



EMPLOYMENT TRIBUNALS

Claimant: IAN HORMAN

Respondent: ADVANCED HEALTH AND CARE LIMITED

Heard at: Reading by CVP **On:** 19 October 2020

Before: Employment Judge Skehan

Appearances

For the Claimant: In Person

For the Respondent: Mr Edwards, Counsel

RESERVED JUDGMENT

1. The claimant was fairly dismissed by reason of redundancy and his claim for unfair dismissal fails and is dismissed.

REASONS

1. This was a remote hearing which was not objected to by the parties. The form of remote hearing was Video (fully remote). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 144 pages, the contents of which I have referred to. The order made is described above.
2. By claim form received at the employment tribunal dated 11/03/2019, the claimant claimed unfair dismissal only. The respondent's notice of appearance was accepted by the tribunal and the matter was defended.

The Law

3. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as

a potentially fair reason. The respondent relies upon 'redundancy'. Section 139(1), ERA provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to 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,
- (iii) have ceased or diminished or are expected to cease or diminish.

4. If the respondent establishes that redundancy was the real reason for dismissal, then the next question, where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal. The leading case on reasonableness in relation to redundancy is Polkey v A E Dayton Services Ltd [1987] IRLR 503 in which the House of Lords held that an employer will normally not act reasonably (and a dismissal will therefore be unfair) unless it:

- (a) Warns and consults employees about the proposed redundancy
- (b) Adopts a fair basis on which to select for redundancy encompassing matters such as identifying an appropriate pool from which to select potentially redundant employees and proper criteria
- (c) Considers suitable alternative employment.

5. It is important to remember at all times that the test to be applied is the test of reasonable response. Williams v Compair Maxam Ltd [1982] ICR 156 at [161] provides that:

“it is not the function of the [employment] tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted:”

The Facts

6. I heard evidence from Mr Wood, Mr Davies and Ms Shenton on behalf of the respondent and the claimant on his own behalf. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

7. The respondent is a large software services provider specialising within the healthcare space. The claimant was employed on 01/10/2008 and his employment transferred to the respondent in July 2009. The claimant worked within 'care sector' services and had been successful in his role for many years.
8. The claimant was employed as a 'Strategic Account Director' from 01/10/2008 until his dismissal on 15/11/2018. The claimant was employed as a homemaker and his role was designated as 'field-based'. It is common ground between the parties that at least up to August 2018, the claimant's role was part of a three-person field based care sales team. The other two employees being Lucio and Faisal who were employed in field-based sales roles. Lucio was assigned to work on sales opportunities in the North, North Midlands and Wales and Faisal was assigned to do the same in the South, South Midlands and Southern Wales. Mr Wood told the tribunal that the field-based teams roles involved travel to the company's larger and more significant customers on a regular basis. The decision-makers within the respondent's client organisations would normally meet with the 'strategic account manager'. The roles attracted car allowance and fuel expenses in recognition of the field-based nature of the role.
9. The remainder of the respondent's care sector sales and account management work was carried out by the Small to Medium Enterprise (SME) team. This was a team of 4 people, all office based in Birmingham. The SME team had a focus on the remote management of customers, rather than regularly seeing customers, and it was expected by the respondent that they would carry out fewer face-to-face meetings. Their roles were distinguished by the respondent from the claimant's 'strategic account director' role as they were more administrative, operational and office based. They primarily dealt with account reviews, version upgrades, billing queries and support issues. Generally, they were not involved with strategic selling of wider portfolio of respondent products. This resulted with their primary client contact tending to the product users rather than decision-makers. Mr Wood considered that the skill set required for SME account manager was lower than that of a strategic account director. SME account managers were not eligible for a car allowance. The salary of an SME account manager would be substantially less than that of the claimant's.
10. Mr Wood told the tribunal that strategic directors were generally expected to visit clients about 3 days a week, hence they were field-based. In contrast, it was expected that the SME team would visit customers about once a month. This was not a metric that was actively tracked by the respondent. The claimant said that he visited clients at a similar rate to the SME account managers. He refers to his final 7 months of employment showing that he attended only 9 client meetings in that period. The respondent accepts that these were the actual number of client meetings made by the claimant however Mr Wood said that this was not the expected number of client meetings for a strategic account director role.

11. The claimant said that historically he reported to Adrian Wookey and he did not consider himself part of the SME team. This was the position up to October 2018, when Adrian left the business. At this time the claimant was informed that his line manager was to be Mr Nick Davies. Other than his reporting line, nothing changed for the claimant. As soon as Mr Davies was announced as his line manager, the redundancy process that led to his dismissal was commenced.
12. Mr Wood said that the respondent identified different phases within which its salesforce operated. The 'invest/strategic' phase was selling new products or new developments. This would normally involve a senior decision maker on the client side as significant cost was involved. Thereafter, there was a 'harvest/maintain' phase that involved servicing existing clients who have already invested in the respondent's products. Client contact in this phase tended to be with the service users rather than the decision maker, as the client had already invested in the product. An internal classification of 'harvest/maintain' indicated that the respondent did not see particular products as being growth areas. The respondent did not invest within development of these products, reducing the sales capacity.
13. Mr Wood said that he reviewed the sales and account management function in the care sector in late 2018. He looked at the efficiency of the field-based model vs the SME model and concluded that the field-based model was not working as well. Mr Wood considered the direction of the market and new business development was better suited to the SME team model. He considered most customers were of low value and did not warrant a field-based approach in order to retain and develop them. Two of the main clients that the claimant was account managing had products that were considered by the respondent to be in the 'harvest/maintain' mode. The respondent was no longer actively targeting new customers to take up this product but focusing on maintaining the product for the existing customers
14. Mr Wood looked at the field-based team targets and projections at the half year point. Lucio achieved 42% of the half year target, Faisal 67% and the claimant 44% of his half year target. The available projections for the full year put the claimant at a projected 27% of his full yearly targets. Mr Wood concluded that the team were not functioning effectively that they were not able to make sufficient sales. The SME team by contrast were broadly on target. Mr Wood considered that the field based model was comparatively expensive and delivered underwhelming results. The new business product direction being in the 'harvest/maintain' phase did not justify the field-based model. He proposed to remove the field based team and the role of 'strategic account director' occupied by the claimant altogether. Mr Wood put together a written proposal explaining the proposed changes to the team and placing all 3 field-based roles at risk of redundancy. The tribunal was referred to a detailed presentation contained within the bundle setting out the rationale for the proposed changes.
15. The tribunal was referred to a slide entitled 'get the team right', where the sales team were identified by name: the claimant had a large 'X' beside his

name; Lucio, a large '?'; and a large '✓' appeared beside Faisal's name. Mr Wood said it was expected that the field based employees would have the opportunity to move to the SME team as an alternative to redundancy. The respondent was aware that they might not choose this position. The respondent believed that Faisal would be likely to move to the SME role as he recently worked within that team. For this reason a '✓' was placed beside his name. The respondent had no sense of whether Lucio would be likely to move to the SME team, and it placed a '?' by his name. Mr Wood assumed that the claimant would prefer redundancy to taking a role in the SME team, and placed an 'X' beside his name. Mr Wood denied that there was any predetermined decision made relating to the allocation of alternative opportunities.

16. The redundancy consultation process was carried out by Mr Nick Davies. Mr Davies met with the 3 members of the field-based teams on 01/11/2018 to inform them that their roles were at risk of redundancy. This information was confirmed in writing by letter of the same date. Mr Davies met with the claimant on 02/11/2018 via Skype. During the meeting Mr Davies explained the rationale for the proposed redundancy and that the respondent had identified that there was no longer a need for the field-based account managers with a significant focus on client meetings. The claimant stressed that he did not have a significant focus on client meetings, and he did not consider his role different from those within the SME team. Mr Davies explained that the respondent's expectation was that the roles would be different. Mr Davies did not consider it credible that the claimant could be unaware of his client focus, being a field-based employee.
17. The claimant was informed of the possibility of a role within the SME team at the initial consultation on 02/11/2018. The claimant told the respondent that he had no interest in that role. The claimant said that he was not happy with the answers given by the respondent to differentiate his role from the SME and wanted to concentrate on why his role, rather than the other account managers within the SME team, had been chosen for redundancy. The claimant said that he would have to apply for the SME role even though he already had an account manager role within the SME team. This was not reasonable. If successful, it was likely to attract a lower package than his current package. The claimant was not prepared to accept a lower package for doing what he considered to be exactly the same job. The claimant also knew that his colleague, Faisal was being considered for the vacant account manager role as he had only recently moved on from this role. The claimant considered it a foregone conclusion that Faisal would get the job and refers to the slide set out above. The claimant said that his redundancy was predetermined and a foregone conclusion.
18. A second consultation meeting was arranged for 30/11/2018. Between the two meetings, the claimant exchanged emails with the respondent's HR function in relation to financial arrangements and commission arrangements. The claimant raised issues relating to commission, his phone and laptop and retaining his mobile phone number. The claimant raised no issues in relation to the rationale for redundancy during this meeting and told Mr Davies that he was comfortable with everything else. Mr Davies

arranged for a further consultation meeting that was scheduled to take place on 15/11/2018. There was considerable email correspondence between the claimant and respondent relating to his commission and miscellaneous matters. The claimant suggested that on the basis miscellaneous matters were agreed, the respondent 'could probably skip' the third consultation meeting and it did not proceed on this basis.

19. The claimant said he performed the same function in the same way as members of the SME team. The respondent's emphasis on client contact was misplaced as claimant had similar client contact to the SME team. The claimant disputes that he was expected to undertake more client visits. He was not provided with a job description nor any formal instruction about how he should go about performing his role. At no point was he given any objective which set out the frequency of face-to-face meetings required. The claimant told the tribunal that he did not participate fully within the consultation process as he was worried that it would affect his treatment in the ongoing redundancy process.
20. The claimant was asked at the meeting of 02/11/2018 whether he wished to speak to Ms Shenton to receive details of alternative roles that were available within the organisation. The claimant did not hear from Mr Shenton following the first meeting and directly investigated potential internal vacancies. He did not consider the available vacancies matched his skill set. At the second consultation meeting on 13/11/2018, the claimant said that he had emailed Ms Shenton but not heard back from her. However, he was pursuing alternative opportunities. He said that he was aware of opportunities within the respondent but did not consider them right for him. He told Mr Davies that he did not want Ms Shenton to call him back at this point as he had a good idea of what was available within the respondent. The claimant says in his witness statement that he heard from Ms Shenton on 30 November but did not learn about any other vacancies other than those that he had identified directly. The claimant was offered the opportunity to appeal but did not appeal the decision to terminate his employment by reason of his redundancy. He said he had no reason to expect that he would receive a different reaction outcome by appealing the decision to that provided during the consultation.
21. It is common ground that following the termination of his employment, his colleague Faisal whose field based role was also made redundant, was appointed to the SME team. The claimant says that he took over the claimant's clients, effectively doing the claimant's job. The respondent says that the claimant's clients were allocated amongst the SME team and Faizal, being the newest member of the SME team, managed some of the claimant's former clients. The claimant alleged that, contrary to the respondent's suggestion that the SME team did not have a car allowance, Faisal retained his car allowance. Mr Davies said that Faizal, on being offered the SME account manager, negotiated retention of his car allowance for 6 months. Thereafter this contractual benefit ceased.

22. The claimant alleges that he has been targeted for a dismissal some time prior to the consultation process he does not consider that the consultation was a genuine process and considers that the end result of his dismissal was predetermined.
23. The claimant complains that he did not received a copy of his employment contract. The claimant signed his employment contract on 15/11/2018. He requested a copy of his contract during the course of the consultation process but it could not be located by the respondent. A copy of the contract was located and sent to the claimant following the termination of his employment. The claimant complains about the enforcement of post termination restrictions.

Deliberations and Conclusions

24. What was the reason for dismissal? The claimant disputes that a redundancy situation exists in that his work continued to be carried out by his colleague, Faisal. I have carefully considered the entirety of the evidence and conclude that the respondent drew a legitimate distinction between the field-based team and the SME team in Birmingham. Mr Wood clearly explained the purpose of the field-based team and in particular the claimant's role as strategic account director. The claimant was expected to have contact with decision-makers within the client organisations. His role required a stronger skill set than that required within the SME team. It is common ground between the parties that the claimant's role attracted a higher remuneration package than that of the SME team. The claimant's own evidence was that he considered his field-based team entirely separate to the SME team until the departure of his previous line manager Mr Wookie in August 2018. The claimant told the tribunal that other than a change of line management to Mr Davies, there was no other change. While I note the claimant's submissions that the reality of his role involved client contact not significantly greater than that undertaken by the SME department, I conclude that the legitimate expectation of the field-based strategic role did envisage substantial client contact at a senior level. That was the entire point of the field-based role. The lack of client contact on the claimant's part prior to his dismissal appears to substantiate Mr Woods assessment of the respondent's diminished requirement for a field-based strategic account manager. It was the case that the claimant had been successful in his role for many years. This situation had changed due to no fault on the claimant's part. Mr Wood had identified the type of products sold by the claimant to some of his main accounts being in the 'harvest/maintain', limiting the opportunities for the claimant to meet his targets. It is the case that management of the claimant's existing client base was passed to the SME team in Birmingham. However these client relationships continued without the benefit of a 'strategic account director' focused upon the client's senior decision-makers as the claimant had been. The respondent has shown that the SME team undertook a predominantly different type of sales role, focused in the main on product users and relatively low value sales.
25. I note the claimant's allegation that he was in some way targeted for other unspecified reasons prior to the announcement of the redundancy process.

There was no evidence to support this allegation and considerable evidence to support the redundancy scenario. In the circumstances I conclude the respondent has shown that it identified a diminished requirement for its field-based strategic account director within care sector sales and the reason for the termination of the claimant's employment was redundancy.

26. Was the dismissal fair, did it fall within the band of reasonable responses?
The claimant was warned of the possibility of redundancy in person by Mr Davies and by letter on 1 November 2018. This commenced a consultation process. The claimant attended two consultation meetings with Mr Davies. There was email correspondence between the claimant and the respondent in relation to various miscellaneous matters such as commission payments and outstanding expenses. A third consultation meeting was offered to the claimant but abandoned at the suggestion of the claimant. The claimant was offered and declined the opportunity to appeal the decision.
27. The substance of the claimant's complaint appears to be that the respondent did not identify an appropriate pool from which to select potentially redundant employees, and in particular the pool should have been extended to include the SME team. The test in an unfair dismissal claim is not whether I would have chosen to formulate the appropriate pool in some other way, but whether the respondent's identification of an appropriate pool fell within the band of reasonable responses. I refer to my findings above in relation to the distinction between the field-based team and the SME team. I consider that the distinction between these two roles to be sufficient to conclude that the respondent's decision to identify a redundancy's situation within the field-based employees only, to be a decision that falls within the band of reasonable responses from a reasonable employer.
28. The claimant cross-examined Ms Shenton and she was criticized by the claimant from a lack of engagement in relation to the availability of alternative roles within the respondent. On consideration of the evidence, while it is the case that Ms Shenton did not contact the claimant prior to the second consultation meeting, the claimant had made contact with her prior to the termination of his employment. He was aware of all other opportunities within the respondent business and did not reasonably require or request any further assistance from Ms Shenton. The claimant was told of the SME team vacancy at the first consultation meeting. This was not identified as 'suitable alternative employment' but presented as a potential opportunity for the claimant, should he be interested. It was a reality of the SME vacancy that it required a lesser skill set and attracted a lesser remuneration package than that enjoyed by the claimant within his strategic account director role. The claimant told the respondent that he was not interested in this role. The claimant's preferred alternative of remaining within his strategic account director role was not an option open to him in light of the respondent's identification of a genuine redundancy scenario for the strategic account director role. For the sake of completeness, I consider the fact that the employee who accepted the SME role negotiated

continuation of his car allowance, albeit for a fixed term, irrelevant to the fairness of otherwise of the preceding redundancy scenario.

29. The claimant complains of a predetermined decision, in particular his concerns in relation to the redundancy presentation and the 'X' marked beside the claimant's name. Taking the entirety of the evidence into account I accept on the balance of probability, the evidence provided by Mr Wood that these marks were a reflection of the respondent's sense of who may or may not be interested within a possible SME team role. These marks do not indicate a predetermined decision nor do they render the process unfair. The respondent correctly assumed that the claimant would be uninterested in an SME role. Even if I am wrong, I note that the claimant was clear that he would not accept the financial package attached to the SME role in any event. In such circumstances, any procedural irregularity in relation to the offering of this potential alternative to redundancy would have had no effect whatsoever on the outcome of the consultation process. Neither the claimant nor the employment tribunal could identify any further steps that could reasonably be taken by the respondent to avoid a redundancy scenario.
30. Taking the entirety of the evidence into account I conclude on the balance of probability that the respondent did warn and consult the claimant about the proposed redundancy. The respondent's chosen process in selecting for redundancy including the identification of the appropriate pool and consideration of all alternative opportunities falls within the band of reasonable response of a reasonable employer. I conclude that the claimant was fairly dismissed by reason of redundancy.
31. For the sake of completeness I note that the claimant was provided with a contract of employment. A signed copy was included within the bundle. The claimant's complaints relating to restrictive covenants are not relevant to the unfair dismissal claim and were not considered by the tribunal.
32. Finally, I apologise to the parties for the delay on my part in providing this reserved judgement. This has been caused by competing obligations on my side and unforeseen Covid related delays.

Employment Judge Skehan

Date:15/12/2020.....

Sent to the parties on: 18 December 20

For the Tribunals Office