EMPLOYMENT TRIBUNALS

Claimant: Mrs C Wigley

Respondent: (1) Vuzion UK Ltd
(2) Cobweb Solutions Ltd

Heard at: Southampton (VHS) **On:** 12 & 13 September 2022

Before: Employment Judge Cuthbert

Representation
Claimant: J Ratledge (Counsel)
Respondent: J Vatcher (Counsel)

JUDGMENT

The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

1. These written reasons are provided following oral judgment and reasons being given at the hearing and a request for written reasons being made on behalf of the claimant.

Introduction, issues and procedure

2. The case was heard remotely, sitting as Southampton Employment Tribunal via the VHS service, as it was reasonably practicable to do so and both parties were content with it proceeding as such.

3. The claim was for unfair dismissal only and the issues were discussed and identified at the outset of the hearing with both counsel as follows, based upon a draft list of issues provided on behalf of the respondents.

4. *Unfair Dismissal*

   4.1 Was the first respondent (**"Vuzion"**) or the second respondent (**"Cobweb"**) the claimant's employer at the time of termination of employment?

4.2 It was agreed that the claimant was dismissed with effect from 4 October 2021.

4.3 The respondents asserted that the reason for dismissal was redundancy. The claimant required the respondents to prove the reason for dismissal and asserted that there was no redundancy situation.

4.4 If redundancy was the potentially fair reason for dismissal, was the procedure adopted by the respondents reasonable having regard to the size and administrative resources of the respondent (section 98(4) of the Employment Rights Act 1996)? Mr Ratledge confirmed that the fairness issues related to the consultation and selection processes. There was no issue as to alternative employment having been available.

4.5 In the event that the tribunal made a finding that the procedure was unfair, would the claimant have been dismissed in any event (*Polkey v AE Dayton Services Limited* [1987] IRLR 50*)*?

5. *Remedy*

In the event of a finding of unfair dismissal:

5.1 It was accepted that the claimant had received her redundancy payment. In the circumstances no basic award would be payable.

5.2 The claimant obtained new employment on a higher salary from 10 January 2022. What compensatory award would be just and equitable? Was it just and equitable to reduce the claimant's award in light of any finding in respect of paragraph 4.5 above?

5.3 Should an award be made for loss of statutory rights?

6. An issue of costs was included in the draft list of issues by the respondents but I indicated that any question of costs would be contingent on my decision on the issues above.

7. The dispute above as to the correct identity of the claimant's employer at the time of dismissal fell away during the course of the hearing and it was accepted that she was employed by Vuzion at the relevant times, so I made no finding on that issue.

8. I heard oral evidence from Michael Olpin, both respondents' Finance Director, who had some involvement in the process leading to the claimant's dismissal, and from Natalie Jones, both respondents' HR Business Partner involved in the redundancy process. I also heard oral evidence from the claimant. I was provided with a 197-page agreed bundle of documents and I refer to some pages in the following decision in square brackets as follows [ ]. I read the documents in the bundle to which I was referred in evidence.

Findings of fact

9. I found the relevant facts to be as follows. I did not make findings on issues raised in evidence/closing submissions which I did not consider to be relevant. In the event, many of the facts were largely undisputed.

10. The claimant was continuously employed from 1 September 2016 until 4 October 2021 as a content writer, and was a Senior Content Writer by the time of termination.

11. The claimant was employed initially by Cobweb, an IT solutions provider which provides cloud-based solutions directly to its customers/clients. On 1 June 2020, her employment transferred to Vuzion, a company wholly-owned by Cobweb. Vuzion provide cloud-based IT services through partner organisations. Both companies have the same head office and I was told that Vuzion was one of a number of subsidiary group companies owned and operated by the parent company, Cobweb. The companies share Directors (i.e. the Senior Leadership Team (**"SLT"**), HR, compliance and finance functions. Vuzion is a relatively small company with 40 employees. Cobweb has 60 employees and so is also fairly small.

12. The claimant's work as a content writer was split between Vuzion and Cobweb. It was in the region of a 50/50 split but there was no formal arrangement in place. The claimant was the only dedicated content writer within both businesses. The end of the agreed bundle contained detailed spreadsheets which the claimant had prepared during employment for her own use, which set out details of her work for each part of the business. These were not provided to the respondent during the redundancy process and so did not form part of that process.

13. The claimant worked in the Vuzion marketing department. Marketing Mangers for Vuzion and Cobweb both left employment during the early part of 2021. The vacant roles were advertised internally by email [63 – 64] and then externally. The claimant did not apply for either role. Samantha Brown (Vuzion) and Richard Meek (Cobweb) were appointed in around May 2021 as the new Marketing Managers.

14. Following those appointments, there were some internal discussions within Vuzion, which involved Claire Satchwell, the Head of Marketing at Vuzion and the claimant's line manager, and the respondent's SLT, which resulted in a proposal to delete the claimant's role.

15. The detail of those discussions was unclear from the evidence before me as there were no notes of them in the bundle, although the result of the discussions is set out further below. Claire Satchwell was a key person in the events in dispute in the case and continues to be employed by Vuzion but was not called as a witness, for reasons which were not apparent or specified. Michael Olpin could not recall the detail of the discussions in his evidence but "believed" that any proposal made by Claire Satchwell would have been ratified by members of the SLT, including himself.

16. The result in any event was clear, namely that the claimant was going to be at risk of redundancy due to the proposal to delete her role and it was clear from what followed that the SLT were on board with that position.

17. The respondents had no written redundancy procedure in place. The following redundancy process occurred in this case, following the decision to put the claimant at risk.

First meeting – 20 July 2021

18. On 20 July 2021, the claimant attended a "catch up" Teams call with Claire Satchwell and Natalie Jones. During that call, the claimant was informed, out of the blue, that she was at risk of redundancy and, in summary, was told that the marketing managers would undertake most of her work going forwards. She was surprised and upset by this news.

19. The claimant was also sent a letter on 20 July 2021 by Claire Satchwell [93 – 95] and copies of some notes of the meeting, which largely set out a detailed script which had been read out at the meeting. The letter included detail of the consultation process which would follow and set out current vacancies within the group (none of which were suitable for the claimant). At [96 – 97] was a fairly detailed rationale for the decision to place the claimant at risk, as follows:

> *Why we think the role is potentially redundant*
>
> *• Since the split of the Marketing function into separate business units (Cobweb and Vuzion) some roles were allocated 100% to each business unit.*
>
> *• There have remained 3 roles within Vuzion which served both Cobweb and Vuzion (Senior Graphic Designer, Senior Content Writer and the Digital Marketing Executive role)*
>
> *• The split of roles across both business units has caused problems for some of the affected employees in terms of balancing priorities and focus, and for the Marketing Business units in terms of available resource when needed and the Marketing resource having a full understanding of the business unit.*
>
> *• To address the issues above we have already, based on the sales and activity priorities for FY22 for Cobweb and Vuzion, moved the Digital Marketing role to Cobweb to provide a dedicated digital capability for Cobweb to best meet the digital needs and the business priorities for Cobweb for FY22 as through the review the needs were deemed greater for Cobweb than Vuzion at this time.*
>
> *• The graphic design capability will remain central because the principles of what we do in this area is common across the business units and more at group level.*
>
> *• Regarding content writing, we believe the need for a central dedicated full-time role is diminished. The reason we believe this*

need has reduced, is with the growth of the distinct Marketing teams, content writing is and can be performed more and more by the respective Marketing Managers and their dedicated teams, and employees of other departments as smaller parts of their role.

• The SLT have made the decision to utilise vendor content more widely. The plan is to edit and re-purpose the content from our vendors and adjust the tone of voice to match the respective brand voice. We believe this strategic change further reduces the need for a dedicated content writer.

• Since we have moved to 100% public cloud our need for strategic content and senior content support for big projects has reduced and all content requests will come from business unit Marketing Managers to ensure efficiency. This change is essential to ensure that our campaigns and programmes of work are joined up, cohesive and presented for claiming Co-op where appropriate.

• From reviewing the accountabilities of your role profile we believe many of the elements are now being/or could be delivered, by other individuals and teams as the business has shifted away from a single central marketing team and now into dedicated marketing teams within Cobweb and Vuzion. Strategically the SLT has also decided to minimise the use of external third-party resource which also affects your role.

• Therefore, the role of Senior Content Writer has diminished responsibilities and likely to have further reductions and is now at 'risk' of redundancy. This only affects you as you are in a standalone "Senior Content Writer" role.

20. The respondent's witnesses, in the absence of the claimant's line manager, Claire Satchwell, or indeed any other witnesses with detailed knowledge of the respondents' marketing function, also gave evidence to the tribunal to the following effect. They understood that the recent closure by Vuzion of a Data Centre (in June 2021) had materially impacted on the claimant's role and was a major factor in the need for her role ceasing. This factor was not apparent from the rationale of 20 July set out above. The claimant's evidence was that she did not work on writing content related to the Data Centre, which she understood was due to be phased out even when she commenced employment and so said that its closure was not directly relevant to her role.

The marketing team and the Marketing Manager role

21. At the relevant times, Vuzion's marketing team consisted of the claimant's line manager, Claire Satchwell (Head of Product and Marketing), the recently appointed Marketing Manager, Samantha Brown, a graphic designer and the claimant. A Digital Marketing Assistant had been transferred earlier in 2021 from Vuzion to Cobweb. Vuzion did not pool the claimant with any of the other marketing roles, including the Marketing Manager role, for the purposes of the potential redundancy.

22. The bundle contained a role description for the Marketing Manager role [65 - 68] and for the claimant's role [73 – 75]. I considered each and found that they were distinctly different roles in terms of purpose, duties, responsibilities and required/desired attributes.

The redundancy process

23. The claimant was invited to and did attend a meeting with Michael Olpin (Finance Director and a member of the respondents' SLT) on 27 July 2021. The claimant was confused about purpose the meeting, as she was told that it was a "without prejudice" meeting but not told what that phrase entailed. Given the nature of the meeting, I heard limited evidence about it. The main point about the open aspect of it was that the claimant did raise some concerns in that meeting about Clare Satchwell and how the claimant had been managed by her over the previous year or so. Michael Olpin advised her to put those concerns in writing.

24. On 4 August 2021, the claimant wrote to Natalie Jones and Claire Satchwell [103 – 114] to set out the 'difficulties' she had experienced in the past year, which included various concerns about how she had been managed, summarised on page 103 as follows:

> *Management has been poor across the past year, with issues escalating to such an extent I was advised in June to raise the situation with Natalie. Support has been missing throughout the year, and I've concerns that my work has been misreported and misrepresented. Negative comments and criticisms have been made behind my back, while I've been increasingly isolated from the Vuzion team, conversations, meetings, and email threads, and I have had to deal with the surprising and summary removal of various aspects of my job role.*

25. The rest of the letter from the claimant expanded on the above concerns and then set out an alternative proposal from the claimant for her employment moving forward [111 – 114], namely a move for her from Vuzion to Cobweb on a full-time basis to continue to work as a Content Writer.

26. On 5 August 2021, the claimant attended a consultation meeting with Claire Satchwell and Natalie Jones. At that meeting, the main focus was on the claimant's alternative proposal and she was told that her concerns about her management and work over the previous year would be looked at separately (by Michael Olpin it transpired). There were no notes made of the meeting by the respondent. Claire Satchwell did write to the claimant on 6 August to set out the next steps in the consultation process [115 – 118].

27. The claimant submitted revised version of her alternative proposal, on request, to the respondents on 6 August 2021 [122 – 125].

28. A further meeting took place on 9 August 2021 between the claimant and the Managing Director of both respondents, Michael Frisby, Michael Gore (Head of Customer Success, which includes Marketing) for both

respondents, Richard Meek (Cobweb's recently-appointed Marketing Manager) and Natalie Jones. The claimant's proposal to work instead for Cobweb as a Content Writer was discussed at that meeting. Again, there were no notes made of the meeting.

29. Later that same day, Michael Frisby informed the claimant by email that her proposal, which would have entailed Cobweb creating a dedicated new Content Writer position, had been rejected [126] as they did not require such a position, and so the redundancy consultation process would continue. It was thus clear again that the SLT were fully aware of the proposal to delete the claimant's role and were of the view that neither respondent required a dedicated Content Writer going forwards.

30. The claimant attended a final consultation meeting on 23 August 2021 with Claire Satchwell and Debbie Clarke (HR – Natalie Jones was on leave). Again, no notes were made of the meeting and so there were none before me. It was not disputed that during that meeting, the claimant was informed by Claire Satchwell that she would be made redundant and that her employment would terminate on 4 October. This was confirmed by a letter from Clare Satchwell the following day [128 – 130].

31. Again, in the absence of Claire Satchwell as a witness, evidence as to the precise process by which the final dismissal decision was reached was rather oblique. Michael Olpin's evidence was to the effect that he and other members of the SLT would have ratified the final decision before it was implemented, as Claire Satchwell did not have authority to dismiss staff; he could not, however, specifically recall having done so and there was no documentary evidence or minutes of such discussions.

32. By way of explanation, Michael Olpin said that the respondents' SLT is a small team, most matters arising were dealt with verbally and on trust and so were often not minuted/noted. It was, as I have noted earlier, plain that the SLT were aware of the redundancy process, the decision to delete the claimant's role and have no dedicated Content Writer, and consequently the proposed dismissal of the claimant.

33. Following confirmation of the redundancy, the claimant submitted an expanded version of her earlier grievance about how she had been managed [131 – 160], on 31 August 2022, to Michael Olpin.

34. Michael Olpin looked into the claimant's grievance without meeting with her, and on 20 October 2021 met with her via Teams and sent her a letter to communicate the outcome, which was that the grievance was rejected [165 – 169]. The reasoning given as to why was very brief, set out details of the company's redundancy process, and concluded:

> *I have reviewed the timelines and steps taken in the redundancy process and there is evidence that the policy has been followed by the company. Although you may be disappointed with the outcome there is no evidence to support the company did not follow the steps set out above.*
> ***Conclusion***

> *Your detailed submission does provide anecdotal evidence that in the management of the business, and with the benefit of hindsight, perhaps some actions and initiatives could have been undertaken differently. You also made it clear that you disagreed with some the decisions that were made by the company and by your Line Manager, Clare Satchwell, a view you are entitled to have. However, I cannot identify that your Line Manager acted unfairly against you in any regard and furthermore I do not identify any omissions in the way the redundancy process was conducted. My conclusion is therefore to reject your grievance, and I consider no further action is necessary.*

35. The claimant then submitted an appeal against her dismissal on 26 October 2021 (170 – 177). The key points in the appeal were (in summary):

- The claimant contested her selection for redundancy and the fact that others were not put at risk
- The marketing managers were not consulted about her proposed redundancy (although I noted that Richard Meek was present in the meeting on 9 August and was certainly aware of it by then)
- Those same individuals had been given her responsibilities
- The claimant had skills the business required and she had remained busy until her employment ended (i.e. there remained a need for a content writer, in her submission)
- She had not received notes of meetings and considered that she had received insufficient information from Vuzion about the redundancy process
- Her concerns raised during the redundancy process had not been addressed

36. Michael Olpin also dealt with the claimant's appeal, which he said was because he was familiar with the background to the situation. He told the claimant that he proposed to deal with the appeal without a meeting and there was no objection from the claimant to this course. He met with the claimant on 9 November 2021 to confirm the appeal outcome and provided a letter that same day – the appeal was dismissed. His conclusions were very briefly stated as follows:

> *The reasons for your role potentially becoming redundant were clearly set out in the letter of 20th July 2021. I am satisfied that there are no grounds for the redundancy pool to extend beyond the role of Senior Copy Writer. Furthermore, I do not identify any omissions in the way the redundancy process was conducted.*

37. The claimant commenced new employment from 10 January 2022, within three months of her employment terminating on 4 October 2021. Her earnings in her new role were higher than they had been at Vuzion and so there was no ongoing loss.

38. Finally, the unchallenged evidence of the respondents' witnesses was that, following the termination of the claimant's employment, neither

Cobweb nor Vuzion had needed to replace the claimant or have use of a senior content writer role. The claimant's residual work was absorbed into other functions through a reorganisation of that kind of work.

Unfair dismissal, the relevant law

39. The right not to be unfairly dismissed is conferred by section 94 of the Employment Rights Act 1996. The question of whether any such dismissal is unfair turns upon the application of the test in section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

> *98 General.*
>
> *(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) (b) ….*
>
> *(c) is that the employee was redundant, or*
>
> *(d) …*
>
> (3) ….
>
> *(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.*

40. The first part of the test focuses on reason for the dismissal. The burden of proof is upon the employer to show that the dismissal was for a potentially fair reason. In this case the respondents say that the principal reason for the dismissal was 'redundancy'.

41. A dismissal will not be by reason of redundancy unless the statutory definition of redundancy is met. Redundancy is defined in section 139 of the Employment Rights 1996. The material parts of that section read as follows:

> *139 Redundancy.*
>
> *(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) …*
>
> *(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.*
>
> *(2) - (5)…..*
>
> *(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.*
>
> *(7) …*

42. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell* [1997] ICR 523 and held that section 139 of the asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

43. Section 139(1)(b) refers to the 'requirements' of the employer. Where the employer has taken the decision to reduce the numbers of employees for a genuine business reason it is not open to a tribunal to investigate whether that decision was sensible - a good commercial reason is enough: *Moon and ors v Homeworthy Furniture (Northern) Ltd* [1977] ICR 117, EAT; *Hollister v National Farmers' Union* [1979] ICR 542, CA; *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 386. There is no requirement for an employer to show an economic justification for the decision to make redundancies: *Polyflor Ltd v Old* EAT 0482/02.

44. A tribunal should be satisfied that the employer held a genuine belief in the facts relied upon to conclude that employees needed to be made redundant, acting on reasonable information (Orr v Vaughan [1981] IRLR 63).

45. In short, a tribunal is entitled to ask whether the decision to make redundancies was *genuine*, not whether it was *wise*.

46. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation: *McCrea v Cullen and Davison Ltd* [1988] IRLR 30. Thus, a redundancy situation will arise where an employer re-organises and redistributes the work so that it can be done by fewer employees. See also: *Lambe v 186K Ltd* [2005] ICR 307, CA: a corporate finance manager (CFM) specialising in mergers and acquisitions was dismissed and his work undertaken by the incumbent of a newly created position of senior CFM. The Court of Appeal upheld a tribunal's finding that there was a diminution in the company's need for CFMs, and in particular for a dedicated employee responsible for mergers and acquisitions and so a redundancy situation existed.

47. The existence of facts that might support a genuine need to make redundancies does not by itself demonstrate that an employee dismissed in those circumstances was dismissed for the reason, or principle reason, of redundancy. Whether that is the case is a question of fact and causation for a tribunal: *Manchester College of Arts and Technology (MANCAT) v Mr G Smith* [2007] UKEAT 0460/06

48. If the employer is unable to show that a dismissal was for a potentially fair reason, then the dismissal will always be unfair. If that burden is discharged, then a tribunal must go on and apply the test of fairness set out in section 98(4) of the Employment Rights Act 1996 set out above.

Fairness

49. The correct test is whether the employer acted reasonably, not whether a tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439. That test recognises that two employers faced with the same circumstances may arrive at different decisions, but both of those decisions might be reasonable.

50. The EAT in *Williams v Compair Maxam Ltd* [1982] IRLR 83 gave general guidance to the factors that need to be considered when assessing the fairness of a dismissal by reason of redundancy. It was said:

> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *(2) The employer will consult the union as to the best means by which the desired management result can be achieved fairly and*

with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

(3) Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

(4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

(5) The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

51. A tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out above will not necessarily lead to the conclusion that the dismissal was unfair. A tribunal must look at the circumstances of the case in the round.

Selection

52. This was the first relevant issue of fairness in the present case. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255 it was held that employers need only show that they have applied their minds to the issue of selection and acted from genuine motives.

53. As was said in *Capita Hartshead Ltd v Byard* [2012] IRLR 814, provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, albeit not impossible, for an employee to challenge it. A decision to create a pool of one is potentially permissible, depending on the circumstances.

54. The issue of bumping was raised during the present hearing. The Court of Appeal in *Samels v University of Creative Arts* [2012] EWCA Civ 1152 stated *"it is not compulsory for an employer to consider whether it should bump an employee... if an employer takes the route of bumping another employee, it can be very detrimental to employee relations. It is in essence a voluntary procedure" (paragraph 31)*. In *Halpin v Sandpiper Books Ltd* UKEAT/0171/11, the EAT held that it was not unfair for an employer to use a selection pool of just one employee where it was ceasing its operations in China and the claimant was the only employee who had been sent to China. It was not unreasonable not to "bump" another employee.

Consultation

55. The second issue of fairness in the present case was that of consultation.

56. In *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72 the features of a fair consultation process were identified:

> *Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting.*

57. The key components of fair consultation were further identified in *British Coal* as:

- Consultation when the proposals are still at a formative stage.
- Adequate information on which to respond.
- Adequate time in which to respond.
- Conscientious consideration of the response to the consultation.

58. The importance of consultation in general but also with individual employees was emphasised in *Mugford v Midland Bank plc* 1997 ICR 399, EAT where HHJ Clarke said:

> *It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.*

Redundancy and appeals

59. The Court of Appeal in *Gwynedd Council v Barratt* [2021] EWCA Civ 1322 confirmed that in redundancy cases the absence of any appeal or review procedure does not of itself make the dismissal unfair. If the original selection for redundancy was in accordance with a fair procedure, the absence of an appeal is not fatal to the employer's defence. However, the absence of an appeal is one of the many factors to be considered in determining fairness.

The parties' submissions

60. I heard oral submissions from Mr Ratledge on behalf the claimant and from Mr Vatcher on behalf of the respondents, in each case factually-based. Neither counsel cited any caselaw.

Submissions on behalf of the claimant

61. Mr Ratledge submitted, on behalf of the claimant, that it was for the respondents to prove a redundancy situation. The Data Centre was winding down with no negative impact on the claimant's work – it was not a genuine redundancy situation.

62. The type of work the claimant understood was the creation of content for all aspects of business – her work was simply copywriting. The Data Centre did not close its doors suddenly. It was not from full steam to non-operational. It was winding down when the claimant took up her post. She was copywriting for all parts – Vuzion and Cobweb. The claimant gave the most reliable evidence and direct evidence for the need to write copy.

63. The claimant's line manager had not given any evidence and the need for the claimant to write copy was set out clearly in her statement. She explained that her workload had not diminished and relied on her workload spreadsheet. The respondent was not just being charitable in using her wages to pay her for the last few months; the claimant carried on as she had been. The closure of the Data Centre was irrelevant to the issue of a redundancy situation. The 20 July notes – the business case – made no mention of the closure of the Data Centre – that was significant – it added weight to the fact that this was not a redundancy situation.

64. It was for the respondent to demonstrate one of the potentially fair reasons for dismissal. The respondent had not discharged that burden.

65. The proposal to delete the role was by Claire Satchwell who was the claimant's line manager and strangely the respondent had chosen not to call any evidence to explain her process in reaching the conclusion to recommend the claimant be dismissed. We heard during evidence for the first time that was ratified by others who mainly were not before the tribunal – the Managing Director. Michael Olpin who gave evidence did not remember the discussion or even the fact of it or the reasons put forward for the proposal to dismiss.

66. Michael Olpin was unable to even remember that a conversation was had and it was not alluded to in his witness statement. It was very hard to pick out from the respondent's witness evidence and documents who made the decision. The dismissal letter was pithy at best in setting out the reasons for dismissal.

67. The claimant was not taken on by the respondents to provide material to market the in-house Data Centre. The written role for her and her position [73] did not refer to her doing work for the Data Centre. The claimant's evidence was that she did not write content for the Data Centre.

68. He invited the tribunal to conclude that the respondent had not demonstrated that the claimant's dismissal was for redundancy

69. There had been no consideration of bumping – it was not considered or mentioned to the claimant for her to consider.

70. The claimant accepted that she had been offered all roles available and decided they were not suitable.

71. The last criticism was that the process was significantly unfair:

    71.1 The "without prejudice" meeting was not explained to the claimant and there was a disagreement as to what was described in the lead up to the meeting. I was invited to prefer the claimant's evidence that she did not understand the role of a without prejudice meeting.
    71.2 Claire Satchwell carried on her role leading the redundancy process for the second and third meetings and made (or at least proposed) the decision to dismiss the claimant. The respondent could have accommodated someone different. It should have been left to someone else.
    71.3 The claimant's grievance was only dealt with by the respondent after her dismissal – it should have been beforehand as touched on the dismissal.
    71.4 The appeal was dealt with by Michael Olpin on same basis as the grievance. He had rejected the grievance without elucidation and faced the same criticisms again. There should have been a fresh set of eyes
    71.5 The general process was flawed – there was no redundancy policy, there was limited explanation given to the claimant or recourse for her to ask questions, as people were on their holidays in between the first and second meetings (Claire Satchwell and Natalie Jones); there was a perfunctory response to the grievance and the appeal.
    71.6 At the 5 August consultation meeting, the respondent refused to discuss the claimant's concerns about the process and it was just about where to go next in the process. This was accepted as a matter of fact by the respondents.
    71.7 The claimant was given no time off for job hunting – she was flat out writing content.
    71.8 There were no minutes made for two of the three consultation meetings.
    71.9 There was no evidence of the decision-making process to decide on redundancy or to dismiss the claimant.

72. The final point made was that Vuzion was not 100% of the claimant's workload. That had been the position since the claimant started employment. She had worked whilst the Data Centre was withering on the vine. This was not an example of a reduction or diminution in the need for employees.

Submissions on behalf of the respondent

73. Mr Vatcher submitted as follows on behalf of the respondents.

74. It was agreed that "redundancy" was the reason provided to the claimant. It was a genuine redundancy and unfortunate.

75. The claimant had set out in her spreadsheet what her workload entailed but the reality was that this document was never presented to the respondent when the redundancy process was undertaken. It was possibly shared at appraisal meetings – that was all. It was a personal record.

76. There was no formal agreement between the claimant and Cobweb. She did tasks for Cobweb but this was informal. The claimant accepted that could not work full time for Cobweb and full-time for Vuzion.

77. She was employed as a Senior Content Writer for Vuzion. Vuzion made a reasonable decision that it no longer needed to employ someone in that role. There were many reasons set out in the minutes of the 20 July meeting. That document set out Vuzion's rationale for why the claimant needed to be put at risk.

78. Vuzion had shut the Data Centre down. The large organisations it worked with had their own content writers. Vuzion used that material to promote and market itself to others and reached the conclusion that it no longer needed to employ the claimant.

79. Looking at the process, it was accepted by the claimant that there was only a pool of her. There was no obligation to consider bumping. Given that the claimant did not raise bumping, the respondent did not need to consider it.

80. With the claimant being placed in a pool of one, she had ample opportunity to respond. Her proposal was considered and she was given the opportunity to present the proposal to the respondents. Neither entity needed to employ the claimant as a content writer.

81. The claimant took issue with Claire Satchwell. She set the process running and it was reasonable for her to continue with it as the claimant's line manager. She dealt with the consultation process. As Natalie Jones had said in her evidence, it was not unusual for an employee to take issue with the person making them redundant.

82. Michael Olpin's evidence was that Claire Satchwell would not have the ability to unilaterally dismiss the claimant. The decision was ratified by the SLT. Michael Olpin was part of the SLT. He was also entitled to be the person who heard the claimant's grievance. He considered this in a reasonable process. He acknowledged the grievance, understood it and reached his conclusions. The claimant confirmed in evidence that he was entitled not to uphold it. There was no grievance appeal submitted. Michael Olpin explained in evidence that he had dealt with redundancy appeals and with grievances. It was a small SLT and it was appropriate for him to undertake the tasks.

83. An appeal process was put in place. Michael Olpin was entitled not to uphold the appeal.

84. I was invited to find a fair dismissal on grounds of redundancy. If I found the dismissal unfair, I was invited to make a *Polkey* reduction on the basis that the outcome would have been the same in any event.

Discussion and conclusions

Was there a genuine redundancy situation and was this the reason for dismissal

85. Applying the legal principles summarised above to the facts of this case, the first question I asked myself was whether the reason or principal reason for the dismissal of the claimant by Vuzion was redundancy.

86. I found that in this case there was not just one decision maker but a collective decision taken by the respondent through its SLT and the claimant's line manager and communicated by Clarie Satchwell. Following the appointment of the new Marketing Managers, it was evident that Vuzion's management considered its needs for a dedicated content writer going forwards and concluded that it no longer required a dedicated individual in that role, as was communicated to the claimant in the letter of 20 July.

87. The claimant sought to challenge the rationale for that decision at the time and before me, and suggested that the position reached by Vuzion in respect of her role had been arrived at in part because she had been sidelined and mis-managed during the previous year or so. She sought to evidence primarily that there remained a need for her role because her work continued.

88. Many of the concerns which the claimant raised in her grievances were, in summary, to the effect that she had been sidelined and isolated and had responsibilities removed. The thrust of her complaints did to some extent unintentionally lend support to the conclusion reached by the Vuzion's management that the business could operate going forwards without the claimant's role.

89. I was somewhat perplexed by the various references during the respondent's evidence to the closure of the Data Centre as being directly relevant to the decision to remove the claimant's role. The claimant's evidence was that the Data Centre had no real bearing on the work she carried out. Neither of the respondent's witnesses before the tribunal had a sufficiently detailed knowledge of the work undertaken by the claimant and Clare Satchwell, who could have shed light on the issue from the respondent's perspective, was bizarrely not called as a witness by the respondent.

90. I nonetheless concluded that Vuzion's need for content writing had diminished and its need for a dedicated content writer role had genuinely ceased, on the basis that (1) it had plainly determined that the claimant's content writing duties could be distributed amongst its existing employees, (2) the claimant's own grievance suggested that the respondent's need for content writing and a dedicated content writer role had diminished to some

degree over the previous year or so, and (3) ultimately it was not disputed that the claimant's dedicated content writing role was not filled or replaced after she left employment and that the content writing work was undertaken by existing employees alongside their other work.

91. I observed that was common redundancy scenario where an employer determines that it no longer requires a single, specific role in its present structure and so decides to redistribute the duties and responsibilities of that role amongst its other employees, due to a diminution in the work and the need for employees to carry out that work of a particular kind. The work is still being done of course but the employer's need for a dedicated employee to carry it out has ceased or diminished and the holder of that role is potentially at risk of dismissal absent alternative employment (see *McRea* and *Lambe*) above. That is what happened in this case. I found that a redundancy situation existed within the meaning of section 139 due to a diminution in the respondent's need for content writing and the cessation of its need for a dedicated content writing role.

92. As to whether the respondent genuinely had in mind that reason when it dismissed the claimant, I found that it did.

93. It was **not** for the tribunal to examine or scrutinise in detail whether Vuzion's decision to make the role of senior content writer redundant was a sensible one; whether it was right or wrong; whether Vuzion should have retained the claimant because she may do a better job of content writing than the respondent's other employees; whether some other restructuring might instead have worked better; or even whether the redundancy situation had come about because of historical issues in how the role in question had been managed (or mis-managed, as was suggested). The test was merely whether a redundancy situation existed and whether the respondent genuinely had in mind that reason (redundancy) when it dismissed the claimant.

94. There was no evidence before me, nor even any suggestion of, any other underlying reason for the claimant's dismissal. It was not suggested, for example, that this was a sham redundancy and that there was some ulterior motive on the part of the respondent for wanting rid of the claimant.

95. I took into account the unchallenged evidence that the claimant's role remained deleted in Vuzion's structure and that her work was swallowed up by other employees, as supporting the genuineness of the situation.

96. In summary, Vuzion's requirements for content writing had diminished and its need for a dedicated employee to carry out that work of a particular kind, the work of content writing, had consequently ceased. That was a reason falling within sections 139(1)(b) and 98(2)(c) of the Employment Rights Act 1996 and was the only reason why the claimant was ultimately dismissed.

Fairness

97. I then considered the question of whether the dismissal was fair or unfair, applying the test set out in section 98(4) of the Employment Rights Act 1996.

98. I reminded myself that I must not substitute my decision for that of the employer and the test was whether the steps taken by Vuzion in respect of selection and consultation were within the "range of reasonable responses".

Selection

99. The issue of selection in the present case boiled down to two issues: was it within the range of reasonable responses for (1) Vuzion to have placed the claimant in a pool of one and (2) Vuzion not to have considered bumping the claimant into one of the Marketing Manager roles.

100. On the pool of one issue, the short answer was that the claimant was the only dedicated content writer, there was no evidence before me of other suitably similar roles which could potentially have been pooled alongside her, and so it was virtually inevitable that this would be a "pool of one" case once it was determined to potentially delete that role. The creation of this pool was within the range of reasonable responses.

101. On the bumping issue, bumping generally arises in cases where a more senior employee at risk of redundancy argues that they should be slotted into a somewhat more junior role which is not in the pool for selection (a role for which they are undoubtedly qualified), thereby bumping the junior employee out of the way. The situation here, on the other hand, was that the claimant argued that the respondent should have considered bumping out the recently appointed Marketing Manager. I found that the two roles were markedly different and it was not apparent that the claimant could have undertaken the Marketing Manager role. An employer is not obliged to consider bumping in a redundancy situation – the question instead is whether the employer's failure in the circumstances to do so was unreasonable. I found that the respondent's failure to consider it in this case was not unreasonable, in the circumstances.

Consultation

102. The consultation process was a more difficult issue for the respondent. A number of issues and problems with that process were apparent from the evidence before me.

    102.1 The respondents did not have a redundancy process/policy in place – this would have provided a clearer structure for Vuzion to follow and some more guidance to the claimant during that process.
    102.2 The purpose of the without prejudice meeting with Michael Olpin on 27 July was not made clear to the claimant and understandably confused her.

102.3 Most of the meetings during the redundancy process were not noted/minuted. It would have been preferable for meetings to have been noted and the notes provided to the claimant and verified by her as soon as possible after the meetings.

102.4 The time taken by Michael Olpin to address the concerns raised by the claimant during the process, mostly about historical management issues in fairness, seemed unduly long, particularly given the brevity of his conclusions. It would have been preferable for those matters to have been addressed prior to the final dismissal decision and a more reasoned decision given, albeit that the outcome would have been the same in any event given that the issues raised essentially related to how the claimant had been managed during the previous year or so, rather than to the proposed decision to delete her role.

102.5 The redundancy appeal outcome was largely a "cut and paste" of the grievance outcome and was very brief, lacking in reasoning.

102.6 It would have been preferable for Michael Olpin to have met with the claimant prior to determining both the grievance and the appeal to explore the same and confirm his understanding of the basis of them, rather than merely meeting with her to communicate his findings as occurred.

102.7 It would have been preferable if another member of the SLT, without prior involvement in the redundancy process, had looked into the grievances and the appeal, although I do recognise that the respondent is a relatively small business (40 employees) and so it may not have been possible for a truly independent senior individual to have been appointed.

103. A more general issue raised on behalf of the claimant was the further involvement Clare Satchwell in the process after the claimant had raised detailed complaints about her management, on 4 August. Whilst it would probably have been a prudent choice for Vuzion to have removed Claire Satchwell from fronting the redundancy process after the claimant raised concerns about her on 4 August, the further involvement of Claire Satchwell after that point did not have a material impact on rest of the process. The claimant remained in a pool of one; her proposal to consider transferring her employment to Cobweb was not determined by Claire Satchwell, but by members of the SLT, who remained of the view that the two businesses did not need a dedicated content writer going forwards. There were no other alternatives on the table and so her dismissal invariably followed.

104. The legal test for me here was whether the overall consultation process, looking at it in the round, was within the range of reasonable responses, bearing in mind the size of this employer (relatively small) and its resources. I found that:

104.1 The consultation was undertaken at a formative stage and no final decision had been made. That was evident from the consideration given to the alternative proposal which the claimant put forwards.

104.2 The information given to the claimant during the consultation process, particularly within the letter of 20 July, was relatively

detailed and was sufficient for her to understand that her role was at risk (namely because the respondent was considering deleting it – that was simple enough) and the reasons why. The claimant had limited options in the difficult circumstances she faced (namely being in a selection pool of one, being the only content writer in the business with no similar roles and there being no suitable vacancies) were understandably limited. She sought primarily to question the rationale/ justification for the decision to delete her role (as many employees in these circumstances tend to) but she was also able to formulate and present a detailed alternative proposal for the transfer of her employment to Cobweb to the SLT of both businesses.

104.3 The only real possible alternative to the claimant's dismissal which came to light during the redundancy process was the claimant's proposal to transfer her employment to Cobweb. This was explored further and in some detail with the claimant and the SLT of both Vuzion and Cobweb at a meeting, albeit that the conclusion remained that the businesses did not require a dedicated content writer role.

104.4 The consultation process entailed meetings on 20 July, 5 August, 9 August and 23 August. The claimant was able to articulate concerns during the process either at those meetings or in writing, albeit that many of the concerns related to historical issues about how she had been managed and treated, rather than directly about the issue at hand, namely possible alternatives to the proposed deletion of her role. The respondent did promptly explore and address the point she raised which did touch directly on the proposed redundancy, namely the redeployment possibility.

104.5 Vacancies were notified to the claimant during the process, albeit none were suitable (that is not the fault of the respondent).

104.6 the claimant was given a right of appeal which she exercised. The appeal points were not responded to in detail but a redundancy dismissal may nonetheless be fair even in the absence of an appeal altogether.

105. The various flaws/concerns which I identified above in respect of the consultation process, whilst they no doubt made the process more upsetting and confusing for the claimant than should have been the case, were not sufficient in my view to take the overall consultation process in the circumstances outside the range of reasonable responses. Looking at the process in the round and in view of the size and resources of Vuzion, it was not "so inadequate" (to use wording of HHJ Clarke in *Mugford*) the as to render the dismissal unfair.

106. The overall test was whether the dismissal, both procedurally and substantively, fell within a range of reasonable responses. In my view it did. Other employers might have acted differently but that was not determinative. I found that in the particular circumstances of this case this employer acted reasonably in treating the redundancy situation as a sufficient reason to dismiss the claimant.

107. Accordingly the complaint of unfair dismissal failed and was dismissed.

Employment Judge Cuthbert
Date: 22 September 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
26 September 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE