Case Number: 1400201/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr Wheeler**

Respondents: **1 ITF Solutions Ltd**
2 RSG Group

Heard at: **Bristol** **On:** **27 July 2016**

Before: **Employment Judge Harper sitting alone**

Representation:
Claimant: **In Person**
Respondents: **Mr Luke Menzies, Solicitor**

JUDGMENT

1. By consent the claim of holiday pay succeeds against the first respondent and the first respondent is to pay the claimant the sum of £44.77.

2. The correct identity of the claimant's employer was the first respondent. The second respondent does not have liability to the claimant.

3. The claim of unfair dismissal succeeds against the first respondent. The claimant was unfairly dismissed and the first respondent is ordered to pay to the claimant the sum of £12,500.

4. No Preparation Time Order is made because I am not satisfied that either respondent has behaved unreasonably or vexatiously.

REASONS

1. The issues for the Tribunal to determine were initially a claim of holiday pay and unfair dismissal. The holiday pay claim was agreed at the commencement of the hearing and it was not necessary for the Tribunal to make a determination. This left an allegation of unfair dismissal arising out of the alleged dismissal for redundancy having regard to Section 98 of the Employment Rights Act 1996 and in particular, having regard to Section 98(4) of the 1996 Act which requires the Tribunal to have regard to equity

and the substantial merits of the case and the size and administrative resources of the respondent.

2. The Tribunal has had regard to the statutory definition of redundancy which is set out in Section 139 of the Employment Rights Act 1996. Subsection (1) states as follows:

> "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 to carry on the business for the purposes of which the employee was employed by him or to carry on that business in the place where the employee was still employed;
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind or 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".

3. The Tribunal has also considered the case of **Williams v Compair Maxam** which sets out the test to be applied in redundancy dismissals. This requires an assessment of the selection criteria, the consultation, the consideration of alternative employment. Overlaid on top of all that, having regard to the guidance in the case of **Sainsbury's Supermarket v Hitt**, the Tribunal has to consider whether at each and every stage what the respondent did was within a reasonable range of response.

4. In dealing with this claim I heard evidence on affirmation from the claimant, his father Mr Brian Wheeler, Mr Matthew Pycock and Mr Anthony Lippiatt. I also considered all the documentation in the bundle to which my attention was drawn but I make the point that if my attention was not drawn to a document than I have not considered it.

5. I have considered all the evidence both oral and written of the witnesses and I have carefully considered the oral and written submissions of the claimant and the oral submissions of the respondent.

6. This claim arises out of the employment by the first respondent of the claimant and that employment started on 18 September 2012.

7. The claimant was employed under a contract of employment. It is important to have a look at that document because of the issue of the identity of the claimant's employer being a live issue in this case. The front page of that document is headed up "Resource Solutions Group Plc". However, it is absolutely clear that the parties to this agreement are the claimant and ITF Solutions Ltd. The main terms and conditions on page 2 of the bundle again make it clear that the contract is between ITF Solutions Ltd and the claimant. Whilst it is quite right to observe that RSG is the Group, ITF Solutions Ltd is a separate legal entity within that group. The group provides resources to the various Companies within the group. I am told, and it was not challenged, that RSG is a substantial group with some £200m turnover.

8. An important Clause in the contract of employment relates to mobility. Clause 4 requires the claimant to work at a variety of locations and this issue is a matter to which the Tribunal will return.

9. The Tribunal also has regard, for example, to the copy of the payslip at page 3 of the bundle which makes it clear that the claimant was paid by the first respondent.

10. Whilst there is reference to the RSG staff handbook, it is equally the case that on page 5 of the bundle it sets out all the Companies within the group. This handbook applies across the group and it cannot be read as meaning that the claimant was employed by the group rather than the first respondent.

11. The Company, R1, is a small organisation and the Tribunal has factored in the size and administrative resources when assessing their response to the situation. However it had ready access to a large groups' resources.

12. The claimant was employed as a Recruitment Consultant. There has been much evidence about the financial performance of the Company and the alleged decline in the turnover. A decline in turnover does not necessarily transfer into a decline in work to do. The Tribunal found the assessment by Mr Wheeler in one of his questions of the respondents' witnesses a compelling argument which was not challenged when he went into the witness box. This was that in fact the amount of work to be undertaken by the consultant, rather than reducing, increased, albeit slightly, in the relevant period. I accept his unchallenged evidence that this is correct

13. As a result of the Directors of the Company, and no doubt the group, being very worried towards the end of 2015 about the financial position a meeting took place. This included Mr Pycock and Simon Lomax the then two Directors. As an aside both of those gentlemen have now ceased to be Directors of the Company.

14. There was a meeting on or about 1 December 2015 at which it was decided by the people at that meeting that the claimant would be made redundant. To approach the decision in that way flies in the face of all known employment law because it gave absolutely no scope at all for the claimant to even know at that stage that his future had been settled. At that stage he had no possibility to comment upon it. A letter was written confirming his redundancy.

15. On 2 December 2015 the claimant was told to come to a meeting, at no notice, with Mr Pycock and Mr Lomax and they were also told that a lady called Mandy would be turning up for the meeting. In fact she chaired the meeting. The claimant was told that he had been made redundant. He was given the letter that was handed to him during the meeting. There is absolutely no room for any other interpretation that the decision about redundancy was predetermined on the day before the meeting and nothing that the claimant could have said at that meeting could have changed the position.

16. There is some debate on the evidence as to whether or not this was truly a

redundancy dismissal. It is quite right for the claimant to highlight in my view that there are differences in approach between the respondents' witnesses on this point, whether it was to do with declining work or whether it was to do with financial viability or some combination of the two.

17. As the Tribunal finds that there is not necessarily a correlation between decline in turnover the Tribunal is not satisfied that the decline in finances of themselves are supportive of the respondents' contention that this was a redundancy situation. It is also my finding that the evidence does not support what the respondent is saying that there was a decline in work available for the claimant to do. Therefore the primary finding of the Tribunal is that the evidence does not support that this was a redundancy situation. Therefore substantively this dismissal is unfair.

18. Having been told on the 2 December 2015 that he was going to be dismissed, he was given a right of appeal. He exercised that right of appeal. He requested the minutes of the earlier meeting but was told that there were no such minutes. If he had not appealed then there is very clear evidence that the respondent would have done nothing at all of their own volition. It is only because he appealed that the respondent decided to treat the appeal as a rehearing. Two of the people who heard the appeal were people who had been party to the decision to dismiss the claimant. It is suggested by Mr Menzies for the respondent that the size and administrative resources as a relevant factor here and that as the two Directors of the Company it was not unreasonable for them to have conducted the appeal.

19. It is quite clear from the analysis already set out in this Judgment that the decision had been taken to dismiss before the meeting. No opportunity had been given to the claimant at the original meeting on 2 December. He could not have had any confidence that the two gentlemen hearing the appeal would have approached the situation in any different way. Would he have expected them to have undone their already done deal ? The answer is that it is highly unlikely that he would have any confidence that they would.

20. As this Company is part of a very large group I am not convinced that the overriding approach here is to consider the size and administrative resources just of the first respondent. It is appropriate to consider that it would have been easily possible, especially as the building premises are shared amongst some of the Companies in the group, for somebody else within the group from a different Company to have been brought into hear the appeal. I therefore find on the facts of this case that it was outside the range of reasonable responses for the appeal to have been heard by the same two people who originally dismissed the claimant. The fact that they did fatally tainted the appeal hearing.

21. The unfortunate aspect of the appeal is that either at the beginning of the appeal, or certainly have sometime during the appeal, the claimant was given a white bag with some of his personal belongings in it. Mr Menzies said there is nothing sinister in this because at that stage the claimant had been dismissed and these were his personal items which were being returned to him. However Mr Pycock was very candid in this replies to some Tribunal questions where he said that it was very much open to the conclusion, by handing the claimant the white bag, that a decision had already been taken. The Tribunal agrees that it is very difficult to reach any

different conclusion to that. The appeal hearing, despite it being called a rehearing, was nothing of the sort. It was going through the motions to achieve a result which had already been irrevocably decided.

22. The claimant understandably left the appeal meeting which he had attended with his father, in a disgruntled state. It was then sometime later that the respondent sent him details of a possible alternative post by giving him a link to a website. The claimant deals with that by saying that at that stage, because that offer was quite a long time after the appeal hearing, all trust and confidence had by that stage had gone. He had no confidence that he could trust the employer. He certainly did not want to beemployed with them and so he did not pursue that alternative employment suggestion.

23. It is a curious factor of this case that the respondents themselves, at an earlier stage, had considered alternative employment in general principle. Having regard to the mobility Clause in his contract they could have required him to work at premises at a reasonable distance away from his normal place of work. However they took the view for reasons best known to themselves that he would be unlikely to agree to such a move. Such an approach is made even more bizarre by the fact that Mr Pycock himself has recently ceased to be a Director of the first respondent and has taken up another post within the group and has in fact decided to work at a different work location to the one that he had been in.

24. Those are the findings of fact I now turn to the law to those findings of fact and that is as follows.

25. As earlier stated the Tribunal is not satisfied that the evidence supports that this was a substantively fair dismissal. It is not supportive of the contention that this was a redundancy dismissal. If the Tribunal was wrong on that, and if it proceeded on the basis that it was a redundancy dismissal, the Tribunal find that it does not comply with the guidance in the case of Williams v Compare Maxim. This is because the consultation in this case was well outside the range of reasonable responses and there was no serious consideration of alternative employment. Therefore procedurally, this dismissal is unfair in addition to it also being substantively unfair.

26. In his closing submissions the claimant makes an application for the Tribunal to consider an award under Section 188 of the Trade Union and Labour Relations Consolidation Act 1988. No such application had previously been flagged up. No application to amend had been made. As this was a dismissal of one person the Tribunal find that it is not a jurisdictional head of claim that is before the Tribunal. Even if that was wrong that it has no legal basis for success.

27. The claimant also flagged up in his closing submission that he wanted to apply for a Preparation Time Order because of some non compliance with an order and also that it was vexatious and unreasonable for the respondent to defend this claim. As Mr Menzies submits the test for an award of a Preparation Time Order is quite a high one. Although I have been roundly critical of the approach of the respondent in dealing with the claimant and have found against the respondent that does not necessarily trigger the award of a Preparation Time Order. I find that although there was a non compliance with an Order earlier in the hearing, it was a minor non

compliance and just because I have found against the respondent does not mean to say that it was vexatious or unreasonable of them to defend and therefore I do not make a Preparation Time Order.

28. Having announced the decision the parties then reached an agreement as to the amount payable which the Claimant wished to be incorporated into Order.

Employment Judge R Harper

Date 4th August 2016

JUDGMENT & REASONS SENT TO THE PARTIES ON
09 AUGUST 2016 BY EMAIL ONLY
MR JA ONGARO FOR THE TRIBUNAL OFFICE