EMPLOYMENT TRIBUNALS

Claimant: **Mrs Anjum Sarah**

Respondent: **Aetos Capital Group (UK) Ltd**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **11 & 12 February 2021**

Before: **Employment Judge R Barrowclough**

Representation

Claimant: Ms Darshana Patel (Free Representation Unit)

Respondent: Mrs. Fairclough-Haynes (Consultant)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1. **The Claimant was unfairly dismissed. Had the Respondent undertaken a fair redundancy procedure, there was at least a 50% chance that she would have remained in the Respondent's employment, and the compensation payable to the Claimant will reflect that percentage.**

2. **Compensation is assessed as follows:**

Basic Award	**£1575**
Less: redundancy payment	**- £1575**
	Nil

Compensatory Award

• **Loss of statutory rights**	**£250.00**
• **Expenses seeking alternative employment**	**£50.00**
• **9 months loss of earnings @ £2561.48 pcm net**	**£23,053.32**
• **9 months medical insurance contributions**	**£459.00**
	£23,812.32
Less: 50% reduction (chance of fair dismissal)	**£11,906.16**
	£11,906.16
Less: (a) Earnings in subsequent employment	**£3,990.75**
(b) Balance of redundancy payment	**£472.50**
Total Compensatory Award	**£7,442.91**

3. **The Recoupment Regulations apply. The prescribed sum is £7,442.91, and the prescribed period is from 1 March to 30 September 2020.**

REASONS

1. This is a claim for unfair dismissal. The Claimant was employed as an accountant by the Respondent from 10 March 2016 until 20 August 2019 when, it is accepted, she was dismissed. The Respondent is a relatively small financial services company, with about fifteen employees in 2019, and is a subsidiary of a larger Chinese undertaking which trades in Hong Kong, Australia and elsewhere in the Far East, whilst being registered in the Cayman Islands. The Respondent asserts that the potentially fair reason for the Claimant's dismissal was redundancy, and that it acted fairly and reasonably in all the circumstances in dismissing her. The Claimant, whilst not disputing that a redundancy situation existed at the time of her dismissal, contends that wholly inadequate and essentially meaningless consultation took place before she was dismissed, and that no attempt was made to offer her suitable alternative employment, which she says was then available.

2. I heard this case over the course of a two day full merits hearing on 11 and 12 February 2021, which proceeded remotely via the CVP programme due to the continuing Covid-19 pandemic. The Claimant was represented by Ms Darshana Patel of the Free Representation Unit and gave evidence in support of her claim, as did her former colleague Ms Daranee Kerdsawang, who now lives and works in Thailand, from where she gave her evidence. The Respondent was represented by Mrs Fairclough-Haynes, a consultant adviser, who called as witnesses Mr Ting Ji, the Respondent's managing director who took the decision to dismiss her, and Mr Andrew Wood, the Respondent's compliance officer who heard and dismissed the Claimant's appeal against dismissal. I was provided with statements from all those witnesses (as well as one from Ms Corinne Kremic, another former employee who was dismissed more or less simultaneously with the Claimant, but who was not called as a witness); an agreed trial bundle; and written submissions on behalf of the Claimant.

3. The relevant events concerning the Claimant's claim all occurred within a very short time frame during July 2019. Up until then, it was not contested that the Claimant was anything other than a satisfactory employee, undertaking her duties conscientiously and well, with no disciplinary record of which I was told. Part of the

Claimant's duties was to correspond, both verbally on the telephone and by email, and virtually every working day, with colleagues based in either Hong Kong or China, including a company accountant, a finance manager and an operations executive. The significance of that fact is that all such communications were in English: the Claimant's first language is Urdu, she speaks English fluently, but cannot speak or understand Mandarin or any other Chinese dialect. The Claimant's annual salary was approximately £46,000 gross; her colleague Ms Kremic, who was the Respondent's office manager and HR officer, was paid about £34,000 per annum.

4. By way of background, it is right to say that the Respondent company was operating at a loss during 2019. However, it had been doing so for a number of years, and there was a funding agreement in place whereby it received whatever financial support and assistance it required from its Chinese parent company. The Claimant, as the in-house accountant at the Respondent's London office, was fully aware of that arrangement, since it was she who would notify her colleagues in Hong Kong or China of what sums were needed from time to time; and I am satisfied that that financial support continued up until and indeed beyond the Claimant's dismissal in August 2019. Secondly, and as both the Claimant and her witness Ms Kerdsawang confirmed, there had been a meeting of the Respondent's staff in early June 2019 when the Respondent's CEO had reassured staff that the Respondent's business in London would continue as before, and would not be impacted by a number of changes in, and the sale of some clients by, the China based undertaking.

5. On 16 July 2019, the Claimant and Ms Kremic were called into separate meetings by Mr Ting Ji, the Respondent's managing director. Whilst I didn't hear from Ms Kremic, Mr Ji's account was that he then told each of them that the Respondent needed to economise and save money, and that it had been decided to amalgamate their duties and functions as, respectively, in-house accountant, office manager and HR officer into one single role; and that he then provided each of them with a job description setting out the requirements of the new role, at the same time making clear that the ability to speak Mandarin (which neither did) was an essential element of the combined role.

6. Mr Ji's evidence was that the Claimant turned that opportunity down flat there and then for two reasons. First, because she considered that the salary offered of £30,000 per annum was not enough for the combined role; secondly because she cannot speak Mandarin. Whether or not Ms Kremic expressed any interest in the role is not clear, but in any event she was not selected for it.

7. The Claimant's account of her meeting with Mr Ji is very different. In essence, she says, she was told by Mr Ji without warning or preamble that both she and Ms Kremic would be dismissed, that the Respondent had already identified and hired someone to undertake their combined duties and functions, who would be joining the Respondent shortly, and that Mr Ji did not suggest that she could apply for either the combined role or any other alternative, since her imminent dismissal was a fait accompli.

8. It is not in dispute that the Claimant subsequently attended what the Respondent describes as two further redundancy meetings, the first being on the following day (17 July) with an external HR consultant appointed by the Respondent, the second two days later on 19 July with Mr Ji, when 'consultation' was concluded. Mr Ji's evidence was that also on 19 July he offered the new combined role of

accountant/office manager/HR officer to a lady called Lin Zhu, referred to during the hearing and hereafter as 'Julie', who can speak Mandarin, and that she accepted the role offered immediately. Four days later, on Tuesday 23 July, Julie started work with the Respondent, as her employment contract in the bundle makes clear; and that was also the day on which the Claimant's dismissal was confirmed, her last day of employment being 20 August.

9. In relation to what actually happened at their meeting on 16 July, and indeed wherever their evidence conflicts, I have no hesitation in preferring the Claimant's account to that of Mr Ji for a number of reasons. First, and even allowing for occasional difficulties in communication/comprehension due to the remote nature of the hearing and because English is not Mr Ji's first language, Mr Ji repeatedly and clearly stated in his oral evidence that his colleague and fellow director Mr Mack Tung had already interviewed Julie by the time of Mr Ji's initial meeting with the Claimant on 16 July, and that he had then informed the Claimant of that fact. Secondly, that confirms and is consistent with the Claimant's evidence that Mr Tung had made clear to her on 16 July that a replacement employee had been found for her role, and that there was no alternative to her redundancy dismissal. That would also fit with the Claimant's account of earlier (and at the time confusing) enquiries having been made concerning her role by the company accountant in Hong Kong, which would only be consistent with her forthcoming dismissal.

10. Thirdly, Mr Ji's account that he offered the combined role to the Claimant on 16 July, which she then refused; that Julie was seen for the first time on 17 July by him (and subsequently by Mr Tung on 18 July) before being offered the role on 19 July, which she accepted and then started work on 23 July, when the Claimant's dismissal was confirmed, is in my view inherently unlikely and not credible, as well as being undermined by Mr Ji's own evidence. Fourthly, evidence in support of the Claimant's overall account, and in particular of her handover of functions from 23 July onwards to Julie and of her discussions with Mr Ji as to when her leaving package and that of Ms Kremic, who had been simultaneously dismissed, should be included in the Respondent's monthly accounts, with the consequent delay in payment of other staff salaries, was provided in the unchallenged evidence of Ms Kerdsawang, as well as in the statement provided by Ms Kremic. Finally, the inclusion of an ability to speak Mandarin as an essential requirement for the combined role postholder was, in my judgment, simply a device to try to justify the dismissal of both the Claimant and Ms Kremic, since no such ability had previously been needed by either of them, nor was it then required in order to undertake the combined role, as Mr Ji frankly accepted in his evidence.

11. Those findings are essentially determinative of the Claimant's complaint. The fundamental duty on an employer is to take reasonable steps to avoid or limit potential redundancies, to engage in timely and meaningful consultation with those employees potentially or actually affected, to utilise so far as possible objectively fair redundancy selection criteria, and to consider suitable alternative employment as a means of avoiding redundancy dismissals. In my judgment, the Respondent has failed to comply with virtually all of those requirements.

12. If it is accepted that a redundancy situation existed at the Respondent in July 2019, where two pre-existing roles (the in-house accountant and the office manager/HR officer) were to be merged, then it was incumbent on the Respondent to

take reasonable steps to try to ensure if possible that only one of the two current postholders was made redundant by means of a genuine redundancy pool with appropriate criteria, which would include the salary payable and other terms and duties of the combined role, but excluding any spurious language requirement; and to engage with the Claimant and Ms Kremic in genuine and timely consultation about what was obviously potentially suitable alternative employment. Plainly that didn't happen, and instead the Respondent chose to dismiss both postholders and in their place recruit a much cheaper replacement who, as the evidence before the Tribunal demonstrated, was ill-qualified to undertake the requirements of the combined role satisfactorily on her own and without third party assistance.

13. I bear in mind that it is not for the Tribunal to second guess an employer, or to substitute its own judgment as to what should have resulted but, had a reasonably fair redundancy selection procedure been adopted, then two things seem reasonably clear to me: first, that the Claimant had at least a 50% chance of being the successful candidate for the combined role, and that percentage will be reflected in the compensation which is payable to her, and secondly that it is likely that the annual salary for the combined role would have reflected the range of salaries then being paid for the accountant and office manager/HR officer roles - £46,000 and £34,000 respectively. Doing the best I can, I consider that an annual salary figure of £40,000 for the new combined role would not have been unreasonable.

14. For these reasons, I find that the Claimant was unfairly selected for redundancy, that the Respondent did not follow a reasonably fair redundancy process, and that the Claimant's complaint of unfair dismissal is successful and she is entitled to compensation.

15. In relation to remedy, both parties accepted that the basic award should be £1575, although the redundancy monies paid by the Respondent should be set against and extinguish that sum, together with the additional £472.50 then paid which is to be deducted from the compensatory award. Neither party contested an award of £250 in relation to loss of statutory rights, and a figure of £50 towards the Claimant's expenses in seeking alternative employment seems to me to be fair.

16. With respect to loss of earnings, the Claimant succeeded in obtaining alternative employment as an accountant with another financial services undertaking in November 2019, albeit that didn't work out beyond January 2020. There is nothing to suggest that that was as a result of any fault on the Claimant's behalf, and there was clear evidence that the Respondent had refused to provide her with a reference for those employers after she had commenced these proceedings. The Claimant was unemployed thereafter until September 2020, when she commenced work (in a similar capacity as before) for her current employers at a salary significantly higher than that payable by the Respondent. I accept that the Claimant took reasonable steps to mitigate her loss of earnings through seeking employment limited to her particular field of expertise, rather than additionally as a cleaner or other manual worker, as the Respondent suggested. Doing the best I can, I think it is just and equitable to both parties to compensate the Claimant for loss of earnings for a period of nine months from the date of dismissal (20 August 2019), subject to deduction of the sums earned by the Claimant between November 2019 and January 2020 (£3990.75). In addition, the Claimant should be compensated for the lost medical insurance payments by the Respondent over the same period (£459), although her claim for a bonus payment is

too speculative and remote in my view. Finally, the Claimant applied for state benefits in March 2020, so that the Recoupment Regulations will apply from 1 March 2020.

Employment Judge R Barrowclough
Date: 1 March 2021