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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100100/2021

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Hearing Held by Cloud Video Platform (CVP) on 12 & 13 July 2021

Employment Judge A Strain

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Mr A Paterson

**Claimant
In Person**

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Invicta Trout Limited

**Respondent
Represented by
Mr A McCormack,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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- (1) the claim of unfair dismissal is unsuccessful and is accordingly dismissed

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REASONS

Background

1. The claimant represented himself. He asserted a claim of unfair dismissal.
2. The respondent was represented by Mr A McCormack, Solicitor.
- 5 3. The issue for determination by the Tribunal was whether or not the claimant had been unfairly dismissed by the respondent.
4. The parties had lodged an Agreed Joint Bundle of Documents with the Tribunal.
5. The claimant gave evidence along with a former work colleague, Mr Lloyd
10 McDonald. The respondent led evidence from Mr Simon Duffin, owner and Director of the respondent company.

Findings in Fact

6. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:
 - 15 a) The claimant commenced employment with the respondent on 30 November 2004.
 - b) As at February 2020 the claimant's position was Farm Manager. At that time the respondent employed Mr Duffin (Owner/Director), Mrs Duffin (Company Secretary), a General Manager, the claimant as
20 Farm Manager and 2 Fish Workers.
 - c) The General Manager was promoted into that post in February 2020. His duties involved the hatchery and responsibility for the whole farm;
 - 25 d) Mr Duffin met with the claimant on 27 February 2020 to discuss concerns the claimant had regarding the General Manager and

issued a letter to him on 28 February 2020 assuring the claimant that his position was safe;

e) In March 2020 the pandemic hit and impacted upon the respondent's business;

5 f) At the claimant's suggestion he was placed on furlough by letter of 23 March 2020 by the respondent. He signed his acceptance to that on 18 April 2020.

10 g) By July 2020 the respondent was losing a considerable sum of money due to the downturn in its business during the pandemic. In the first quarter of 2020 it lost £24,582 and the second quarter, £37,804. It was reliant on its bank facilities.

15 h) Mr Duffin sought to reduce costs. He was looking ahead. He considered that the respondent could reduce costs by reducing headcount. He took legal advice on the process to be followed. He considered that an option would be to make the claimant's position redundant and absorb his duties and responsibilities into the existing roles of General Manager and Farm Workers.

20 i) The respondent initiated consultation with the claimant by letter of 11 July 2020. This letter informed the claimant that he was at risk of redundancy and that Mr Duffin wished to meet and discuss matters.

j) The claimant did not respond to the letter of 11 July so Mr Duffin wrote to him again on 20 July 2020 informing him that he had been provisionally selected for redundancy and to get in touch with him to discuss.

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k) A meeting was arranged and took place between Mr Duffin and the claimant on 28 July 2020. Mr Duffin took notes of the meeting and

had a handwritten script which were produced. He informed the claimant that the respondent needed to reduce costs and would have to get "by" with the 2 Farm Workers and General Manager. The claimant was afforded the opportunity to comment on what was proposed and whether he had any proposals to avoid redundancy. The claimant's response was that there was nothing he could say to save his job and asked why "last in, first out" wasn't being used. Mr Duffin said he'd take advice and respond.

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l) Mr Duffin responded to the claimant's queries by letter of 11 August 2020 advising last in first out would not be used and requesting a second consultation meeting.

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m) The claimant responded by letter of 12 August 2020 requesting further information and asserting that the decision was pre-determined. He also requested that future dealings should be in writing. By letter of 2 September 2020 Mr Duffin agreed to deal with the matter by correspondence and reiterated that the proposal to make the claimant's post redundant was financial. The claimant was invited to make further representations within 7 days before a final decision being made.

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n) The claimant responded by letter of 4 September 2020 stating his questions had not been answered and there had been a clear unwillingness to engage in any meaningful dialogue.

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o) By letter of 10 September 2020 Mr Duffin informed the claimant that his position was redundant and the basis of the decision.

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p) His employment with the respondent was terminated on 4 December 2020. The reason given by the respondent for the termination was redundancy.

q) By letter of 15 September 2020 the claimant responded and stated that there was no point in appealing the decision, the decision was

unfair and so was the process. He also sought to clarify some financial matters.

- r) The claimant received a redundancy payment (£7,841.22), notice and holiday pay and an ex gratia payment of £1,500.
- 5 s) A Farm Worker (Lloyd McDonald) left the respondent's employment on 11 December 2020. The respondent advertised for a replacement who was eventually recruited in 2021.
- t) The respondent currently employs Mr and Mrs Duffin, General Manager and 2 Farm Workers. The claimant's post has not been
10 replaced.

The Relevant Law

7. The claimant asserts a claim of unfair dismissal. Section 98 of the Employment Rights Act 1996 provides:

- 15 (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 subsection (2) or some
20 other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—
 - (c) is that the employee was redundant. If the employer has satisfied the requirements of section 98(1) then the Tribunal must
25 determine the question whether the dismissal is fair or unfair.

Section 98(4) provides:

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) 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

(b) shall be determined in accordance with equity and the substantial merits of the case.

10 8. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

15 9. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).

20 10. In **Safeway Stores plc v Burrell [1997] IRLR 200** the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide: (a) Whether the employee was dismissed. (b) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? (c) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution? If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer

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acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA).

11. A redundancy situation will arise where that work is reorganised such that there is a reduced need for employees overall (see ***Kingwell & Others v Elizabeth Bradley Designs Ltd EAT/0661/02***).
12. In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.
13. The House of Lords in ***Polkey v A E Dayton Services Ltd 1988 ICR 142*** held that “in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation”. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

Submissions

14. Both parties made oral submissions.

Discussion and Decision

Observations on the Evidence

15. The claimant’s evidence was to the effect that Mr Duffin’s mind was made up; the decision had been made and he was going to be made redundant. There was an agenda with the General Manager to get rid of the claimant. There was no point in the claimant suggesting alternatives to redundancy as it would have been a pointless exercise. According to the claimant it was the respondent’s obligation to consider alternatives.

16. The claimant had been a long and faithful employee. He had qualifications which the General Manager did not. His duties and responsibilities were ongoing and had been undertaken by the Farm Workers following his departure. The General Manager could not carry out the claimant's duties and responsibilities.
17. The claimant had offered a pay cut before the redundancy situation had arisen which the respondent had refused. The claimant had been put on furlough at his own request to save the respondent money.
18. It was clear to the Tribunal that the claimant was aggrieved at the General Manager having been appointed over his head and also had no time for the General Manager. This clearly impacted upon his approach to the redundancy consultation process and his sense of unfairness that he was being selected for redundancy.
19. Mr Duffin gave his evidence in a straightforward, credible manner. The business was in financial difficulties, it was losing money and he needed to reduce costs. The decision to dismiss was not motivated by anything other than a desire to reduce costs and looking at the future.

Decision

20. The Tribunal considered and applied the approach set out in **Safeway Stores plc v Burrell [1997] IRLR 200**. The claimant had clearly been dismissed. The requirements of the respondent's business for a Farm Manager had ceased or diminished. The claimant's work was undertaken by the remaining employees during his absence on furlough and after the termination of his employment.
21. A redundancy situation will arise where that work is reorganised such that there is a reduced need for employees overall (see **Kingwell & Others v Elizabeth Bradley Designs Ltd EAT/0661/02**).
22. The Tribunal considered that the claimant's dismissal was caused wholly or mainly by the reorganisation and not by any personal animosity or agenda to

get rid of the claimant. It was a business decision and one that was open to the respondent to make. The respondent absorbed the duties and responsibilities of the Farm Manager within the remaining staff. Whilst the claimant did not agree with that approach it was a business decision for the respondent to make.

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23. The Tribunal then considered whether or not the dismissal was fair under section 98(4). In this regard the Tribunal took into account that the respondent were a small employer with limited experience in dealing with redundancy situations. Mr Duffin had endeavoured to consult with the claimant and the claimant had refused to engage in the process due to his belief that the decision was a fait accompli and futile. The selection criteria was by post which was a fair criteria to adopt in the circumstances. There were clearly no suitable alternatives as the objective was to reduce staff costs and by absorbing the duties of Farm Manager into existing posts this saving was achieved.

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24. The Tribunal considered that the dismissal was, in all the circumstances, fair.

25. The claimant asserted an underpayment of 1.5 weeks pay in his redundancy payment due to an error in calculating it by the respondent. The claimant received an ex gratia payment significantly in excess of 1.5 weeks pay and accordingly the Tribunal makes no award in this regard.

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26. The claim is accordingly unsuccessful and is dismissed.

Employment Judge: Alan Strain

Date of Judgment: 03 August 2021

5 Entered in register: 05 August 2021
and copied to parties