



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Valimulla

Respondent: Al-Khair Foundation

Heard at: via CVP **On:** 22nd September 2021

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr A Williams - solicitor

LIABILITY JUDGMENT

It is the Judgment of the Tribunal that the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

1. The claimant presented a claim of unfair dismissal on 18/12/2020. The respondent claims the dismissal was for the fair reason of redundancy.
2. The respondent is a faith-based charity which provides emergency relief and development world-wide, to impoverished areas.
3. The Tribunal heard evidence from the claimant. For the respondent it heard from Mr Musa (the claimant's line manager), Mr Khan (Mr Musa's line

manager) and Ms Rudman of HR. The witnesses were all very clear that there was no personal animosity between them and they were courteous towards each other. The respondent's witnesses in particular were candid, for example, Mr Khan and Mr Musa agreed they had had issues.

4. Another point should be noted which was that there were no issue at all with the claimant's performance and indeed, the respondent offered to provide a reference for the claimant should one be required in future.
5. The claim was listed for one day. The evidence concluded after 1pm. Mr Williams made a very short and succinct closing submission and the claimant provided a written submission. There was an agreed bundle of 131-pages.
6. The claimant had provided sound files of various conversations, which he had recorded. The files lasted for over two-and-a-half hours, although the claimant identified the relevant parts of the file. The claimant did not make an express application for the files to be heard and the Tribunal declined to do so. Not least for the reason that there was no transcript of the files provided and the respondent had not had an opportunity to comment upon any transcript.
7. The claimant takes issue with whether or not the redundancy was genuine. If not and if the redundancy was a sham, the respondent would not be able to show a fair reason for the termination of his employment. He also takes issue with the redundancy process which the respondent followed and says the procedure was so flawed as to render the dismissal unfair.

Findings of fact

8. The claimant started to work for the respondent on 5/2/2018 and he was employed as a Masjid Liaison Officer, latterly at the respondent's Bolton branch. Due to his domestic responsibilities, the claimant worked from home. He was the only member of staff who did so.
9. The respondent had undergone a restructure in 2019 and the claimant's role remained in the organisation.
10. There was a dispute between Mr Khan and Mr Musa and they both agreed this was the case. In essence, Mr Khan replaced Mr Musa with the result that Mr Musa was demoted. The claimant said that he was asked to become involved in this dispute and he declined to do so. He said that led to him being made redundant in October 2020. As Mr Khan pointed out, any dispute would have affected other staff, not just the claimant. The Tribunal finds that any dispute had nothing to do with the claimant's role being made redundant. It was the intervening event of the Covid-19 pandemic which led to the redundancy.
11. The claimant's role was fundraising in the community and he worked mainly in public and private schools. The UK first went into lockdown on 23/3/2020, the claimant was subsequently 'furloughed' under the Coronavirus Job Retention

Scheme (CJRS) on 23/4/2020. The claimant lived with his parents who were classed as 'vulnerable' (one of the reasons he worked from home was to care for his parents).

12. The respondent reassessed its business model during the period the claimant was on the CJRS. It was disappointing as this followed the restructure in 2019 and would clearly cause further anxiety for the staff. The senior management team (SMT) and the CEO had discussions during August 2020 and this led to the CEO announcing a proposed restructure of the organisation and notice that there was a potential risk of redundancy on 3/9/2020 (page 44). Furthermore, the respondent pointed out the claimant was furloughed for over four months as it had no work for him to do.
13. Although he was on notice of redundancy, as far as the claimant was concerned, when schools re-opened in September 2020, he was able to return to work and to resume fundraising. The respondent had a different view. The respondent's position was that even if for example, Mosques were open, they were only open for prayer and not for other activities, such as fundraising. The respondent also took the view that in these desperate times, it was unlikely that donations would be made as people did not know what the future held. The respondent also changed direction (Mr Khan said and it is accepted that the respondent had to change 'overnight') and it became an aid agency. The future was extremely uncertain in respect of what would happen, the after-effects of the pandemic and in particular what would happen to the UK economy.
14. The claimant had three redundancy consultation meetings on: 9/9/2020; 16/9/2020; and 23/9/2020. The outcome, communicated to him on the 2/10/2020 was that his contract would be terminated with effect from 31/10/2020. The claimant was offered an appeal against the decision to dismiss, which he declined to exercise.
15. There are some difficulties in attempting to recreate the atmosphere in September/October 2020. It should be remembered that the CJRS was originally due to end in May and then in June. On 29/5/2020 the Chancellor announced that it would be extended to the 31/10/2020. In addition, employers then had to pay national insurance and pension contributions from August and contribute 10% of pay from September and 20% from October. Throughout September 2020 the Government ruled out any further extension of the CJRS. On the 31/10/2020 it was announced there would be a second lockdown to start on the 5/11/2020 and that the CJRS would be extended until the end of November. It was only on 5/11/2020 that the Chancellor retrospectively extended the scheme to March 2021. There was a provision that any employee made redundant after the 23/9/2020 could be reinstated and put back onto the CJRS. The situation was unpredictable and volatile. Statements made were contradicted. The Tribunal finds that not only was the financial position of a charity such as this respondent precarious, but that there was no certainty at all about what would happen in the future.

16. Ms Rudman said there was a concern that if redundancies were made much later, that any redundant staff would be disadvantaged as by that point in time, more employers would have shed staff and so finding an alternative role would be more difficult.
17. The claimant criticised the consultation process and said that it was not effective consultation. In particular, the claimant criticised Mr Khan for his comments in the first consultation meeting in which he told the claimant it had been decided his role would 'disappear'. It is accepted that this was loose or sloppy language. It did appear to the claimant that the decision had already been taken and that the redundancy was a *fait accompli*. Ms Rudman attempted to mitigate this impression by adding that it was *proposed* that the role would be deleted.
18. Out of 14 proposed redundant roles, nine in the end resulted in the role being deleted. Furthermore, there was a proposal to close the Leicester branch, due however to representations made, that decision was reversed. On balance, the Tribunal finds that the respondent's position was not entrenched and it was open to consider representations made during the consultation process. If there is a proposal to delete a post, then of course the respondent must have in its mind that it could manage without position. The proposal was that the role of Masjid Liaison Officer *would be* delete.
19. The claimant takes issue with the selection criteria and selection pool. There was no selection criteria. The Tribunal was told the claimant's role was unique and so he was in a self-selecting pool of one. Whilst that may have been the case, those factors could have been made expressly clearer to the claimant in the course of the process.
20. In considering alternatives to redundancy, the claimant put forward a business case as to how his role could continue. The Tribunal finds the respondent did consider the claimant's proposal, even if ultimately it did not accept it.
21. In respect of alternative work, there were two vacancies in Croydon. The claimant also referred to Zaid Musa being offered work after his employment had ended. Mr Zaid Musa was a zero hours worker, who had worked for the respondent for 'years' and who came in on an as required basis. Furthermore, he worked in the warehouse. In light of that, the Tribunal finds that the vacancies which existed at the time the claimant was going through the redundancy process were discussed and rejected due to the location.
22. The claimant also criticises the respondent in that he was treated inconsistently with other members of staff. It is not clear what the issue he takes is as he has not identified the other staff. In any event and taking the claimant's claim at its highest, even if there was a difference in treatment, the claimant's role was unique, with the result that accounted for any difference in treatment.

The Law

23. Section 94 of the Employment Rights Act (“ERA”) states that an employee has the right not to be unfairly dismissed by his employer.

24. Section 98 ERA states:

(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 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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

...

(3) 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

[Tribunal’s emphasis]

25. Section 139 ERA states:

(1) *For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*

(a) *the fact that his employer has ceased or intends to cease—*

(i) *to carry on the business for the purposes of which the employee was employed by him, or*

(ii) *to carry on that business in the place where the employee was so employed, or*

(b) *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,*

have ceased or diminished or are expected to cease or diminish.

26. The ERA requires the claimant to prove that he has been dismissed. The burden then shifts to the employer to prove the reason for the dismissal. If the respondent succeeds in showing a potentially fair reason for dismissal, there is a neutral burden for the purposes of determining whether or not the dismissal was fair.

27. If the respondent fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied. The helpful test is the range or band of reasonable responses, a test which originated in the misconduct case of British Home Stores v Burchell [1980] ICR 303, but which has been subsequently approved in a number of decisions of the Court of Appeal. An approach based on the 'Burchell test' can be useful in cases other than conduct cases, albeit that the focus must always be on the statutory wording.

28. The manner in which the employer handled the dismissal is important in considering whether the respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e., within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

29. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer.

30. Williams v Compair Maxam Ltd 1982 ICR 156 EAT gave guidelines (and they are only guidelines) that a reasonable employer might be expected to follow in making redundancy dismissals. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the respondent should have behaved differently. The Tribunal should ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.
31. The factors suggested that a reasonable respondent might be expected to consider were:
- whether employees were warned and consulted about the redundancy
 - whether, if there was a union, the union's view was sought
 - whether the selection criteria were objectively chosen and fairly applied
 - whether any alternative work was available.
32. In respect of consultation, the Tribunal was referred to R v British Coal Corporation 1994 IRLR 72, where fair consultation means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration by an authority of the response. Or, that consultation 'involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely'.

Conclusions

33. This employer, like many others during the pandemic was in an invidious position. It had to change its working model overnight. It was clear from the evidence given that the staff involved in the redundancy process were compassionate and fully appreciated the impact of the difficult decisions they had to take. After a re-organisation in 2019, there was in effect a further 'cull' in 2020. The pandemic and the impact of it could not be predicted and from March 2020 there was immeasurable uncertainty.
34. Unlike all of the other staff, the claimant was not branch based and even though he worked from home, he could not continue in his role during lockdown and he was placed on the CJRS. The respondent changed its business model and during the summer of 2020, it came to the conclusion that the role the claimant performed could be deleted.
35. The Tribunal accepts the redundancy was genuine. Due to events outside of either party's control, it was no longer possible for the role of Masjid Liaison Officer to operate by fundraising in the community. At the time, it appeared to the respondent (and it was reasonable for it to take that view) that it was impossible to say when, if ever, the role could continue in the future as it had in the past.

36. The respondent was in a position akin to an employer whose factory has been destroyed in a fire and who decides to make its staff redundant. The requirement for the work of the particular kind the claimant performed had ceased or diminished. Furthermore, it was reasonable to conclude it was expected to cease or diminish. The respondent could see no prospect of a return to community fundraising in the manner the claimant had previously performed resuming; and that was a reasonable view.
37. The claimant criticises the respondent for not allowing him to continue on the CJRS. By September 2020 the terms of the CJRS had changed and there was now a cost to an employer. In addition, there were repeated statements made that the Scheme would end on 31/10/2020. Had the respondent allowed the claimant to continue on the CJRS and had as expected, the scheme ended on 31/10/2020, what was the respondent to do then? The claimant's role no longer existed through no fault of either the claimant or the respondent. A redundancy situation would still have existed.
38. The Tribunal makes no conclusion on the respondent re-hiring the claimant further to the announcement made on 5/11/2020 when the country was in a second lockdown, as the claimant did not take this point.
39. Mr Khan did have an open mind in respect of the proposals the claimant made and the consultation was effective. The process does not have to be perfect and overall, the process was reasonable and therefore ultimately it was fair. It is noticeable that the claimant criticises both the respondent's process and the genuineness of the dismissal, yet he did not appeal against the decision to dismiss him. In particular, if the process is criticised, then it would be logical to have appealed to the CEO. The claimant also had the option of raising a grievance in accordance with his contract of employment and he did not exercise that option.
40. This was a small employer with 40 full-time staff. It did not have unlimited resources. Had the claimant been retained, there was a cost to the respondent, even under the CJRS. The decisions taken and the process followed which resulted in the claimant's employment being terminated were within the range of reasonable responses which an employer could take, particularly during the pandemic.
41. For those reasons, the Tribunal finds the dismissal was fair by reason of redundancy and the claimant's claim fails and is dismissed.

22nd September 2021

Employment Judge Wright