



EMPLOYMENT TRIBUNALS

Claimant: Mr S Sundaram

Respondent: Newday Cards Ltd

Heard via Cloud Video Platform (London Central) On: 8, 9, 10 March 2021

Before: Employment Judge Davidson

Representation

Claimant: Mr P Sangha, Counsel

Respondent: Ms I Ferber, Counsel

JUDGMENT

The claimant's complaint of unfair dismissal succeeds.

The respondent is ordered to pay to the claimant £500 by way of remedy.

Employment Judge Davidson

Date 11 March 2021

JUDGMENT SENT TO THE PARTIES ON

12/03/2021.

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FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.
2. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.
3. The participants were told that it was an offence to record the proceedings.
4. Evidence was heard from the claimant, Zena Ellis and Karen Shortland on behalf of the claimant and from Tim Willmott, Helen Carter and Cath Ready on behalf of the respondent.
5. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

Issues

6. The claim is for unfair dismissal arising out of a dismissal of the claimant by the respondent in June 2020. The respondent asserts the reason for dismissal as redundancy. The issues for the hearing are as follows:
 - a. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or, in the alternative, some other substantial reason. The claimant alleges it was a sham.
 - b. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:
 - i. The respondent adequately warned and consulted the claimant;
 - ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
 - iii. The respondent took reasonable steps to find the claimant suitable alternative employment;
 - iv. Dismissal was within the range of reasonable responses.

Evidence

7. The tribunal heard from the claimant, Zena Ellis (PMO Specialist) and Karen Shortland (formerly Team Leader) on behalf of the claimant and from Tim Willmott (Head of Change Delivery), Helen Carter (Head of Employee Relations) and Cath Ready (Head of Risk Business Partnering) on behalf of the respondent. In addition, there was a bundle of documents running to 267 pages.

Facts

8. The respondent is a financial services company specialising in providing credit products to consumers in the United Kingdom.
9. The claimant was employed by the respondent from 7 November 2017 until his effective date of termination on 19 June 2020. His starting job titled was 'Senior Specialist in Business Solutions' but his job title was changed in September 2019 to 'Senior Specialist Project Management' because that more accurately reflected the role he was performing. At the time of his redundancy, the claimant was employed by the respondent as a Senior Specialist, Project Management at the respondent's offices in London. The claimant's role was categorised as a Band C role. His manager when his employment began was Karen Shortland, then Tim Willmott became his manager during 2019 and from January 2020, it was Trish Garratt.
10. The claimant alleges that he was subjected to bullying by Mr Willmott and that he was unsupportive and dismissive. The claimant did not raise a grievance about this, having been told that Mr Willmott was his manager only on a temporary basis.
11. In January 2020, two new Project Managers were recruited to Band C roles.
12. In May 2020, as a result of business and financial reasons (including but not limited to the coronavirus pandemic) the respondent looked at its organisational structure and ascertained that there was an overlap of work that was being carried out in the Business Transformation Team (which the claimant was part of), Enterprise Risk Team and other business functions across the organisation.
13. It was proposed that teams should merge to create economies of scale with the result that there was a reduced requirement for certain roles within both the Business Transformation Team and Enterprise Risk Team including Band C Project Manager roles. The respondent took the decision not to invite volunteers for redundancy as they wanted to retain the better performing employees.
14. Band D roles were not at risk of redundancy. One Band D employee, Lorna C, remained in post. Subsequently, after the redundancies in October 2020, she was promoted from Band D to Band C due to excellent performance. This gave her a salary and bonus increase, but she remained in her post and no additional Band D employees were recruited so the headcount was unaffected by her promotion.
15. The respondent identified selection criteria for the relevant roles. Those employees that carried out the relevant work and therefore fell within the scope of the proposed reorganisation were placed in pools with employees in the same Band and scored against the criteria. In the Business Transformation Team in which the claimant worked, he was in a pool with 11 other employees who were also Band C. The respondent identified that as a result of the proposed reorganisation, only 10 of those roles would be required.
16. Mr Willmott was told to devise his own selection criteria, as were the other Band B managers with redundancies in their departments. He does not appear to have received any particular guidance or advice from HR on how to approach this. He decided to use criteria which mirrored the job profile for the job after the reorganisation and these were essentially competence based criteria. He decided

what weight to give to each element. It is not for me to consider what criteria I think would have been better or what weighting should have been given to each element.

17. His selection criteria and weightings were reviewed by his line manager, Andrew Vasko, and other colleagues. As a result of that input, some changes were made to Mr Willmott's initial draft.
18. Mr Willmott then scored each member of the pool against his criteria, applying the appropriate weighting. He then asked the Band B Manager of the Commercial Team, Rob Pearce, who knew the individuals in the pool, to review his scorings. He did the same for Mr Pearce's scoring of his team.
19. All the scores were then moderated by a panel comprising other Band B managers, Andrew Vasko and Helen Carter from HR. Most of those managers knew something of the people in the pool, including the claimant and one of those present, Wayne Milburn, had previously given the claimant good feedback.
20. As the claimant's score came out as being the lowest, his role was one of the two placed at risk of potential redundancy.
21. A parallel exercise was undertaken with the respondent's Enterprise Risk Team and redundancies were subsequently made.
22. The respondent's senior leadership team devised a Communications Plan to ensure co-ordination of the message across the business. This gave the managers conducting the consultation meetings a script to follow. This did not include the option of explaining or discussing the selection criteria or the selection scores.
23. The claimant was invited to a meeting on 8 June although he was not told in advance what would be discussed at the meeting. The meeting was attended by Helen Carter (Head of Employee Relations, People Operations and Governance) and Tim Willmott (Head of Change Management), and the claimant was informed that his role was being placed at risk of redundancy as a result of the proposed reorganisation. At this meeting, Mr Willmott explained the reason for the reorganisation, the impact on the claimant and the consultation process which would be followed. It was also confirmed that the consultation period would last for 7 days and that the claimant would be able to apply for alternative vacancies. The claimant was informed that the reason for 7 day consultation period was because of the limited number of redeployment opportunities available, and that no new roles were being created. He was told that he must not speak to anyone else about this.
24. The claimant was also informed that he would be required to attend a further consultation meeting on 15 June 2020. These matters were confirmed in writing to the claimant on the same date and the claimant was informed that in the event that he was unable to secure a suitable alternative role at the end of the consultation process, or no way was found to avoid the redundancy of his role, his employment would be terminated by reason of redundancy.
25. Mr Willmott and Ms Carter spoke to all the people in the pool, either to tell them that they were 'at risk' or that they were safe.

26. Later on 8 June 2020, the claimant became aware of an organisation chart which had been circulated which did not include his name or the name of the other Project Manager who was at risk of redundancy.
27. On 9 June 2020, the claimant contacted Ms Carter with questions in relation to the consultation process. The claimant queried the rationale behind the 7 day consultation period and also asked questions regarding the specifics of a potential redundancy package. Ms Carter addressed the claimant's queries by email dated 10 June 2020, and provided details regarding the claimant's redundancy package if his role was confirmed as redundant at the end of the consultation process. Ms Carter also offered to discuss the claimant's queries further if he so wished but the claimant did not take up Ms Carter's offer.
28. In response to the claimant's queries raised on 10 June 2020, Mr Willmott provided further information to the claimant by email, including a copy of the assessment criteria that was used in the selection process and confirmed to the claimant again that he had unfortunately scored lower than others. He did not provide the claimant with his scores.
29. The selection criteria were as follows:
 - a. Ability to deliver complex change (25%)
 - b. Team leadership (10%)
 - c. Deployment flexibility (15%)
 - d. Fit to Job Profile (25%)
 - e. Performance Results (25%)
30. By email dated 12 June 2020, the claimant requested additional information in relation to other proposed redundancies and also in relation to his scoring.
31. On 10 June 2020, Jo Huckle (Head of Talent Acquisition) shared details of live vacancies within the respondent's business with the claimant by email. As these roles required a specific skillset which the claimant did not have, they were not suitable redeployment alternatives and the claimant did not apply for any of the roles.
32. The claimant attended a further consultation meeting on 15 June 2020 with Mr Willmott and Ms Carter. Ms Carter asked the claimant whether he was exploring any other roles and if there were any roles he wished to apply for. The claimant confirmed during the meeting that he had not seen any other positions that were of interest to him. During the meeting the claimant's proposed redundancy was discussed with him. As no viable alternative to the proposed redundancy of the claimant's role had been found, and in the absence of any alternative options being put forward, it was confirmed to the claimant that his role was redundant. The claimant was informed that he would work until 30 June 2020, and would be paid in lieu of the remaining balance of his three month notice period. The claimant was also told that as part of the redundancy package he would be paid a compensation payment of £13,184 as a goodwill gesture in recognition of the short consultation period in addition to his statutory redundancy entitlement. The claimant's redundancy and termination arrangements were confirmed in writing to the claimant on the same date.

33. Shortly after the meeting, Mr Willmott provided the claimant with a copy of the job specification which employees had been assessed against in respect of one of the selection criteria used. Mr Willmott also provided the anonymised scores for the other 11 employees within Band C.
34. On 16 June 2020, the claimant emailed Ms Carter with questions relating to the redundancy package and also the position in respect of a potential referral fee he was due. Ms Carter responded to the claimant's queries, and confirmed that the referral fee would still be paid despite his employment ending.
35. By a separate email on 16 June 2020, the claimant emailed Mr Willmott querying why the respondent did not request for voluntary redundancies and requested that his leave date be brought forward to 19 June 2020. In response, Mr Willmott explained that it had not been considered appropriate to request for volunteers for redundancy as the respondent wanted to ensure it retained the right skills and expertise for the roles moving forward.
36. The claimant's redundancy was confirmed in writing on 18 June 2020 and that his last day of employment would be 19 June 2020. The claimant was informed of his right of appeal.
37. It is noted that in addition to the claimant's role, the other role of Senior Manager, Project Management placed at risk of redundancy, who scored the second to lowest on the selection criteria was also made redundant at the end of the redundancy consultation process. Redundancies were also made in the respondent's Enterprise Risk Team as a result of the reorganisation.
38. The claimant appealed the redundancy outcome on 22 June 2020. The claimant contended that his redundancy had been predetermined and that he had been unfairly selected for redundancy. The claimant considered that he had been selected for redundancy on the basis of a personal disliking of him and raised allegations of bullying against his manager Mr Willmott.
39. The claimant attended an appeal hearing via Microsoft Teams on 2 July 2020 with Cath Ready (Head of Conduct and Operational Risk). Saudi Peters (Specialist, Employment Relations) was also in attendance as note taker. The claimant was given the opportunity to be accompanied at the hearing but chose to attend the hearing alone.
40. During the appeal hearing the claimant was given the opportunity to state his case, ask questions and present his evidence. When Ms Ready asked the claimant what his desired outcome was in respect of his appeal, the claimant confirmed that he wanted to be compensated as opposed to his employment being reinstated.
41. After the appeal hearing, Ms Ready conducted further investigations into the claimant's grounds of appeal (along with other redundant employees who had appealed against their dismissals), which included reviewing the criteria and selection process and undertaking investigation meetings with Mr Willmott and Rob Pearce (Head of Change Delivery Business Partnering, Commercial), in relation to the allegations of bullying raised by the claimant. The claimant had contended that Mr Pearce had witnessed some alleged acts of bullying by Mr Willmott. Ms Ready also interviewed Ms Carter, Mr Willmott and Mr Pearce in order

to assess the appropriateness and fairness of the redundancy selection process and consultation procedure.

42. Following a thorough investigation into the claimant's grounds of appeal and consideration of all the circumstances, including the claimant's representations, the claimant's appeal was not upheld. Ms Ready determined that the redundancy selection process had been carried out fairly and transparently. In addition, that the scoring allocated to employees correlated to the rationale given and performance evidence supplied. Further, whilst Mr Willmott's management style could be perceived as direct on occasion, there was no evidence of any bullying, discrimination or bias against the claimant. The claimant was provided with the outcome on 31 July 2020.
43. This was the final stage of the respondent's internal process.

Law

44. The burden is on the employer to show the reason for dismissal and that it is a potentially fair reason (section 98(1) Employment Rights Act 1996).
45. If the reason is a fair reason, the employer must act reasonably in treating it as a sufficient reason for dismissing the employee (section 98(2) ERA 1996).

Determination of the Issues

Genuineness of the redundancy

46. Was the redundancy a sham? I find that it was not a sham. There was a genuine restructure proposal with the result that fewer Band C Project Managers were required.
47. I accept the respondent's position that the redundancies were decided on in May 2020 and that the recruitment in January 2020 of two new PMs was not inappropriate.
48. I make no findings regarding the relationship between the claimant and Mr Willmott, save to say that there clearly had been issues which became less acute when Mr Willmott ceased to be the claimant's direct line manager at the beginning of January 2020. I do not have sufficient information to determine whether Mr Willmott's interactions with the claimant in that period were bullying or simply strong management. For the reasons set out below, I am satisfied that I do not need to resolve this in order to determine the issues before me.
49. I do not accept the claimant's contention that the reorganisation and redundancy was a sham, used as a means to remove him from the business.
50. I must assess the redundancy situation at the time it was carried out. At that time the two new recruits were part of the workforce and were included in the pool to be assessed with the other Band C PMs. Lorna C was a Band D Project Manager and therefore not part of the pool. The fact that, at a later stage in October 2020, she was reclassified at Band C but continuing to do her same work is not, in my opinion relevant to the genuineness of the redundancy in June. I therefore find that the pool was appropriate.

51. I also consider that the claimant's change in job title in 2019 is not relevant. At the time of the redundancies, he was employed as a Band C PM. The evidence is that he was in that role even in 2019 but was working under an incorrect job title. The change in job title just corrected that error.

Selection process

52. In this case, Mr Willmott decided to use criteria were essentially competence based criteria. He decided what weight to give to each element. It is not for me to consider what criteria I think would have been better or what weighting should have been given to each element.
53. Apart from the appraisal scores, the selection criteria were all based on a subjective assessment carried out by Mr Willmott. I find that the respondent has done enough to balance the risk of personal bias by including a number of other managers to cross-check and challenge his scoring. I do not accept the claimant's submission that Mr Willmott had a personal issue with the claimant which resulted in him receiving poor scores. I find sufficient evidence in the documents and even from the claimant's own evidence to conclude that the claimant's scores were within the reasonable range of scores.

Consultation Process

54. Looking at the consultation process, I find that there were a number of flaws in this process.
55. I find that the respondent's intention in carrying out the consultation process was limited to looking at alternative employment (knowing that this was extremely unlikely).
56. The subject matter of consultation should be:
- a. an opportunity for the employee to comment on the basis for selection – both in terms of the pool and the selection criteria;
 - b. an opportunity for the employee to challenge their redundancy selection assessment and explain any factors which might have led to their selection and of which the employer might not have been aware;
 - c. an opportunity for the employee to put forward any suggestions for ways to avoid their redundancy;
 - d. consideration of alternative employment positions;
 - e. any other concerns the employee may have.
57. Further, the employer must have an open mind and still be capable of being influenced about the matters which form the subject matter of consultation.
58. The reasons I find that the respondent failed in its consultation obligation are as follows;
- a. the meeting on 8 June cannot be said to be a consultation meeting. It was a meeting at which the employee was told he was 'at risk'. He could not make meaningful representations as he had not had a chance to consider the issues, particularly bearing in mind the shock element of being told such unwelcome news.

- b. The period of consultation was deliberately fixed at the outset to be short period. This suggested that the respondent was not expecting to have to look into other options or investigate any representations, for example regarding scoring.
 - c. The respondent's Communication Plan indicates that the matters for consultation were limited to consideration of alternative roles.
 - d. By informing the employees who were not 'at risk' that they were safe, it would make it very difficult to re-do the scoring if the claimant (or anyone else at risk) could show that they had been scored wrongly and that somebody else should be selected for redundancy. This notification to the 'safe' employees suggests that the respondent did not have an open mind on 8 June.
 - e. The consultation meeting on 15 June was also not really a consultation meeting. Although the respondent's letter states that the purpose of the meeting was to raise issues or proposals he may have about how to avoid the redundancy, It had been made clear that the decision would be confirmed on that date. Any representations made by the claimant which required follow up could not be considered due to the constraints of the time limit which had been imposed. Additionally, the process does not appear to allow for the claimant to challenge the selection. This has been taken as concluded with the matters up for discussion limited to whether there is any alternative employment.
 - f. As the respondent concedes, the claimant was not given the information regarding the selection criteria and the scoring which is further evidence that the respondent did not consider that the selection was an issue on which they needed to engage in consultation.
 - g. There were organisation charts in existence prior to 8 June which reflected the position as it would be after 15 June. The fact that these were disclosed internally in breach of confidentiality instructions is immaterial. It is evidence that the respondent considered the reorganisation outcome to be settled, with the only issue for consultation being alternative employment.
59. I find that the appeal failed to address the flaws in the consultation process and therefore it did not remedy any defect on appeal. Given that the respondent rightly accepts that there was a flaw, the failure of the appeal manager to deal with this cannot amount to a remedy of that defect.

60. I therefore find the dismissal unfair.

Remedy

- 61. Basic Award: the basic award is offset by the redundancy payment the claimant received.
- 62. Compensatory Award: I must consider what would have happened if a fair procedure had been followed following the principle in *Polkey* and whether the flaws in the consultation process made any difference to the final outcome.

63. Having found that the respondent was entitled to adopt the selection criteria they chose and having found that the scoring was within the range of reasonable scores, I must consider what would have happened if the claimant had had an opportunity to challenge the scores. There is inevitably an element of speculation but on the basis of the evidence before me, I find that he would not have moved sufficiently up the table to be safe. I note that he had scored significantly lower than the person third from bottom, whom he would have to leapfrog to be safe. Even if he could have persuaded the respondent to give him some more points, he would not have been able to bridge the gulf. I therefore find that the final outcome would not have been different.
64. I also find that the claimant would not have been able to find another way of avoiding his redundancy if the consultation period had been longer. He did have an opportunity to make representations on this aspect of the redundancy during the consultation period and did not have any suggestions. Even at this hearing, he has not put forward any examples of representations he might have made.
65. I find, however, that the claimant's employment should have continued while a proper consultation process took place. In assessing how long that period should be, I note that Cath Ready took a month to investigate the appeal. If the respondent had carried out that investigation as part of the consultation process, presumably it, too, would have taken a month. I therefore award one month's pay.
66. The claimant accepts he received an ex gratia payment which was made as compensation for the shortened consultation process and therefore the one month's pay has been covered by the ex gratia payment.
67. I therefore award £500 in respect of loss of statutory rights.



Employment Judge Davidson

Date 11 March 2021

JUDGMENT SENT TO THE PARTIES ON

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