



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Anna Smart

v

Essential Care (Organics) Limited

Heard at: Bury St Edmunds

On: 17 January 2019

Before: Employment Judge Cassel

Appearances

For the Claimant: In person, assisted by her mother Mrs B Smart

For the Respondent: Mr L Chapman, Lay representative

JUDGMENT

1. The claimant was unfairly dismissed from her employment and her claim of unfair dismissal succeeds.
2. The respondent is to pay to the claimant the following sums:

For loss of one week's pay, net of tax and NI	£250
For loss of statutory industrial rights,	£250
For failure to follow the Acas Code of Practice, the sum of	<u>£ 50</u>
Total sum of	£550

REASONS

1. In her claim to the tribunal the claimant, Anna Smart, complains of unfair dismissal from her position as Operations Assistant from the respondent company.
2. In the response, dismissal is admitted and the respondent avers that redundancy is the reason for dismissal.
3. The claim was listed for hearing today before me and as a preliminary matter I discussed the nature of the claim informally with both parties.

Mr Chapman represented the respondent and Mrs B Smart appeared for her daughter, the claimant.

4. During the discussions that were undertaken, three issues were identified for consideration in this claim:
 - (1) Was there a redundancy situation?
 - (2) Was the amended data that was provided by the claimant for the appeals process dealt with fairly at appeal? In this regard, the respondent says it made no difference and the claimant avers that a co-worker 'Juliette', would have been selected;
 - (3) Did an alternative role exist? A position was identified by the claimant for a contract as a temporary worker that was undertaken by 'Gayle'.
5. I heard evidence from Abigail Weeds who is the Managing Director of the respondent and Miss Kirsty Button who is the Operations Manager. I heard from Anna Smart and had produced to me a bundle of documents marked as A1.

Findings of Fact

6. I make the following findings of fact based on the balance of probabilities having considered those documents to which my attention was drawn.
7. The respondent company operates from premises in Mildenhall and is a small certified organic cosmetics manufacturer and retailer which is 100% family owned.
8. The claimant commenced her employment with the respondent on 3 May 2016 as an Operations Assistant.
9. The company had proved to be profitable during the accounting year which ended in June 2017. However, Miss Weeds as Managing Director reviewed the third quarter management accounts during 2018 and established there was an urgent review of costs and efficiencies to limit losses and stabilise cash flow.
10. Labour costs account for about 50% of the running costs of the organisation and she identified a reduction in labour costs as the way to avoid serious cash flow issues.
11. Employed at that time were 12 employees. Miss Weeds was the Managing Director, her mother was Director of Research and Development, Miss Button was Head of Operations, there were two employees making product, there was a full-time member of the Dispatch Team and a further member of staff under a part time contract. In the office there was a Customer Services worker and there were two members

of staff in the Marketing Team. In addition, there was a Finishing Team comprising the claimant and 'Juliette'.

12. Miss Weeds identified that the savings could only be achieved by reducing the number in the Finishing Team and the other members of staff were identified as vital to continue with the business operation into the future.
13. Without informing the claimant, a selection procedure was undertaken and the single criterion of productivity was used to determine which of the two should be selected for redundancy.
14. Having heard evidence from Miss Weeds and seeing the documentary evidence that was relied upon, I find that a fair procedure as far as the application of productivity as a criterion was undertaken.
15. The unfairness however, arose because rather than consult with the claimant, she was called to a meeting on Wednesday 2 May 2018 and told that she was being dismissed by way of redundancy.
16. The claimant has given evidence in her statement that she was shocked and was subsequently given a right of appeal, although the decision had already been made.
17. She was provided with information as to how the computation was undertaken and was able to make representations to the appeals officer, Ms Charlotte Bates, from whom I did not hear evidence, to make a judgment. Miss Weeds undertook an analysis based on the information provided by the claimant and provided that evidence to Ms Bates.
18. At the appeal hearing, having considered all those matters raised by the claimant, Ms Bates reached the conclusion, on the evidence available to her that the decision was a sound one and that the appeal should be dismissed. The effective date of termination of employment was 2 May and on that date contractual notice pay was made and subsequently, as I understand it, a redundancy payment was also made.

Law and Conclusions

19. The statutory provision is provided for under section 98 of the Employment Rights Act 1996, where at section 98(1) is the following:

98(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 sub-section (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;*

98(2) *A reason falls within this sub-section if:*

c. *is that the employee was redundant*

20. Under section 98(4) is the following:

98(4) *Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer),*

a. *depends whether in the circumstances, (including the size and administrative resources of the employers 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.*

21. Under section 139(1)(b) redundancy is defined in the following terms:

139(1)(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.

22. In the preliminary discussions it was accepted by the respondent that the claimant had been dismissed and a procedure described in the Acas Code of Practice was not followed. Inevitably, that must mean that the dismissal was unfair.

23. However, the respondent maintained that the only reason for dismissal was redundancy and it was accepted by the claimant that the use of a pool of two, comprising the claimant and Juliette, was a fair way of proceeding, that productivity was a reasonable criterion to use to select for dismissal, that productivity measured for the period of February to April was a fair way of assessing productivity and that evidence produced showed that the claimant was slower than 'Juliette'.

24. Having heard the evidence, I find that there was a redundancy situation as provided for under section 139 of the Employment Rights Act. I am equally satisfied that the amended data based on representations made by the claimant was fairly considered at the appeal and the conclusions

reached by Ms Bates, that the consideration of that data and the other matters raised by the claimant made no difference at all to the selection.

25. Having explored other evidence, it appears that the only suitable alternative role would have been that of a temporary contract worker, 'Gayle' whose role continued for two months following the claimant's dismissal.
26. Having announced that I found the decision to dismiss unfair and the reasons why I reached that conclusion, I heard further representations from the claimant. Having heard those representations and those made on behalf of the respondent, I find that a fair procedure would have done nothing more than delay the claimant's departure from the respondent's employment by one week. I am satisfied that the respondent acted conscientiously in the requirement to consider who should be selected for employment and Miss Weeds in particular, had gone to some length to make sure so far as she could, that was a fair procedure. The error of course was not consulting with the claimant prior to the decision being made, but I am quite satisfied that in reality all that would have happened would have been to delay that departure by that one week period.
27. The claimant received £250 per week net and that is the measure of her loss. I also award £250 for loss of statutory industrial rights and 20% up lift on the award for a failure to follow the Acas Code of Practice which amounts to £50. The total therefore payable to the claimant by the respondent is £550 net. The recruitment provisions do not apply.

Employment Judge Cassel

Date: 17 February 2019

Sent to the parties on: 26 February 2019

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For the Tribunal Office