EMPLOYMENT TRIBUNALS

Claimant: Joanne Allan

Respondent: Oakley Builders and Groundwork Contractors Ltd

Heard at: **Exeter** **On:** **04-05 July 2019**

Before: Employment Judge Housego
Ms R Hewitt-Gray and
Mr I Ley

Representation

Claimant: Ms J Davies
Respondent: Mr S Bromige of Counsel

JUDGMENT

1. The claims for age discrimination and unfair dismissal are dismissed.

2. The claim for a redundancy payment is to be relisted for a 1 hour hearing on the first open date after 42 days, if not resolved by then.

REASONS

1. Ms Allan claims unfair dismissal, a redundancy payment and age discrimination, following her dismissal on 24 August 2018.

2. The law is well known. Redundancy is a potentially fair reason for dismissal[1]. It is not disputed that this was the reason. Whether it is fair or not is an issue where there is no burden or standard of proof and is matter for the Tribunal's judgment in all the circumstances of the case[2]. Age is a protected characteristic[3] and discrimination on that basis is unlawful[4]. Such discrimination can be justified if it is in pursuit of a legitimate aim and

[1] S98(2) Employment Rights Act 1996.
[2] Applying S98(4) of the Employment Rights Act 1996
[3] Equality Act S 5
[4] Equality Act S13

is proportionate[5], but that is not said to apply in this case. The claimant must find a comparator[6], and Ms Allan chose her colleague Ms Wise, who was not dismissed. As it is asserted that the dismissal was by reason of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination claim, it is for the claimant to show reason why there might be discrimination[7], and if he does so then it is for the employer to show that it was not. Other cases are referred to below.

3. The Tribunal heard evidence from Ms Allan, and from Ms Hamley (who manages the office) and from Ms Harbin, not employed but the partner of Mr Wise, the director of the respondent, who also gave evidence. All the witnesses were cross examined and the Tribunal asked them questions. Both representatives made submissions, the substance of which appears in the findings below.

4. Ms Allan worked for Oakley Builders and Groundwork Contractors Ltd as an administrative assistant. She started on 09 May 2016. She accepts that she was told in her interview that in the event of there being a redundancy situation there would be a *"last in first out"* method of selection. There was no redundancy dismissal before her own dismissal. There were three other workers in the office and an office manager. Mr Wise runs the company. His daughter was one of the other administration assistants. She started work as an employee before Ms Allan. (She had started in 2013 and had a break in 2014, but resumed her employment in 2015, so about 10 months before Ms Allan started).

5. Ms Harbin is involved in the company, but not employed by it. In December 2017 she said that there might have to be redundancies. It is agreed that at that time she said that this would be on a *"last in first out"* basis. This was no surprise as that was what Ms Allan had been told when she joined. Nothing happened at that time.

6. On 19 July 2018 there was a cost-cutting exercise put in place. On 30 July 2018 there was further discussion. There would have to be more savings. Ms Allan offered to stop working on a Friday. This was not acceptable because that was the company's busiest day. She declined to go down to 2 days a week at that time: it was put to her.

7. On 02 August 2018 Ms Hamley came into the office and spoke to Ms Allan, Ms Wise and Ms Taggart to say that one person would be made redundant. She asked for volunteers. No one volunteered. The same day Ms Hamley telephoned the other person who worked in the office, Ms Zab, who was on holiday in America, to have the same discussion. She did not want to volunteer for redundancy either.

8. The only substantial dispute of fact it that Ms Allan says that she then offered to go down to 2 days, and that her offer was declined. The respondent says that there was no such offer. The Tribunal does not find it

[5] Equality Act S13(2)
[6] Equality Act S23(1)
[7] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and most recently Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

necessary to resolve this difference, for the reasons that follow, and as it would still leave a .4 of a full time equivalent ("FTE"), when it is agreed that the redundancy situation was to remove 1 FTE from the office.

9. Ms Hamley was said to have been in the pool for selection, but as she had been there a long time, and last in first out was being applied, there was no difficulty for her in speaking to the others. Mr Wise soon told her she would not be made redundant.

10. By letter dated 09 August Ms Allan was given 2 weeks' notice of the termination of her employment, and her employment ended on 24 August 2018.

11. There are a number of matters agreed by Ms Allan. She agrees that there was a redundancy situation, she says that Ms Wise is her comparator, she accepted that Ms Wise had worked for the respondent for longer than she had done, and accepted that there is now an admin staff that is 1 FTE fewer than when she worked there.

12. Ms Allan points to the disparity in age between her and the two who were retained (Ms Wise and Ms Zab), who are in their 20s. Ms Hamley was the manager, and is older, but was told early on that she would not be made redundant. Ms Allan attributes her dismissal to the age disparity between her and Ms Wise (Ms Zab having been employed for much longer).

13. Counsel for the respondent submitted that Ms Wise was not a true comparator and submitted that she was not someone where there was *"no material difference between the circumstances relating to each case".* He submitted that without a comparator the discrimination claim had to fail. The Tribunal did not agree. Ms Allan and Ms Wise did similar work in the same office, and that one worked 3 or 4 more hours in a week, and that one had a slightly higher pay rate (£1.50 or 50p an hour) is not *material*. The claimant and her comparator do not have to be identical.

14. The Tribunal does not find this to have been age discrimination or unfair, for the following reasons.

15. First, that a protected characteristic is involved does not mean that it is the reason for the selection for redundancy. There must be a causative link between the protected characteristic and the detriment[8].

16. *"Last in first out"* is now largely discredited for a variety of reasons. From the employer's point of view it means that a relatively recent employee who is a stellar performer of great value to the future of the business may have to be sacrificed for a timeserver nearing retirement with no enthusiasm for his or her employment (which is not to suggest that is the case for all older employees, or that all younger employees are stellar performers). From employees' point of view, last in first out tends to be indirect sex discrimination against women, because women tend to have shorter employments than men, in particular by reason of breaks for childcare. It can also be age discrimination, because the young have less

[8] Bahl v The Law Society [2004] IRLR 799

opportunity to acquire long service records. Neither of these problems are relevant in this case, because the entire pool for selection was female, and because Ms Allan was the oldest rather than the youngest of the pool.

17. The Tribunal has to be astute to ensure that there was a proper means of choosing the pool for selection. There is no dispute in this case that it is the administration staff, and that was a rational pool for selection.

18. The Tribunal has to assess the criteria used to select the person to be dismissed. While last in first out is not everyone's first choice these days it cannot be said to be an irrational method to choose. It is an entirely objective criterion. It avoids the employer having to judge people. It is not disputed that Ms Allan was the last in, and so was the first out. It was genuinely the method chosen, and was said to be such for all of the last 3 years.

19. During the hearing Ms Allan's representative sought to say that in terms of hours worked it was quite likely that Ms Wise had worked fewer hours in total than Ms Allan, because she had a shorter working week. That was not the way the claim has been pleaded in any way, and in any event the respondent was using last in first out by reference to the starting date of employment.

20. There was consultation about alternatives to redundancy, limited to asking whether anyone would take redundancy voluntarily. There was a suggestion that Ms Zab would have done so and some text messages from her produced so to indicate. Closer examination of those, however, indicated that she had refused voluntary redundancy. Subsequently she had had some discussion with her partner about whether she might like to change her mind, but it was clear from those text messages that she had never conveyed that to the respondent (and she was on a different continent at the time).

21. Where there are criteria for selection the respondent employer should discuss how those criteria are applied in order to make sure that a person made redundant is properly scored. There is no point in doing so where this is a matter of the calculation of length of service, as was the case here.

22. There were no written notes of meetings, little in the way of written communication with the claimant other than her letter of dismissal, even though she asked for it in writing. She was taken by surprise at a meeting where this was discussed, and not told that she could have a companion with her. She was not told that she might appeal.

23. In these circumstances none of this makes any difference. There is no specific claim made for not being allowed a companion. There is no dispute that there was a genuine redundancy situation, and it was always made clear that the method to be used was last in first out. Discussion of the outcome was pointless, because it was arithmetic. The one point that could be discussed was whether there were alternatives to redundancy, and all the staff were asked whether they wished to volunteer. No one suggested job sharing. The claimant's first suggestion of dropping Fridays

was unacceptable for business reasons. If she did offer to drop to 2 days that was still .4 FTE more than the respondent needed.

24. The claimant then suggests that Ms Wise was given a pay rise shortly before she was dismissed. Previously their pay rises had gone in tandem. There is nothing particularly suspicious about this. Ms Wise's pay was increased by £1 an hour. That reduced the pay difference between them from £1.50 an hour less than that of Ms Allan to 50p an hour less. Since Ms Wise had been there longer and she may well have thought she should be paid the same as Ms Allan. She would have an argument that it was age discrimination to be paid less.

25. Ms Wise's hours then increased by one day, to cover the Friday when Ms Allan was no longer working. However Ms Hamley, who was on a much higher pay rate, dropped a day a week at the same time, and for that reason. The net result of that was a further saving in wages for the respondent.

26. The admin staff also do work for Ms Harbin's business, and Mr Wise's separate letting business, but that is not material: that Mr Wise lends the staff is not to the point. It was the business which employed Ms Allan that had a diminished need for employees to carry out work of the type that Ms Allan did (and even if it was the other businesses, the respondent would still have needed fewer employees).

27. None of this suggests any age discrimination. None of it suggests any unfairness. If there was any unfairness in the procedure (and a fair procedure must be followed throughout[9]) then there is a 100% *Polkey*[10] reduction, because application of last in first out would inevitably have resulted in the dismissal of the claimant, and in the same timeframe.

28. There is the further point that the comparator is the daughter of the director of the respondent. It may be said that it was nepotism to favour her over Ms Allan. If so that is everything to do with the father/daughter relationship and nothing to do with age.

29. While it was not the reason for the choice of Ms Allan over his daughter, in a small family business with no more than 15 employees, and having employed his daughter for 5 years (with a break in the middle) it is hard to see that it would be unreasonable for Mr Wise to choose someone other than his daughter to make redundant. As it happens, that was not what occurred, as strict application of last in first out meant that Ms Wise was not the person that chosen criterion identified as the person to be selected for dismissal.

30. The claim for a redundancy payment arises because the correctly calculated redundancy payment was put through payroll, meaning that income tax and national insurance payments (both employer and employee) were paid. The income tax and employee's national insurance payments were deducted from the money paid to Ms Allan (and were paid to HMRC). This was incorrect, as redundancy payments are to be paid

[9] Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588
[10] Polkey v A E Dayton Services Ltd [1988] ICR 142 HL

gross. The respondent says that the claimant (and only the claimant) can recover these deductions from HMRC. The claimant says that at the April case management hearing it was indicated that the respondent should resolve this. Mr Bromige submitted that this was not "wages" as defined in the Employment Rights Act 1996, so there was no deduction. The Tribunal did not agree with this analysis, for the fact was that Ms Allan had not received her full redundancy payment, and the reason why was nothing to do with her. Nevertheless, if she could recover the deduction from HMRC it would be unfair for the respondent to make up that shortfall, for that could lead to unjust enrichment of the claimant. The position was further complicated because the last payslip for Ms Allan aggregated her redundancy payment with her earnings, so that it is not possible accurately to determine what income tax and national insurance was deducted from the redundancy payment.

31. It was agreed that the best way of dealing with this was to adjourn the matter to a 1 hour hearing after 6 weeks, in the hope that the accountants to the respondent could help the claimant recover the deductions (as the respondent promised they would be instructed to do). Only if that failed would the respondent be ordered to pay the claimant the balance (on the understanding that if Ms Allan would engage with the process of seeking reimbursement). To be entirely clear, it is the respondent's error, and it is for them to correct it, and do all the work required to do so. The claimant's obligation is to help them all she can to get the money back from HMRC. If this is not possible by the time the 1 hour hearing takes place then the expectation is that the respondent will have to make up the shortfall, as it was they who made the deduction. The respondent's accountant advised the respondent that the tax deducted was £252.00 and the national insurance was £98.50. The claimant accepted that these were figures that she was prepared to accept as correct.

Employment Judge Housego

Dated: 05 July 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON: 2 August 2019

FOR EMPLOYMENT TRIBUNALS