EMPLOYMENT TRIBUNALS

Claimant: Ms E Midgely

Respondent: Link Market Services Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central (by CVP)
On: 23 & 24 October 2024

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances
For the claimant: Mr D Langley (Solicitor)
For the respondent: Mr G Graham (Counsel)

JUDGMENT

Unfair Dismissal

1. **The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed on procedural ground (section 98 (4) Employment Rights Act 1996)**
2. **There is a 50 % reduction to the compensatory award based on the Polkey principle.**

Remedy Hearing

3. **The Tribunal shall schedule a further one-day Remedies Hearing**

REASONS

Background

1. This was an Unfair Dismissal claim lodged by the claimant on 3 April 2024 (following Early Conciliation with ACAS from 21 February to 7 March 2024).
2. The claimant had been employed from 5 November 2010 by Link Asset Services (then owned by Capita) as Head of Custody and Settlement. In 2018 there was a take-over of the business from Capita to the respondent. It was accepted that the claimant had continuity of employment from November 2010. The respondent is a member of ASX-listed Link Group, a leading global administrator of financial ownership data within the pension fund industry and across corporate markets.
3. In August 2019 the claimant became Senior Service Delivery Manager and then in October 2021 became Head of Operations Share Dealing in Corporate Markets
4. The claimant was dismissed with effect from 27 November 2023 on grounds of redundancy. The claimant was placed at risk of redundancy on 9 November 2023 by Victoria Gilmour, (VG), former Operations Director Corporate Markets EMEA. The respondent said that this action followed a review in October 2023 "to identify potential operational efficiencies in the structure of the Share Dealing Team. This review was conducted by VG, Ian Stokes (Managing Director – Corporate Markets Europe) and HR in both the UK and Australia. VG is no longer employed by the respondent.
5. The claimant was informed that this was a proposal and that no final decision had been made. She was told that there would be a redundancy consultation process during which she would have "*every opportunity to discuss the proposal of redundancy and to provide feedback"* (as per paragraph 5 of the Grounds of Resistance).
6. The redundancy consultation process lasted from 13 to 27 November 2023 and was carried out by VG, supported by Rhian Evans (RE) during which the claimant was accompanied (at all the meetings) by a colleague, Sue Oakley (SO).
7. At the last meeting on 27 November 2023 the claimant was dismissed with immediate effect (by reason of redundancy). She was paid 12 weeks' salary in lieu of notice and outstanding sums for holiday pay etc. together with statutory and enhanced redundancy payments. There was a right of appeal, which the claimant exercised on 3 December 2023.
8. There was an appeal hearing held on 13 December 2023. This was conducted by Justin Smith (JS) Head of Client Relationships, who was supported by Nicola

Axell (NA) HR Business Partner. The claimant was again accompanied by SO. On 21 December, the claimant was notified that her appeal was not upheld.

9. Following the termination of her employment the claimant made a Data Subject Access Request and as a result, discovered records of various "conversations" between VG and Dominic Flood and other colleagues, which led her to believe that she had been dismissed because of mistaken perceptions concerning the claimant's conduct/performance and not because of a redundancy situation.

The Issues and Relevant Law

10. At the commencement of the hearing, I asked the parties to agree a List of Issues. After some extended discussion, and each party taking instructions, the following was agreed.

Unfair Dismissal – Employment Rights Act 1996 (ERA)

a. *Section 94* – the right not to be unfairly dismissed and Section 98 – general.
b. There was no dispute that the claimant had been dismissed on 27 November 2023. *Section 95 (1) (a) ERA*.

Potentially Fair Reason for Dismissal

c. The respondent said that this was by reason of redundancy. (*Section 98 (2) (c*)). The "review" conducted in October 2023 had identified that the claimant's role (Head of Operations, Share Dealing) may no longer be required within the business as the responsibilities of the role could be absorbed into existing roles within the team (paragraph 4 Grounds of Resistance).

d. In the alternative, the respondent said that the reason for dismissal was some other substantial reason (SOSR). (*Section 98 (1) (b)).*

e. The claimant disputed that there was a genuine redundancy situation. (*Section 139 – meaning of redundancy)*. Following the DSAR disclosure, the claimant believed that the real reason for her dismissal was the respondent's perception of her conduct/performance, in that colleagues believed she was holding up processes within the organisation and also because the claimant took a day's compassionate leave following the death of her dog. The claimant also believed that VG had secured her dismissal due to her personal animosity against the claimant.

Procedural Fairness (*Section 98 (4))* – reasonableness in all the circumstances

f. The claimant said that if the Tribunal found that there was a genuine redundancy situation, then in the alternative, there were procedural irregularities. These were:

- The consultation process was a "sham" in that RE and VG simply repeated the same "mantra" and did not provide the detailed information requested by

the claimant. Further the claimant was misinformed by RE that the review/proposal was in writing, which was incorrect.; and

- The appeal conducted by JS was a "flagrant breach of natural justice" (as per paragraph 17 of the Particulars of Claim). After some consideration (and after taking instructions), it was confirmed that the alleged breach was that prior to the appeal meeting JS had discussions / a Teams meeting with VG, PT and RE, which adversely affected his impartiality (ref paragraphs 31 and 36 of the claimant's witness statement).

Polkey Reduction

g. The respondent maintained that if the Tribunal found that the dismissal was procedurally unfair, then it relied on the principle in **Polkey v AE Dayton Services Ltd [1987] ICR 142** and argued that the claimant would have been dismissed in any event and sought a reduction in any compensatory award accordingly.

Remedy

h. The claimant seeks reinstatement/reengagement as well as compensation if her claim is successful.

Conduct of the Hearing

11. It was agreed that the hearing would proceed on the basis of liability only**.**

12. The Tribunal was presented with an electronic Agreed Bundle (of 477 pages) page references are to that Bundle. Written witness statements were provided from the Claimant and on behalf of the respondent: from RE and also from Paula Turner (PT) HR Manager since October 2022. The witnesses' statements were taken as their evidence in chief, given on Oath. Each witness was cross-examined and was asked questions by the Tribunal Judge. Opportunities for supplemental questions and re-examination were offered.

Day 1

13. The hearing started 30 minutes late due to problems with Mr Langley's connection to the remote hearing and the absence of the Tribunal Clerk. There were also connectivity problems for Mr Graham during the course of the first day, which resulted in some delays.

14. The morning was spent finalising the outstanding issues to be determined in this case and the Judge reading the witness statements and key/core documents in the Bundle as identified by each of the parties' representatives.

15. The afternoon was spent hearing RE's evidence.

Day 2

16. The Tribunal heard PT's evidence and that of the claimant. The Tribunal also heard oral submissions from both parties. No written submissions were

presented, and no legal authorities were cited by either party, other than the principle in **Polkey** as relied on by the respondent. Mr Graham did not make any submissions as to the relevant percentage of a Polkey reduction but given that he submitted that the respondent would come to the same outcome, I assume he meant a 100% reduction would be appropriate.

17. The hearing concluded at 4.05 pm and I reserved my Judgment

Findings of Fact

18. I will make only such findings of fact as are necessary to determine the Issues as set out above.

19. There was no dispute between the parties concerning the dates of the claimant's employment and continuous service. It was also agreed that the there had been no performance or conduct issues raised with the claimant during her employment.

The redundancy situation/decision

20. PT said at paragraph 6 of her witness statement that she began discussions with VG "in or around October 2023" about the efficiency of the Share Dealing Team both in terms of its operations and costs. On 8 October 2023 VG emailed RE and PT to say that the Share Dealing Team was the only one that had both "Head of.." and "Senior Manager" roles. This was a further factor in identifying the claimant's role for redundancy.

21. PT said that she had relied on VG's information and assessment about the need for cost efficiencies within the Share Dealing Team. There had already been a streamlining of the team from 80 to 47 employees, before the claimant took over her role as Head of Operations in October 2021.

22. It was accepted by RE and PT that there was no documentary evidence whatsoever supporting the business decision to make the claimant redundant. All of PT's discussions with VG had been verbal and no notes had been made. PT accepted that the references in the consultation meetings to "sign off" on the business decision could be seen as misleading: there was no physical documentation to be signed. The term "sign off" had been used loosely.

23. RE acknowledged that her references in the first consultation meeting to the existence of a written proposal were mistaken. She had assumed from her earlier experience working in larger organisations that there would be a written proposal but accepted that she had not checked this fact before making references to a written proposal in the consultation meeting. RE also acknowledged that she thought it was "odd" that VG who was present at all the consultation meetings, had not corrected RE when she referred to a written proposal.

24. The only written confirmation of the business decision received by the claimant was in an email dated 8 November from RE (copied to VG and PT) which confirmed the respondent's business rationale as "We *have recently carried out*

a review of operational efficiencies and team structure within the Operations Share Dealing team and as a result have identified that the standalone role Head of Operations- Share Dealing is no longer required in the business".

25. VG had indicated that all the claimant's work could be allocated to others within the Share Dealing Team. Again, there was nothing in writing to explain the thought processes behind this statement. There were no structure or organisational charts produced by the respondent in the Bundle. PT could not explain why there had been nothing in writing about the decision to make the claimant redundant. She accepted that this was not good practice.

26. In her oral evidence in response to questions from me, PT said that the claimant's role was the "obvious one to go". She said that other than the leadership elements of the role, all the claimant's work tasks could be undertaken by others in the Share Dealing team and the leadership role could be taken over by the Senior Manager (Paul A) in the team.

27. PT then said that reality was that the claimant was doing very little: her diary was virtually empty, and she did not really have a role to perform. This was why PT had been comfortable to advise VG that the claimant was redundant. PT accepted in her oral evidence that there had been a lack of clarity in the way the redundancy was described to the claimant and that the position had not been put to her accurately in the consultation.

28. The claimant accepted in cross examination that since October 2023, she had fewer direct reports. She also accepted that only the Share Dealing team had both a Senior Manager and a Head of Operations. However, she did not agree with PT's assessment that she did not have very much work to do. She denied that her workload had diminished, and she did not accept that Paul A could carry out her leadership role.

29. On 9 November 2023 the claimant was told she was at risk of redundancy and invited to commence an individual consultation exercise (page 176). The letter said that no formal decision would be taken on the claimant's redundancy until 21 November 2023, the last day of the consultation period.

30. However, It appeared from PT's evidence that this was not the case and the redundancy decision about the disappearance of the claimant's role had been taken in all but name.

<u>The redundancy consultation</u>

31. The claimant attended consultation meetings on the following dates with VG and RE (and accompanied by SO): 14 November, 20 November, 23 November, and 27 November 2023. The claimant had recorded the meetings without notifying the respondent and transcripts of her recordings were contained in the bundles. The claimant said that she had not realised that she needed to let the respondent know that she was recording the meetings. I did not find the claimant's evidence on this point to be plausible. However, it was accepted by

both parties that the transcripts were an accurate record of the consultation process.

32. At the first meeting the claimant was told that following the review into operational efficiencies, the respondent felt that her role (Head of Operations Share Dealing) was no longer required by the business and that all her functions /activities would be absorbed by others in her team.

33. In summary, the consultation meetings consisted of the claimant asking for more detailed information about how her role/functions were to be divided between her colleagues, which information was not forthcoming from the respondent. The respondent in turn was asking the claimant to provide her suggestions of how the redundancy situation could be avoided or mitigated, which was not supplied by the claimant.

34. This resulted in an impasse. The claimant could not understand why her role had been selected for redundancy and at no point was the claimant told, in clear terms, that the respondent believed that she effectively had very little work to do.

35. The claimant was asked to send a list of questions, which she did (pages 196-198 and pages 233-237). The claimant repeated her request for a "solid rationale" as to why her role had been identified for redundancy. The respondent continued to refer to "operational efficiencies" in the team structure. It was confirmed that the claimant's role was the only one at risk (so there was no selection process) but at no stage was the claimant told that the respondent believed that her job activities had severely diminished and were minimal. The claimant also asked, *"Why has this had an immediate effect on only my position?"* but this was never answered by the respondent.

36. The claimant accepted in cross examination that she was the best placed person to understand whether, and how, her roles could be absorbed by others. The claimant appeared to accept in her evidence that she may have been unduly recalcitrant in engaging with the consultation process. However, she insisted that she needed to understand the respondent's intentions to restructure the team before she could comment on the feasibility of the restructure. For example, she could not have expressed her view that Paul A was unable to carry out her leadership tasks, as she had no knowledge that the respondent was proposing this change.

37. The claimant accepted that she had never suggested any alternatives to her redundancy as part of the consultation. She said that she had been upset and stressed by the whole process. The claimant accepted in cross examination that she had not commented on PT's evidence that the respondent's business had coped well without the claimant's role. PT's evidence on this point was not challenged in cross examination.

38. From the evidence presented, I find that the respondent was not open and honest with the claimant about the real reason for her redundancy, namely that her duties had substantially diminished, which is why her remaining tasks could

be given to others in the Share Dealing Team. I appreciate that those conducting the consultation may have felt this would be unpalatable information for the claimant, but without addressing it, the respondent's business rationale was essentially incomplete, and the consultation could not be conducted constructively or fairly.

39. I accept that the claimant was upset and stressed by her imminent redundancy, however, I find that she did not attempt to co-operate in the consultation process or to be constructive in progressing it. To that extent, both parties were not responsible for the stalemate in the consultation process.

The Fairness of the Appeal

40. The claimant's complaint on this matter was that there had been an alleged breach of natural justice. The breach was that prior to the appeal meeting JS had discussions / a Teams meeting with VG, PT and RE, which adversely affected his impartiality (ref paragraphs 31 and 36 of the claimant's witness statement).

41. RE said in her evidence that there were discussions on 5 and 11 December but insisted that these related only to the documents which were available for the appeal meeting held on 13 December 2023. However, this evidence was contradicted by PT who accepted that at those meetings, as well as clarifying the available documentation, JS had asked VG and PT questions about their position on the claimant's redundancy situation. I note the inconsistency in the evidence of the respondent's witnesses, but I accept PT's evidence as being more plausible.

42. I find that It would be reasonable for JS to want to understand VG and PT's thought processes on the redundancy decision, especially as there was no supporting documentation to explain the reasons for the decision.

43. Further, the claimant accepted in cross examination that JS was impartial in carrying out the appeal.

Other reasons for the dismissal

44. The claimant accepted in cross examination that as regards the conversation between VG and Dominic Flood about her absence due to her dog's death, she had no reason to believe (or any evidence) that Mr Flood had influenced VG's decision on the operational review resulting in her redundancy. Both RE and PT confirmed that VG had never raised this matter or complained to HR about the claimant's conduct.

45. The claimant also accepted in her oral evidence that she had never raised any grievance with HR about any perceived animosity of VG towards her. The claimant said that she was not aware of the possibility of this until she had seen the DSAR, but she could not recall exactly when this was. The claimant accepted in her oral evidence that the DSAR documents revealed petty and spiteful workplace comments and gossip rather than any real alternative motivation for her dismissal.

Conclusions

The dismissal

46. There was no dispute that the claimant had been dismissed on 27 November 2023.

The reason for the dismissal

47. The respondent maintained that the reason for the dismissal was redundancy. However, it was only during her answers to my questions concerning the definition of redundancy in section 139 ERA that PT revealed that the claimant's duties had substantially diminished and that in the respondent's assessment, she had very little to do and was being paid around £80,000 per year. This was a key part of the operational efficiencies review and the Business Rationale to have other members of the Share Dealing team absorb the claimant's functions.

48. It is for the respondent to show the reason for dismissal and the standard of proof is on the balance of probabilities. I find that the respondent has demonstrated that the reason was redundancy, but this is based solely on the oral evidence of PT at the Tribunal. I had no reason to doubt her credibility on this point, however, I must note that the reason given by her was not raised in express and clear terms during the consultation process, nor in the appeal process, nor in the dismissal letter, nor in the Grounds of Resistance nor in PT's witness statement.

49. Further, I must express my concern and reservations that the respondent, described by its witnesses as a "leading share registry and related market services provider" and in its grounds of resistance as "a leading global administrator of financial ownership data" did not record in writing any of its business reviews/assessments of the situation concerning the claimant's redundancy.

50. PT said that it was common practice within the UK where there was only one role impacted, for such matters to be dealt with in verbal discussions. That may be so. However, as an HR professional, PT must have been aware that at the very least, a note should be kept of such discussions for the record. She would almost certainly have ensured this if the dismissal had been for conduct or capability reasons, and there is no excuse for failing to do so for redundancy reasons.

51. That said, the claimant was unable to show that there were other reasons (such as her own conduct or VG's animosity/ill will towards her) for the dismissal. The claimant accepted in her oral evidence that the conversations in the DSAR records did not substantiate her allegation that her conduct (and not the redundancy) was the reason for her dismissal.

52. I find on the balance of probabilities that the reason for the claimant's dismissal was redundancy.

Procedural Fairness

53. Based on the findings of fact set out above, I find that the redundancy consultation process did not provide the claimant with accurate information. The business rationale was written by RE, an HR support manager, and not by the decision makers. That rationale was couched in the vaguest generic terms and did not address what was eventually revealed as the "nub" of the situation: namely that the claimant was left with minimal work to do and as an expensive member of the team, the operational efficiency must sensibly be to make her redundant.

54. It may be that the respondent's management and HR team did not wish to address this fact directly with the claimant as it may upset her. However, she was clearly distressed by the situation in any event and the failure to be honest about the underlying reason for the redundancy has led to a costly and time-consuming Tribunal case.

55. I have found that both parties were obstructive in failing to providing full and frank information in the consultation process. However, given that the respondent was not being honest about the true motivation for the redundancy, much of the blame for this situation must lie with those who ran the consultation process – as they set the tone for it.

56. There also appeared to be little consideration, if any, of suitable alternative employment for the claimant and as such it does appear on a balance of probabilities that the decision about her redundancy had effectively been made and that the consultation process was not a meaningful and genuine one.

57. I find that there was procedural unfairness in the way in which the redundancy consultation process was carried out. **The dismissal was, therefore, unfair as it breached section 98 (4).**

58. I have found that there was no breach of natural justice or procedural unfairness in the appeal. The claimant accepted that JS was impartial.

Polkey Reduction

59. The respondent maintained that if the Tribunal found that the dismissal was procedurally unfair, then it relied on the principle in **Polkey v AE Dayton Services Ltd [1987] ICR 142**. Mr Graham said that the claimant would have been dismissed in any event and sought a reduction in any compensatory award. Mr Graham cited no other legal authorities and did not indicate a percentage for the claimed reduction.

60. Given the nature of the procedural irregularities in the consultation process, I have no evidence before me to suggest for how much longer the claimant may have been employed. I have found that the respondent did not provide the information requested by the claimant but also that the claimant was obstructive in the way she engaged with the consultation process. I have also found that there was little (if any) discussion of suitable alternative employment within the respondent organisation.

61. There was no clear indication from either party as to how long a procedurally correct process may have taken and how the outcome may (or may not have changed). The claimant may have averted dismissal by providing her thoughts on avoiding/mitigating the redundancy, but she did not do so. She said that she could not do so until the respondent provided written information on how her duties were to be absorbed by others on the team: the respondent did not provide that information.

62. There were no submissions from either party on this point and there was a total lack of any legal authorities provided by either party's representative.

63. I note that guidance was given by Elias J in the EAT in **Software 2000 Ltd v Andrews [2007] IRLR 568** as to how to approach the task of assessing the chance of a fair dismissal and in particular the difficulties inherent in what is essentially a predictive exercise. He said that:

"(*1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience, and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

64. As I have observed, the Tribunal in this case had no available evidence presented by either party as to how much longer the employment may have continued. I am therefore unable to make any sensible prediction based on the evidence. Given that situation and given my findings on the behaviour of both parties during the consultation, applying "*common sense and a sense of*

justice", I make a 50% reduction in the compensatory award based on the **Polkey** principle.

65. The Tribunal shall schedule a one-day Remedies hearing.

Employment Judge Henderson

JUDGMENT SIGNED ON: 12 November 2024

JUDGMENT SENT TO THE PARTIES ON

14 November 2024

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AND ENTERED IN THE REGISTER

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FOR THE SECRETARY OF THE TRIBUNALS