



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Jamie Hardy

**Respondent:** F.O Four Ltd

**HELD AT:** Leeds (By Video Link)

**ON:** 16 April 2021

**BEFORE:** Employment Judge R S Drake

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr M Melling (Operations Director)

## JUDGMENT

1. The Respondent has satisfied the Tribunal that redundancy was the reason it had in mind for dismissal of the Claimant for the purposes of Section 98(1) and (2) of the Employment Rights Act 1996 ("ERA").
2. The Tribunal is satisfied that in accordance with the substantial equities and merits of the case, and thus for the purposes of Section 98(4) ERA, the Respondent acted reasonably in all the circumstances in relying upon redundancy as a sufficient reason for dismissal and that, in relation to the procedure adopted by them, they acted reasonably.
3. The Claimant's claim for a Protective Award under Section 189 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULR(C)A") fails and is dismissed.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.  
"This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the Covid19 pandemic."

## REASONS

### The Issues

4. With regard to the allegation of unfair dismissal, it was for the Respondent company to establish whether redundancy was the reason its management had in mind for the Claimant's dismissal, for the purposes of section 98(2)(c) ERA, and thereafter it was for the Tribunal to determine whether redundancy was a sufficient reason for dismissal and that the dismissal was fair in respect of the procedure adopted for the purposes of section 98(4) ERA all of which entailed consideration of the following:
  - 4.1 Whether the Respondent failed to consider or identify the appropriate pool for selection, failed to adopt fair and objective criteria for selection, failed to take account of all relevant issues, or did not apply selection scoring fairly – but all these issues were not ultimately argued by the Claimant at today's hearing, so were taken as accepted;
  - 4.2 For the Claimant, a significant issue was that he believed that there was no need to declare his position redundant and that the job he was doing was replaced by the self-same job he had already been doing – that of General Manager at the Respondent's Adventure Park sited at Doncaster;
  - 4.3 Whether the Claimant's representations were not properly taken into account;
  - 4.4 Whether the Respondents failed to take adequate steps to identify alternative roles for the Claimant;
  - 4.5 Whether the consultation process with him was not fair or reasonable;
  - 4.6 Whether there had been a failure by the Respondent to comply with the statutory duty under Section 188 TULR(C)A to undertake collective consultations with appropriate representatives of their workforce so as to give confer a right for the Claimant to make an individual claim in his own right for a Protective Award.

### The Facts

5. With regard to the issues to be determined, the Tribunal made the following specific findings of fact relevant to its conclusions:-
  - 5.1 The Respondents are a national company owning and managing Adventure Parks with both indoor and outdoor activities. They first engaged the Claimant on 1 May 2018. At the time of his dismissal on notice on grounds of redundancy on 19 September 2020, he

held the position described as full time General Manager at their Doncaster site.

5.2 His terms, as evidenced by his Terms of Employment (pages 3-10 of the agreed documents bundle) coupled with his Job Description (pages 1-2) define his role as including amongst other tasks to –

5.2.1 “ ... control and develop all aspects of the operation including marketing, financial control, maintenance, staffing and product development ... and

5.2.2 ... to manage KPIs and EBITDA, and to drive the financial performance of the business ... “

5.3 In contrast, after redundancy consultation commenced, he was made aware that other posts were on offer (given the change of his then current post) and that a new post described as “General Manager” was at a lower salary and included duties of -

5.3.1 “ ... to provide on-site general management and operational leadership

5.3.2 ... to lead and manage the overall guest experience

5.3.3 ... to contribute to continuing commercial development ... “.

5.3.4 I note that in the new role there is an absence of control and development of marketing and financial control and of managing KPIs and EBITDA which appear to have commanded a higher salary and range/scope of management high level responsibility. The new role concentrates on day-to-day lower level responsibility even if it expresses its content in a longer way than the role in the original Terms.

5.4 The Respondent’s evidence was given principally by Mr Matthew Melling, the Operations Director. His testimony was given cogently and with candour. I will record the same of the Claimant, to both persons’ respective credit.

5.5 The Respondent’s management decided in early Autumn 2020 that in response to the huge changes affecting their business occasioned by the Covid19 Pandemic restrictions introduced by HMG, they need to reduce management and overhead cost and restructure their local managements at all their outlets. They described this thinking in memoranda to affected management members by confidential emails sent 7 September 2020 (pages 40 – 43) coupled with warnings (pages 41 – 43) that such staff were “at risk” of termination of employment on grounds of redundancy unless such staff were willing to consider taking new roles the full

details of which they published to them in pages 44 – 50. They described the process as “Resetting Management”. The Claimant queries whether his position was truly redundant, but he does not question the Respondent’s position on selection or criteria for selection as all he and his fellow managers were in the same position;

5.6 The Respondent’s management were unable to undertake face to face contact with staff such as the Claimant affected by being identified as “at risk” because of the Covid19 restrictions, but they did what they could via remote and electronic means;

5.7 After the 7 September 2020 WhatsApp message and email package, they indicated that the process of individual consultations was starting immediately, and that a decision was requested in less than three days’ time. The Respondent’s Regional Manager Mr M Randall telephoned the Claimant and asked if he understood what was happening and whether or not he required an explanation. He used the phrase that “he did not want to teach (the Claimant) how to suck eggs” - meaning that he was aware that the Claimant as an intelligent person would understand the situation and what his options would be. The Claimant does not regard this approach as being provision of support of the kind he expected. Mr Randall explained that the Respondent’s headquarters had chosen to restructure their management in a way that they believed was proven to work at other stores, namely at Chester and Stoke. The Claimant disagrees about this business decision, but his argument brings him in conflict with case law referred to below which is binding upon me by having been promulgated by higher Courts;

5.8 Immediately after this on the same day, the Claimants sent an email to the Respondent asking what would happen if he did not reapply for one of the jobs available, but he did not receive a reply immediately on that day and therefore on 8 September he sent a follow-up email asking for a response as he felt that a deadline being set for application by 9 September was unreasonable for the making of such a big decision.

5.9 At 11:00 am 8 September he received a response, which thus came within 18 hours of him requesting it, saying that if he did not apply for and take one of the posts on offer, then his existing post would be redundant. He sought an extension of time to take advice but did not in fact need it as he had concluded early on that the reduced salary of a new post was too great a reduction to accept and he did not seek to trial the new post at the new rate because of this fact.

5.10 The Claimant takes exception to the pace at which this process moved, but the Respondent argues that once started, they were advised and believed it is in everyone’s best interests to move

to conclusion rapidly and thus cause less stress which often accompanies passage of time between the stages of consultation. The Claimant himself overtook the process of consultation by asking to be advised what package he might receive if made redundant. He was asked for confirmation of various key pieces of information such as the start date of his employment and his date of birth, but he takes exception to being asked since he believes the Respondent would be aware of this in any event. The Respondent argues that they were advised of the wisdom of checking this sort of information as it is the basis for calculating a person's redundancy entitlement. He was provided with this information almost immediately, but says he felt pressured into acceptance with less than 24 hours to the expiry of the initial deadline.

- 5.11 At 11:00 am 9 September the Claimant emailed Mr Randall to notify him that he would not re-apply for any of the new jobs on offer for application because he did not regard them as suitable alternatives being at much lower salary than his original level. This was a situation which the Respondent accepted as they stood by their original willingness to give notice and make a redundancy payment if the Claimant did not accept any of the posts being proposed. They accepted that these alternatives were not "like-for-like" alternatives, the refusal of which by the Claimant would have been unreasonable.
- 5.12 Though the process commenced on the 7 September and concluding 15 September was relatively rapid, it did not lack for opportunities for the Claimant to speak to his Regional Manager on several occasions or anyone else whom he might approach for advice, guidance, or support. I find that each of the points he raised was considered but did not affect the outcome;
- 5.13 During the consultation process the Claimant says he was expecting his end of employment date to be 18 September, but on 15 September he received a notification setting out his redundancy entitlement but changing the expected termination date to 18 October. He takes exception to this, though the Respondent explains this change as being an expression of expectation that the Claimant would work his notice of one month. When the Claimant objected, the Respondent recanted and allowed his employment to terminate 18 September. There is no challenge to the value of the final pay or the redundancy payment.
- 5.14 On the evidence before me, I find it is not difficult to conclude that even had consultation taken longer, the outcome of termination of employment or grounds of redundancy would have been no different. The Respondent genuinely perceived they needed to make a major management level restructuring which affected all of their outlets and they did not treat the Claimant in an exceptional or different way to any other similar Manager.

5.15 The Claimant's main argument however remains that he contests the economic and organisational wisdom of restructuring and the genuineness of what the Respondent says are changes to the levels of responsibility of local management roles. I find the differences, particularly evidenced by scope and extent of responsibilities, and of salary levels to be significant and such as to make it impossible on a balance of probabilities to conclude that the new General Manager role was the same as the old role.

### The Relevant Law on Redundancy

6. The Tribunal had regard to section 98(1) and (2) ERA 1996 which provides as follows:

"In determining ... whether the dismissal of an employee is fair or unfair it is for the employer to show the reason, or the principal reason for the dismissal, and that it is either a reason falling within subsection (2)... and a reason falls within subsection (2) if it (c) is that the employee was redundant."

7. If the Tribunal is satisfied that the Respondent has discharged this onus of proof, it is then for the Tribunal to consider under subsection (4) of section 98...

"The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer -

depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; - and -

that question shall be determined in accordance with the equity and the substantial merits of the case."

8. The Tribunal's attention is always drawn to the guidance given in the seminal case of **Williams v Compair Maxam Limited [1982] EAT**. In that case the EAT sets out the standards which are intended to guide Tribunals in determining whether a dismissal for redundancy is fair, which (in paraphrase) requires that "employers should give as much warning as possible of impending redundancies so as to enable employees to take steps to inform themselves of relevant facts and consider possible alternative solutions; employers should consult about the best means by which the desired management result can be achieved fairly and with as little hardship to employees as possible, including (though this is not relevant in the present case) agreement of criteria and the application thereof; selection criteria should, of themselves, be fair and reasonable and reasonably applied; and that where so far as possible selection does not depend solely upon the opinion of one person and thus selection is made fairly in accordance with fair criteria, taking into account representations made by affected employees".

9. The Tribunal is as always urged to note, and it did indeed take account of the following guidance from the cases listed below:

**9.1 Eaton Limited v King [1995] EAT** which is authority for the proposition that in selecting employees to be made redundant a senior manager is entitled to rely on assessments of employees made by those having direct knowledge of their work; In this case selection was of all local General Managers so no distinguishing selection was necessary;

**9.2 Kvaerner Oil & Gas Limited v Parker [2003] EAT** which is authority for the proposition that a Tribunal should not substitute its view as to the identification of an appropriate pool for that of the employer;

**9.3 Capita Hartshead Limited v Byard [2012] EAT** in which reference was made to the judgment of Mummery J in **Taymech v Ryan [1994]** which is authority for the proposition that the question of how a pool should be defined is primarily a matter for the employer to determine, and that it is true that the employer has considerable latitude in redundancy selection cases and that a Tribunal must not overstep the mark and impose what it would have decided. Rather the Tribunal does have power and right to consider the genuineness of a pool, but it is not the function of the Tribunal to decide whether it would have thought it fairer to act in some other way. It is appropriate for a Tribunal to consider whether the dismissal in the case in question falls within a range of conduct which it is reasonable for the employer to adopt. In terms, it is difficult for an employee to challenge the identification of a pool where the employer has genuinely applied its mind to the problem.

### Conclusions in respect of Redundancy

10. It is not open to a Tribunal to find that a dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. This proposition of law was made abundantly clear by the EAT in the decision of **Moon v Homeworthy Furniture (Northern) Limited [1976]**. This approach was also adopted by the Court of Appeal in the case of **James W Cook & Co (Wivenhoe) Limited v Tipper [1990]**. Thus, in relation to a redundancy dismissal, the basis upon which a Claimant may legitimately challenge a decision to dismiss is on the method of selection and the consultative process which is clear and elaborated in the above-mentioned propositions of law.
11. The Claimant in this case particularly challenges the appropriateness of the speed of the consultation process and whether it was a genuine and meaningful process capable of giving rise to management varying its decision. For reasons which I will touch on below, I find that this is not a case in which there is a statutory or common law minimum period of consultation necessary.
12. I recognise but when an employer tells an employee that he is at risk, he is saying that his position is at risk but not necessarily his overall employment. In this particular case I have found as fact that this Claimant was told his position was at risk but then he could apply for other posts, so from this I conclude that the Respondent did not jump to an immediate conclusion about the Claimant's

future employment until they had given him a chance to consider applying. I regard this as being a sound basis for concluding that the Respondent did what I would expect another reasonable employer to do.

13. I recognise that when an employer tells an employee that his position is at risk, this can cause enormous stress for the employee and that it is in his and everyone's best interests that, once started, a consultation process comes to a speedy conclusion allowing for sufficient opportunity for dialogue in between the start and the end. In this case, the process started on 7 and effectively finished 15 September.

14. I find that consultation was undertaken over a short time but that in any event, for the facts as I have found them, the Claimant did have ongoing dialogue with his superiors which included what amounts to meaningful consultation. Thus, though the consultation, though it was undertaken over a short time span, I cannot find this insufficient either in duration or in content when compared to what I would expect from another reasonable employer.

14. The Tribunal is satisfied that the Respondents acted reasonably in seeking to find alternatives to dismissal and were unable to do so because they were rejected by the Claimant. Therefore, the Tribunal finds that the dismissal of the Claimant was fair and that therefore his claim of unfair dismissal fails and is dismissed.

15. Therefore, the Claimant's complaint of unfair dismissal fails and is dismissed.

### **The Law on Protective Awards**

16. Because the claimant has claimed a protective award, I must refer to sections 188 of TULR(C)A.

S188 provides as follows:-

“(1) where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected ...”

S189 adds as follows:-

“(1) where an employer has failed to comply with the requirements section 188 a complaint may be presented to unemployment tribe on the ground ... (d) by any of the employees affected ...”



**Conclusion on the Protective Award Claim**

17. In this case the Respondent did not propose to dismiss 20 or more employees as redundant. Therefore section 188 does not apply, and if it does not apply then there is no basis for a complaint to tribunal under section 189. Therefore, the claim for seeking a protective award also fails and is dismissed

Employment Judge R S Drake

Signed 16 April 2021