (No. 3)** [1994] IRLR 72.

38. The obligation to find alternative work, again, is an obligation which is subject to the caveat of reasonableness. The employer is not under a duty to take every possible step to retain an employee, simply to do what it can so far as is reasonable, **Thomas & Betts Manufacturing Company v Harding** [1980] IRLR 255.

39. It is not a requirement for there to be a perfect procedure nor is the employer obliged to agree with the proposals put forward by an employee. The Tribunal must take

great care not to substitute its decision for that of the employer but to apply the above law and have in mind the issue of reasonableness.

Conclusions

40. Considering the pool, I am satisfied that the Respondent did turn its mind properly and genuinely to the construction of the pool both during collective consultation and when considering the Claimant's role in the Creative Department. The collective consultation discussed in detail the effect of the restructure on each department and, whilst not determinative, is persuasive evidence of the reasonableness of the pool.

41. Mr Pritchard considered the effect of the pandemic upon the creative work in film and entertainment and the lack of recovery in the short term. Mr Pritchard was aware of the Claimant's work and his wide and varied experience and did not put the Claimant in a pool of one by reason of his job title and salary alone. Mr Pritchard considered whether the Claimant should be pooled with Mr Keep and gave a credible and genuine reason why he decided that it would not be appropriate. Mr Keep was doing a very specific task for a very different set of clients, who were still very busy, to the Claimant whose main work was for film and large events. Mr Pritchard concluded that they were very different roles. Whilst the Claimant disagrees, I have found that this was Mr Pritchard's genuine belief based upon his knowledge of the work each man was undertaking as well as the nature of their clients.

42. The Claimant sought to persuade the Respondent during the consultation and appeal process that he was undertaking other, broader work and should have been pooled with Account Managers for film and publishing clients, Senior Designer, Art Creative Director, Art Worker and Project Managers as he had covered each area during his time with the Respondent. The Respondent considered this properly but decided that it did not make the Claimant's job sufficiently similar to others in the Creative Team. Nor was it unreasonable for the Respondent to conclude that cover work was not sufficient to make it appropriate to pool such disparate roles. The Claimant was the only employee within the Creative Department working in film and entertainment as his primary role and purpose and it was reasonably open to the Respondent to conclude that he was in a unique position, effectively a pool of one. Whilst there were similarities in the nature of the work he undertook both in and outside of film clients, I am not satisfied that these were so great as to render the Respondent's choice of pool outside of the range of reasonable pools open to it. Nor was it outside of the range of reasonable pools for the Respondent to refuse to bump other employees simply because the Claimant had the skills to perform their work.

43. With regard to the consultation period, I am satisfied that there was appropriate collective and individual consultation. Both Mr Pritchard and Mr Weatherbed explained why redundancies were required and why the Claimant's role was specifically affected. Mr Pritchard, with support from Mr Tingey, considered the Claimant's arguments against his selection for redundancy. Mr Weatherbed carried out further investigation after the appeal hearing into the points made by the Claimant and gave considered reasons for rejecting them. The Respondent was not simply going through the motions, it fully considered the arguments made by the Claimant but was ultimately was not persuaded by them. I conclude that the Claimant had a fair and proper opportunity to understand the matters about which consultation was taking place, to express his views and have those views properly and genuinely considered.

44. With regard to alternative employment, the Claimant turned down the two vacant posts which were deemed by him to he unsuitable. That is understandable given the reduced salary and seniority which each would have brought. The offer of those posts is consistent with the Respondent genuinely seeking to redeploy the Claimant. I have found that the Lidl Account Manager role was not filled as there was no budget and was not therefore an alternative into which the Claimant could have been redeployed to avoid redundancy. There is no obligation on the Respondent to create a role or to proceed to recruit to a role which it has decided not to fill for budgetary reasons. The lack of redeployment opportunities is plausible given the scale of the restructure exercise and consistent with the redundancy of the Senior Account Manager in the Creative Department. The Respondent acted reasonably in looking for and considering the Claimant for such limited alternative work as existed.

45. The Claimant was undoubtedly a high performing employee, not only specialist in his area but also flexible enough to undertake work outside the strict scope of his job and to cover for his colleagues. Regrettably the effect of the pandemic upon the Respondent's business was severe and it no longer required an employee to do work of that particular kind. Following a fair procedure, the Claimant was made redundant. Whilst I appreciate the strength of the Claimant's feeling that he could have been retained if another employee (a designer, artworker or account manager) had been selected instead, I am satisfied that it was appropriate to include him in a pool of one and that his dismissal was fair in all the circumstances of the case.

46. For those reasons therefore the claims fail and are dismissed.

Employment Judge Russell
Date: 24 November 2021