



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 14 January 2022

Claimant: Mr Danny Lee

Respondent: New Era Fuels Limited

Before: Employment Judge Fowell
Ms L Lindsay
Ms S Khawaja

Representation:

Claimant: In Person

Respondent: Ms V Finch, HR Manager

JUDGMENT

The complaint of discrimination on grounds of disability is dismissed.

REASONS

Introduction

1. Mr Lee has dyslexia, which amounts to a disability. He worked for the company as an HGV Driver until his dismissal on 23 July 2020. The company say that this was on grounds of redundancy. He did not have the length of service to bring a claim of unfair dismissal but he has brought complaints of disability discrimination. He says that in handling the redundancy process, in which all the drivers at his depot were made redundant, the company failed to make reasonable adjustments and that the redundancy process indirectly discriminated against him.

2. The complaints presented are therefore as follows:
 - a. failure to make reasonable adjustments (under section 21 Equality Act 2010) and
 - b. indirect discrimination (under section 19 Equality Act 2010) on grounds of disability.
3. The issues to be decided were set out in the Case Management Order on 15 June 2021 and so need not be repeated at the outset. Mr Lee explained that the aspects of the redundancy process which caused him the most difficulty were that it was conducted in a rush, over a matter of a few days, and that during that period he was also having to carry out his driving duties. He also felt that a face to face consultation meeting at head office in Epping would have helped.

Procedure and evidence

4. Given Mr Lee's dyslexia, we ensured that Mr Lee was not asked about documents unnecessarily, and that any relevant ones were read out to him. We heard evidence from Mr Lee and Ms Vicky Finch, the HR Manager who handled the redundancy process and also acted as their representative today. There was a bundle of about 100 pages plus Tribunal paperwork. Having considered that evidence and the submissions on each side, we make the following findings.

Findings of Fact

5. The redundancies all took place during the first lockdown period. Despite the recent public concern about the lack of qualified HGV drivers, that is not how things appeared in June 2020, when many parts of the economy were closed.
6. New Era Fuels are a medium sized haulage company with about 134 staff spread over several depots in the home counties. They have about 40 drivers and deliver what is known as red diesel, mainly to customers in construction sector. Mr Lee was one of four drivers at the Tonbridge Depot.
7. Mr Lee had been with the company since January 2019. When he joined he was given a medical form asking about any health problems which might affect his ability to drive. There was a long list of such conditions, starting with epilepsy, then fits or blackouts, giddiness etc. These are the conditions which have to be reported to DVLA. Unsurprisingly it did not include dyslexia, and he signed to say that he did not have any of them. However he completed a further medical form in March 2020 which did ask about dyslexia. Naturally he indicated 'Yes' and said that he had been diagnosed at the age of 16.
8. This is not something which Ms Finch was aware of when she embarked on the redundancy procedure at Tonbridge, but that is not the question we have to answer. The question is whether she, as the decision maker, knew or ought to

have known about it, and given this clear statement we have to conclude that she ought. That is the point of the company asking him to fill in the form. They cannot say later on that this came as a surprise to them. That is clear enough that it is not therefore necessary for us to go through the times when Mr Lee told colleagues or other managers about this, as he has set out in his witness statement.

9. Oddly, this was a busy time for the drivers. Mr Lee and the other drivers were making plenty of deliveries every day. The Depot Manager was made redundant in June, but this did not particularly surprise or concern them as his main role was taking orders from customers in a store at the depot, and that did not take much of his time. So, when Mr Lee had a call on 14 July to tell him that he was at risk of redundancy, this came out of the blue.
10. The call was from Ms Finch. She called each of the drivers in turn and the call to him was at 10.31. Since she was able to get hold of him it seems likely that he was on his 45 minute break that morning, during the deliveries. The gist of the call was simply that he was at risk of redundancy. It was followed by a letter which was emailed to him. Mr Lee and the other drivers were then left to carry on with their deliveries.
11. The day before, Ms Finch had been in discussions with the Finance Director, Mr Newman, about the proposed redundancies. At that stage the idea was to select two of them for redundancy and she had drawn up a matrix with selection criteria.
12. The first consultation meeting was on 17 July, by video. Ms Finch was at home, as was Mr Lee. He had a day off. Also on the call was a friend of his, Ms Robin Taylor. It seems by then that the plan had changed and that all of the drivers were to be made redundant. According to Ms Finch's witness statement, she told Mr Lee they were all at risk of redundancy, that the depot may close and that the company could not compete with the price their competitors were selling at. It follows that there was little left to discuss. There were no alternative vacancies at that depot.
13. During that call Ms Finch found out that Mr Lee was dyslexic. She made sure that from then on all emails and letters were read to him. There seems to have been fairly frequent contact between them over the next few days, and he mentions her calling him several times while he was out making deliveries. He would have to wait for a break to ring her back.
14. After that meeting they agreed that the decision would be announced on 23 July. That day he was at work as usual. There were relatively few deliveries. His recollection was that he got the call shortly after lunch, while he was on a break. Ms Finch told him that his employment was terminated. He returned the lorry to the depot and went home.
15. The dismissal letter followed. It contained no right of appeal, unlike the letter for

the depot manager. That may reflect the fact that Mr Lee did not have two years' service. (In fact, none of the drivers did as it was a relatively new depot.) That is nevertheless disappointing, and he submitted his tribunal claim the next day.

16. A few months later the depot re-opened. One of the drivers applied for a job with them again and was rehired, but no steps were taken to contact those who had been made redundant.

Applicable Law

Indirect discrimination

17. The test under section 19 Equality Act is as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

18. The provision, criterion or practice here is the redundancy process. It goes on:

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

19. The test under section 20 and 21 Equality Act are as follows:

20. Duty to make adjustments

...

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

(6) Where the first or third requirement relates to the provision of information, the steps

which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

20. Again the same provision, criterion or practice is relied on.
21. This duty only applies where the company did not know, or could not reasonably have been expected to know, that he had a disability or was likely to be placed at this disadvantage. As already stated, we find that they ought to have known, but once it was realised Ms Finch did take extra steps to explain things and read out all the written material. Hence she appreciated that it put him at a disadvantage.

Conclusions

22. We are not dealing with a claim of unfair dismissal, so we do not need to consider the fairness of the process but it may be helpful to say a few words about it. From the company's point of view, there may well not have seemed much to discuss. But from the point of view of the drivers, this was bound to be a huge shock. Like Mr Lee, they were all on a week's notice. It is usual for staff at risk of redundancy to be given some time off. Apart from the difficulty in focussing on the task in hand, they need time to take stock of things. They may have proposals to make about reducing hours or pay. That may involve them talking to their family, or colleagues, or even their bank manager. None of that was possible for them here. It was not in fact possible for them to make any points in response to the economic decision to close the depot. They were not told this was going to happen until they were dismissed. The possibility of being placed on furlough, as an alternative to keeping working and completing deliveries, was never up for discussion, and the fact that the depot reopened shortly afterwards suggests that this may have been a hasty decision. Hence the process was rushed, and there was no real consultation about alternatives. Lastly, there was no right of appeal. That alone would have rendered this an unfair dismissal.
23. We do not blame Ms Finch for these shortcomings. She seems to have been left to deal with everything in difficult circumstances. The timetable may well have been outside her control, and the fact that the drivers had to carry on working right to the end. But she did address Mr Lee's dyslexia conscientiously when she became aware of it.
24. To get the news of dismissal in this way, while Mr Lee was still out driving, shows a total lack of consideration by the company and we fully understand how he felt aggrieved. But however basic the process, it was the same for everyone. All four had the same short consultation period, all four had the same emotional shock, all had to carry on working during this period, and all had the same short notice period. We have to focus on what, if anything, was more difficult for Mr Lee to manage as a result of his dyslexia. He does have difficulties with written work, but the fact is that all of the letters and emails that passed to and fro were read to him. That is really the nub of the matter. Having something read out does not always

mean that the contents are taken in, especially when in shock, but Mr Lee also had help from his wife and Ms Taylor, together with another driver, and the fact is that there were few facts to retain. The company essentially told him on 14 July that he was at risk of redundancy, underlined that in the video meeting on 17th, and confirmed that he was redundant on 23rd.

25. It might also have helped him to have a face to face meeting at head office, but again, that would have helped all of the drivers. It was still during lockdown, so the decision to handle things remotely is understandable and it does not seem that he asked for this at the time.
26. In those circumstances we cannot see that he suffered any particular or substantive disadvantage, to use the terms in sections 19 and 20 of the Equality Act, and so although we accept that Mr Lee may well have felt aggrieved by the way in which things were handled, the claim of disability discrimination must be dismissed.

Employment Judge Fowell
Date: 14 January 2022

Sent to the parties on
Date: 17 January 2022