



EMPLOYMENT TRIBUNALS

Claimant: Ms Harriet Parkin

Respondent: Tractorland Limited

Heard at: Exeter **On:** 2 and 3 April 2019

Before: Employment Judge Fowell

Representation:

Claimant: In person

Respondent: Mr Cameron of Avensure Limited

RESERVED JUDGMENT

The claimant's dismissal was fair.

REASONS

Introduction

1. The claimant, Ms Parkin, was employed by the respondent, Tractorland Limited, as a New Business Development Manager until her dismissal on 15 January 2018 on grounds of redundancy. Tractorland is the owner of a children's TV character known as Tractor Ted and has developed a range of merchandise to go with the character. These are sold online and in such outlets as garden centres and farm shops nationally. It is a small company which at present has three full-time members of staff, four part-timers, three freelance staff for bookkeeping and social media and a total of seven sales agents working on a self-employed basis to sell these products across the UK, Ireland and Holland. There are also three directors, two of whom - Mr Guy Holmes and Mr Christopher Humpherson - joined the business in autumn 2017. On their arrival there was a review of the business which led to Ms Parkin's redundancy.
2. Ms Parkin joined in 2014, and as her job title indicates, her role was to develop new business, such as by identifying new retail outlets who would take the

company's products. Her dismissal followed a steady and marked reduction in the volume of such new sales.

Legal Framework

3. Redundancy is a potentially fair reason for dismissal under the Employment Rights Act 1996 (ERA), the statute which governs such cases, and at section 98(4) it provides that it is for the employer to show the reason for dismissal and that in the circumstances, including their size and administrative resources, they acted reasonably in treating it as sufficient. As a small employer, less is expected, although I note that the company instructed an HR consultant to advise them on this redundancy exercise. Section 139 provides a definition:
 - (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 ...
 - (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."
4. The need for the employee's services does not therefore need to have come to an end, just that the need has diminished, or is expected to.
5. A fair procedure is also very important in showing that an employer has acted reasonably, and I set out more detail below about the steps required.
6. In addressing these issues I heard evidence from Ms Parkin, and on behalf of the company from Mr Humpherson, one of the new owners; Ms Jo Sparrow, the General Manager; Mr David Horler, the Operations Director and co-founder, whose decision it was to dismiss her; and Ms Alexandra Heard (also one of the co-founders) and the Creative and Sales Director, who heard the appeal hearing. There was also a bundle of about 200 pages. Having considered this evidence and the submissions on each side I make the following findings.

Findings of Fact

7. Ms Parkin's efforts to generate new business were successful for a time but as already noted, from 2015 onwards there was a steady and marked decline. The reasons for that decline are outside the scope of this decision and it was not suggested that her performance was to any extent to blame. Ms Parkin pointed to the fact that she was taken away from new business development in order to help to maximise sales to existing customers and to carry out a range of other tasks including managing the sales agents. Such sales agents are self-employed and are paid on commission-only terms. They generally have an assigned territory and aim to maximise sales to their existing customers in that area and also to set up various events and promotions, rather than seeking to develop new business clients. The view of the respondent was that it is very much easier to maximise sales in this way rather than finding new clients. So, increasingly, Ms Parkin was

asked to carry out other tasks such as follow-up calls with new retail outlets to maintain relationships with them and persuade them to take more merchandise for sale. She found this rather frustrating and felt that others should be exploiting and maximising the resulting new business opportunities, but she agreed to do so. Several of the employed staff work in customer service, making such follow-up calls as part of their duties. The view of the company was that she had time on her hands which this made use of, whereas she saw it as making inroads into her available marketing time.

8. It is a long-established company, run on informal lines. There is a single main office shared by the staff and Ms Parkin generally came into the office one day a week, working from home or spending her time out visiting clients for the remainder. She reported to Ms Heard, whose responsibilities also included that of Sales Director and who was therefore responsible for redirecting her efforts from time to time.
9. During 2017 the volume of new business sales declined to about £50,000. Ms Parkin's salary was a substantial proportion of that amount and the company began looking for ways to save money. In October 2017 the lease on Ms Parkin's company car expired and Ms Heard raised with her the possibility of selling it or cashing in the remainder of the lease, and replacing it with a car allowance paid directly to Ms Parkin instead. She was unhappy about this, and feared that it was the precursor to redundancy. There is no obvious connection between the two, but the risk of redundancy was already very much a concern at that stage, reflecting the decline in new business sales. In fact, her concern was so great that it resulted in two weeks off work with stress. Her doctor recommended that she have a phased return to work but this request was refused by Mr Horler. When she returned she asked him about raising a grievance over this issue, to which he responded that the company did not have a grievance policy and it went no further. No steps were taken however to replace the car and she kept the use of it.
10. It was around the same time that Mr Humpherson and Mr Holmes joined the business. Mr Humpherson had known Mr Horler for some time and was confident that he could turn things around with improved business methods. Mr Holmes had previous experience in the TV industry and of marketing similar characters. Mr Humpherson therefore set about a fairly thorough review of the business with a view to saving costs.
11. Among the steps taken was to introduce a computerised stock control system and finance management system. Increasing sales was a priority and his preference was to switch to what he described as an agency model, i.e. using self-employed commercial agents rather than employed staff. That had the advantage from his point of view of reducing overheads, especially when sales were low, since commission was only paid on results. He also carried out an assessment of the different roles and skills carried out each member of staff which was set out for this hearing in rather complicated graphical form. Since that exercise was never shared with Ms Parkin I will not go into it in any detail; suffice to say that he formed the conclusion that there were others in the business, particularly Ms Heard and Ms Sparrow and the customer service staff who could carry the sales function, and that Ms Parkin's salary could be saved by focusing on existing business and using commercial agents for that purpose.

12. On 2 January 2018 Ms Parkin was in the office in Exeter. There was no one else there and Mr Horler, together with Ms Daniel, the HR consultant, had a meeting with her to broach her redundancy. The meeting took the form of him reading a letter to Ms Parkin. This referred to the drop in turnover, the need to make savings, and set out his proposal that her role be made redundant. The letter had clearly been prepared on HR advice. It explained that they would meet again on 8 January 2018 at which point she would have the opportunity to suggest any alternative solutions. Ms Parkin was extremely shocked by this, returned to her desk briefly, and then went home.
13. Afterwards, she thought it suspicious that no one else was in the office, and an indication that the others knew that she was about to be made redundant. Mr Horler's evidence was that this was simply fortuitous and they had taken an extra day off work after the New Year's break. Whatever the correct position, it is not necessarily unreasonable by one means or another to arrange for a private meeting and it does not indicate that other members of staff were aware of the subject under discussion or that any final decision had been made.
14. Ms Parkin had already been in touch with her own HR adviser following her concerns the previous autumn and approached him for further advice at this point. For some reason the letter which was read to her was not provided in hardcopy at that meeting but it was sent onto her shortly before the end of that week. It stated that she had until close of business that Friday to let Mr Horler know of any proposals she had, which was a tight timescale. That was to allow time for the second consultation meeting the following Monday. In the event, she asked to move the meeting to 12 January and it went ahead on that occasion. She asked for her HR adviser to accompany her to the meeting, which was refused; the company took the view that the statutory right to be accompanied by a work colleague or trade union representative should suffice.
15. No notes were taken of that meeting, which took place in what was described as a pub, but in fact what appears from the address to be the bar of a Premier Inn. It was thought by the company that this more informal setting would be less intimidating but Ms Parkin found it inappropriate. She came with a former employee, Mr Mackenzie, who was a friend of hers and although not clear from the subsequent letter, I assume that Mr Horler was again accompanied by Ms Daniel.
16. For whatever reason it does not appear that Ms Parkin made any alternative suggestions at this meeting. She could not remember doing so at this hearing and no clear alternative approach has been set out at any stage. Despite the informality of the hearing there is a detailed outcome letter, dated 15 January 2018, which explained that in the absence of any such proposal, the decision was to dismiss her on eight weeks' notice. She was informed of her right to appeal.
17. The appeal hearing was with Ms Heard and took place on 23 February 2018. This time, by agreement, both parties recorded the hearing. Only one recording survives – that of the company - since Ms Parkin has changed her mobile phone but no dispute was raised over the accuracy of the transcript. Ms Daniel also attended, as she had at the last hearing, and Ms Parkin was again accompanied by Mr MacKenzie.

18. Ms Parkin emphasised the stress and anxiety the process that caused her and felt that very little information had been given as to why her role was considered for redundancy rather than anyone else's. Her main issue, she stated more than once, was about the process. She felt that they had wanted to make her redundant since proposing to sell her car the previous year, and she had been fobbed off when she asked to raise a grievance about her return to work. In fact, a good deal of the discussion was about that episode. She also raised the fact that the office was empty on 2 January and that she had not been able to bring a companion of her choice to the dismissal meeting. The upshot was that she felt the process should be started again from square one.
19. Some points of substance were discussed, or at least touched on. The business review carried out by the two new owners the previous autumn was raised, and it appears from the discussion that Ms Parkin was aware of this, and that she met Ms Heard and the two new owners in November to talk about her role. Ms Parkin had expressed some dissatisfaction about being pulled away from new business development and they had responded by changing their approach and leaving her in that existing role without those distractions. Ms Parkin felt nevertheless that she had not been listened to.
20. She was also very clear in that meeting that she could not take a significant drop in her salary. There was some discussion about her looking after existing customers instead, to which Ms Heard responded that they were looking to the customer services staff, who were much less senior, to do that role. A number of comments indicate that Ms Parkin was aware of the poor sales figures.
21. The outcome was communicated by letter dated 26 February 2018. Summarising matters, Ms Heard stated that she was not the only one to lose her job since one of the sales agents for the south-west had resigned and had not been replaced because they could not afford it. She set out the other changes made to streamline finance and stock control and felt that the business had no alternative. No such alternative proposals had been made, just concerns about the process, which Ms Heard did not accept, and so the appeal was dismissed.
22. Since then, it appears that the sales agent for the south-west has been replaced and another one appointed in Scotland.

Legal Framework

23. It is necessary to set out the relevant law in further detail. In **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, the Employment Appeal Tribunal (EAT) laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed that it is not for the employment tribunal to impose its standards in deciding whether the employer should have behaved differently; instead it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.
24. This test, now referred to as the "range of reasonable responses" test, reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against

substituting their view of the matter for that of the decision maker¹, not only in cases of misconduct but in all types of dismissal².

25. That doctrine applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion. If a failing is identified in the redundancy process it is necessary to ask whether the approach taken was outside that range, i.e. whether it complied with the objective standards of the reasonable employer.³
26. In the **Compair Maxam** case the Employment Appeal Tribunal held that a reasonable employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection'. The chosen selection criteria are then applied to this group to decide who to make redundant. In **Taymech Ltd v Ryan** EAT 663/94 they held that how the pool should be defined is primarily a matter for the employer, although if an employer simply dismisses an employee without first *considering* the question of a pool, the dismissal is likely to be unfair.
27. Here, there was no pool for selection. Ms Parkin's role was the only one identified as redundant. She was in a "pool of one". This type of situation was considered by the Employment Appeal Tribunal in **Capita Hartshead Ltd v Byard** 2012 ICR 1256. In line with the previous guidance in the **Taymech** case they held that tribunals are not precluded from holding that the choice of pool for selection by the employer is so flawed that the employee selected has been unfairly dismissed. But that is only the case where the employer has not "genuinely applied his mind to the problem" of selecting the pool. Even then however, they thought that an employer's decision would be difficult to challenge.

Application of the Law to the Facts

28. Those cases suffice to show what an uphill struggle an employee has in such circumstances. In the **Capita Hartshead** case, Ms Byard was one of four account managers and although her business had declined the tribunal felt that the reasons given for placing her in a pool of one, rather than making a selection from all four, were particularly weak. All four should have been in the pool. In Ms Parkin's case however there is no such clear-cut alternative so it cannot in my view be said that the decision to place her in a pool of one was obviously incorrect, applying the range of reasonable responses test. The key point however is that, as I accept, Mr Humpherson did carry out a thorough business review before embarking on this process and considered which employees ought to be placed at risk. His conclusion that Ms Parkin's role was the only appropriate one is difficult to interfere with, reminding myself that it is not for me to substitute my judgement for his in such matters, but even without that stricture it is a difficult decision to fault: new business sales were declining and Ms Heard was responsible for that aspect of the business.
29. I do not find that the decision to place her at risk of redundancy was to any extent affected by the episode over the company car or the phased return to work. All of

¹ For example, by the Court of Appeal in *London Ambulance Service NHS Trust v Small* 2009 IRLR 563

² *Hendy Banks City Print Limited v Fairbrother & Others* UKEAT/0691/04

³ *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111

the respondent's witnesses in fact appeared well disposed towards Ms Parkin and considerate towards her during the redundancy process. That episode was followed by the business review and the meeting with the new owners in November, in which she complained of being distracted from her new business role by other expectations such as following up existing clients and managing the sales agents. Far from insisting on their own views they listened to her and adapted their approach, allowing her to concentrate again for the present on new business. This does not indicate any settled intention by that stage to select her for redundancy since they allowed to some free rein to turn things around in her own way. But this was a small company which was running into real difficulties, for which it needed, or felt it needed, to take swift action, so time was limited.

30. Was there sufficient consultation? There is never a good time to broach such a subject and the first consultation meeting will not generally involve any exchange of ideas at all; it is simply an occasion for breaking the bad news as considerately as possible, and then explaining the process from then on. That appears to have been done. The letter was not given to her at the time, as it might have been, and the timetable for her to come up with alternative proposals appears to have been particularly brisk, but against that there was an extension given to the time and I cannot see that Ms Parkin was prejudiced in any way by the original approach. The same applies to her choice of companion for the second meeting, as she had the benefit of HR advice beforehand. Certainly by the time of the appeal hearing no clear alternative solution was under discussion. The nearest approach to that was the suggestion that she go back to focusing on existing clients – effectively a switch around from the discussion in the previous November when she had asked to concentrate on new business development. By then, this proposal did not find favour, and again the question of whether that was a reasonable view to take is primarily for the employer. It is not for me to substitute my view unless it can be said that no reasonable employer would act in that way. I cannot say so in this case. There appears by then to have been some urgency to the situation and it may well be that from a business point of view Ms Heard was correct in responding that this could be done more economically by other staff. Once again, the definition of redundancy does not mean that the requirement for work of a particular type has ceased, only that it is expected to cease or diminish, and that will include situations where more economic arrangements can be put in place.
31. One point raised by the claimant is that it was her salary rather than her skill set which was being removed, but that is part and parcel of any decision to make redundancies. A company has to cut its coat according to its cloth and is not obliged to continue employing a member of staff if it can cover those duties in other ways or more economically.
32. Holding the dismissal hearing in a pub or Premier Inn was far from ideal, although it may well have been done for reasons of consideration. Ultimately however the venue is not decisive, and the real question is whether there was a proper opportunity of putting forward alternative proposals and questioning the rationale. It does not therefore seem to me that on that basis the dismissal was rendered unfair.
33. The reference to a sales agent not being replaced in the appeal outcome letter was perhaps something of a sop to Ms Parkin's feelings, since the agent was replaced, and there was no cost implication to having one in place. This does not

affect my view that part of the rationale was to move to an agency model; it is simply that that part of the justification given was erroneous.

34. Dismissal on grounds of redundancy, particularly in a pool of one situation like this, is always stressful and is a difficult process for an employee to fight against as they may not have the overview of the business to challenge the conclusions reached. That is why it is important to explain things and allow an opportunity to make alternative proposals. The explanations given here at the two consultation meetings and in the appeal hearing, have to be understood in the light of the previous discussions about her role, and appear to me to be sufficient. She did not ask for any specific further information. There was indeed no obvious alternative and although criticisms were made of the process none of those appears to me to be sufficiently serious to affect the fairness of the decision. If that conclusion is wrong for any reason, the chances of a different approach yielding a different outcome must be particularly low given the lack of any substantive alternative.
35. It is not necessary to consider that alternative further however. For all of the above reasons I conclude that this was a redundancy situation and that the procedure followed - given the size of the company and applying the range of reasonable responses test - was a fair one, and so the claim must be dismissed.

Employment Judge Fowell

Date 03 April 2019