



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr John Morris

v

United Distribution Company

Heard at: Watford

On: 29 June 2022

Before: Employment Judge Alliott sitting alone

Appearances

For the Claimant: In person

For the Respondent: Mr M Newman (Consultant)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim is dismissed.

REASONS

1. The claimant was employed by the respondent on 7 January 2011. By 2020 he was working as a Warehouse Manager. His employment terminated on 2 October 2020 when he was made redundant. He accepts that he was paid the correct redundancy payment, notice pay and outstanding holiday pay.
2. By a claim form presented on 8 December 2020, following a period of early conciliation from 23 October to 23 November 2020, the claimant presents a claim of unfair dismissal. The respondent defends the claims.

The issues

3. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and 2) of the Employment Rights Act 1996? The respondent asserts that it was redundancy.
4. If so, was the dismissal fair or unfair in accordance with the Employment Rights Act s.98(4) and in particular, did the respondent in all respects act within the so called band of reasonable responses.
5. As far as the redundancy is concerned:

- 5.1 Was there a genuine redundancy situation?
- 5.2 Was a fair procedure adopted, including:
 - 5.2.1 Warning.
 - 5.2.2 Consultation including consideration of alternatives to termination of employment.
 - 5.2.3 Fair selection criteria and pool for redundancy.

The law

- 6. Section 98 ERA 1996 provides as follows:-

“98 General (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 is it either a reason falling within sub section (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.”

- 7. Under sub section (2) redundancy is a potentially fair reason.

- 8. As per s.98(4)

“(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.”

- 9. Section 139(1) deals with redundancy as follows:-

“(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 —

...

- (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.”

10. The selection criteria have to be fair and at least some of them need to be objectively measurable.
11. Nevertheless, it is permissible to have subjective criteria. From the IDS Employment Law Handbook on redundancy at 8.119:

“In *Swinburne & Jackson LLP v Simpson* EAT 0551/12 a differently constituted EAT rejected the employer’s submission that the EAT’s comments in *Tattersall* on the validity of criteria that are “matters of judgment” had changed the law in this area by removing or reducing the requirement for objectivity. The EAT stated that “In an ideal world all criteria adopted by an employer in a redundancy context would be expressed in a way capable of objective assessment and verification. But our law recognises that in the real world employers making tough decisions need sometimes to deploy criteria which call for the application of personal judgment and a degree of subjectivity. It is well settled law that an employment tribunal reviewing such criteria does not go wrong so long as it recognises that fact in its determination of fairness.”

12. Further at 8.121:

“Extent of employer’s discretion. Provided an employer’s selection criteria are objective, a tribunal should not subject them or their application to over minute scrutiny – *British Aerospace Plc v Green and others* [1995] ICR 1006, CA. Essentially, the task for the tribunal is to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion.”

The evidence

13. I had a hearing bundle of 89 pages.
14. I had witness statements and heard evidence from the following:
 - 14.1 Mr Bonal Chua, Operations Director of the respondent who made the decision to dismiss the claimant.
 - 14.2 Mr Perry Rawlinson, who sat in on the dismissal meeting held on 2 October 2020.
 - 14.3 Mr Mark Horwood, Managing Director of the respondent.
 - 14.4 The claimant.

The facts

15. The respondent is a small family run business importing and supplying gaming machines, spares and maintenance services to family entertainment centres across the UK. In 2020 it had 18 employees. The respondent’s business is highly seasonal with the main activity taking place in January as customers prepare for the holiday season and it tails off in the autumn.

16. The claimant worked in the warehouse. He was in a team of two. When he took on the role he made clear and it was agreed that he could not operate the “Opera” system (a computer warehouse management system) or work on Microsoft Excel spreadsheets and the like. He could send emails and answer the phone. Initially the computer work was undertaken by two individuals in the office. However, in due course a Mr Shatish Sunwar, or “Steve”, was recruited to do the computer part of the warehousing role. As the claimant put it he was employed to act as the claimant’s assistant to help with admin and the manual side of the job. Steve was the second member of the warehouse team in 2020.
17. It is clear to me that the claimant was a loyal, hardworking and exemplary employee who did a good job and was flexible in that he filled in doing tasks as required outside the warehouse. The system clearly worked well with two members of the team. As we all know the country moved towards lockdown in early 2020 and the national lockdown was announced on 23 March 2020. The respondent’s staff were furloughed. Mr Horwood told me and I accept that the respondent’s business was severely adversely affected. Although the workforce returned to work on 1 July 2020 operations and revenue were substantially down by approximately 70 per cent. Mr Horwood told me the business model changed from 20 to 30 units going out per week to about 5/6 units per week.
18. By August the furlough system was said to be coming to an end, a second lockdown was feared and employee costs were rising. Children were about to return to school which marked the end of the traditional season. Mr Horwood decided he needed to cut costs to ensure survival of the respondent and the warehouse was identified as an area where activity had fallen substantially. A decision was made to make two employees redundant, one from the workshop (out of three) and one from the warehouse (out of two).
19. I find that the respondent’s need for warehouse work had diminished and that there was a genuine redundancy situation.
20. On 28 August a staff meeting was held and Mr Horwood explained that redundancies were going to take place.
21. Later on 28 August 2020 Mr Chua sent out a generic letter warning of redundancies and the process was explained. The letter states as follows:-

“As you aware the impact of Covid 19 restrictions on our industry and the company has been severe. We are regrettably proposing to make redundancies. We would like to reiterate that no final decision has been made at this stage.

Whilst redundancies are unfortunate, the company is considering these due to the following business reasons.

- Downturn in revenue due to customers being unable to open their premises and missing the main Bank Holidays.

- Customers cancellation of orders for games due to uncertainly and possible second wave.
- Customers inability to pay for games purchased and delivered due to poor income.

Over the coming weeks, the company will be meeting with affected individuals to discuss the redundancy proposal and examine whether there are any alternative options for the business, such as reducing the number of redundancies. The company anticipates this process will be carried out for a minimum of ... days and you will be informed of any ongoing developments as these arise.”

22. On 4 September 2020 a further staff meeting was held where Mr Horwood explained why redundancies needed to take place. Later on 4 September 2020 Mr Chua sent a letter informing the claimant that his role had been identified as potentially redundant and he was invited to a consultation meeting on 8 September 2020. The letter states as follows:-

“Re: Potential redundancies in UDC/warehouse.

Further to our Managing Director’s email last 28 August 2020, I regret to confirm that the company is facing a potential redundancy situation and anticipates having to make one employee redundant within your area. Redundancies are being proposed because of a severe downturn in business due to the pandemic.

Your role has been identified as being at risk of redundancy. As a result of this, the company has commenced a two week period of consultation with you.

I would like to invite you to attend an individual consultation meeting on September 08, 2020 at 10.00 at workshop back room. This meeting will be held by me.

The purpose of this meeting is to discuss the proposed redundancy and consider any alternative proposals or suggestions you may have to avoid redundancies.

If you are unable to make the meeting as scheduled, please contact me by email to arrange this.

It is important to stress this letter does not mean the company made a final decision in relation to the redundancy and we will not make a decision until the consultation process has been completed.”

23. The consultation meeting was held on 8 September 2020 by Mr Chua. The claimant pointed out that “Steve” spent 50 per cent of his time on paperwork and suggested it remained a two man job. The following exchange is recorded:-

“Mr Chua: let’s say you are chosen for redundancy do you have any suggestions how we can prevent that redundancy for example place you on a different role? Or with a different pay scale?

The claimant: Well, there won’t be different role here that I can do here, I’m not a technician I’m not in the office so you know there is no other role that I can do here, I mean at the end of the day the company is

going to do what they are going to do. As I say there is no other job here for me that's the way it is."

24. I find that a meaningful consultation did take place in that alternatives were discussed, albeit with limited options.
25. The claimant was put in a pool of two. I find that this was reasonable and fair as only two people worked in the warehouse.
26. Mr Chua told me he devised the skill matrix for selection having consulted Acas. The matrix was sent to three managers, namely Mr Horwood, Mr Lauda and Mr Moriarty. The claimant accepts that Mr Horwood was an appropriate manager to assess him. The other two he challenges. Mr Lauda was a salesman in another building. I find that he had some but limited interaction with the claimant when placing instructions for units to be sent out and monitoring the progress of the dispatch but could comment on the limited contact he had with the claimant to some extent. Mr Moriarty had been the claimant's supervisor until May 2019 and so his knowledge of the claimant's working could be said to be somewhat out of date. However, given the size and administrative resources of the company with a limited number of managers, I find it was reasonable to get those individuals to assess the claimant. Presumably their limited contact with the claimant was also applicable to "Steve". Mr Chua did not assess the claimant as he was conducting the redundancy exercise.
27. The skill matrix has five sections dealing with selection criteria. They cover performance, knowledge, skills, adaptability and communication.
28. Mr Horwood rated the claimant's knowledge at 3 with the comment "Unfamiliar with Opera system, Excel & email despite being shown", rated his skills at 0 commenting "Unfamiliar with office system despite being shown", rated his adaptability as 3 commenting "much resistance to change" and rated his communication at 3 commenting "great guy, lack of ideas to improve his job".
29. The other two assessors mainly recorded no comment. Most of the criteria were subjective assessments. However, the operation of the Opera system and Microsoft Office/Excel are objective and the plain fact is that the claimant accepts he could not do those functions. I accept and find that the computer aspect of the warehouse job had grown in importance over time.
30. The claimant scored 46 points. "Steve" scored 57.
31. If Steve had been selected and the claimant retained it begs the question who would have operated the Opera and Microsoft Office and Excel programmes. The claimant couldn't and so someone else would have had to do so. Steve could and no one else would be needed. I find that the claimant's selection for redundancy was fair in all the circumstances.
32. On 2 October the claimant was informed of the outcome and his employment was terminated.

Conclusions

- 33. I find that there was a genuine redundancy situation.
- 34. I find that a reasonable redundancy process was conducted. The claimant was warned.
- 35. I find that it was reasonable to place him in a pool of two.
- 36. I find that a meaningful consultation took place and alternatives were explored.
- 37. I find that the selection criteria included an important objective element and that the claimant was the lesser candidate against that criteria. Even though two of the assessors had limited knowledge of the claimant's work, their exclusion from the assessment would not have changed that fact.
- 38. I find that the reason for dismissal was redundancy and this is a potentially fair reason.
- 39. I find that Mr Chau genuinely believed the claimant was redundant.
- 40. I find that the claimant's selection for redundancy was fair.
- 41. In all the circumstances the claimant's claim is dismissed.

Employment Judge Alliot

Date: 10 August 2022

Sent to the parties on:

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For the Tribunal Office