EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Jay	**v**	**Michael Graham (Aylesbury) Ltd**

Heard at: Watford **On**: 1 February 2017

Before: Employment Judge Manley

Appearances

For the Claimant: Mr M Williams, Counsel
For the Respondent: Mr S Hill, Managing Director

JUDGMENT

1 The respondent has not shown that the dismissal was by reason of redundancy and the dismissal must therefore be unfair.

2 Even if the respondent had shown that the claimant was redundant, the dismissal was unfair.

3 The respondent is ordered to pay a compensatory award to the claimant in the sum of **£14,857.44** (fourteen thousand, eight hundred and fifty-seven pounds 44 pence).

4 I make no order for an uplift for failure to follow the ACAS code because it did not apply in these circumstances.

5 The respondent is also ordered to pay costs of **£1200** to the claimant being the tribunal fees paid by her.

REASONS

Introduction and issues

1. This was a complaint of unfair dismissal arising out of the claimant's purported redundancy in June 2016. The issues were agreed to be as follows:-

The issues

1. *Was the claimant dismissed for one of the potentially fair reasons set out in s.98(1) of the Employment Rights Act 1996?*

2. *If so, what was the reason for dismissal?*

3. *If the reason for the claimant's dismissal was redundancy:*

    (a) Was the redundancy genuine under s.139(1) of the Employment Rights Act 1996?

    (b) Was the claimant sufficiently warned?

    (c) Did the respondent undertake meaningful consultation?

    (d) Did the respondent adequately apply its mind to a fair selection pool and therefore apply a fair selection criterion?

    (e) Did the respondent consider suitable alternatives including "bumping"? and

    (f) Was the claimant offered her right of appeal?

4. *Was the claimant's dismissal procedurally fair?*

2. The list of issues included reference to a TUPE transfer but it was agreed that was no longer an issue. It was agreed that the claimant's employment commenced in 2013 until her dismissal in June 2016.

The hearing

3. I heard evidence from Mr Hill, the managing director; Mr Robson, area sales manager; and from the claimant herself. I also had a bundle of documents going to 82 pages although I did not need to look at all those in the course of the hearing. I want to thank the witnesses and the representatives for putting this as plainly as they could and clearly attempting, as far as they were able in the circumstances, to give me as much information as they had. The facts are largely not in dispute.

The facts

4. The claimant had worked for a previous owner of the offices in Princes Risborough. When those offices were taken over by the respondent, or more accurately, a partner respondent, called Michael Graham (Princes Risborough) Ltd in 2013, the claimant was asked to join them after a delay of some months. As I understand it she had many years working before this in those offices but it is not suggested that that is continuous employment.

5. The respondent is a small to medium sized employer. They have around 100 employees with 14 offices in the area and they have a fairly detailed employee handbook which appears in the bundle of documents. The only relevant section that I was taken to is that which appears with respect to redundancy which reads:

> "We will endeavour to take all reasonable steps to avoid compulsory redundancies. If a redundancy situation arises the following steps will be considered to prevent compulsory redundancy:
>
> (a) Reduction in or freeze on overtime;
> (b) Lay off all short time working (without pay) other than statutory guarantee pay;
> (c) We will seek to find volunteers as a first step but reserve the right to refuse particular volunteers if the needs of the company require it.
>
> In the case of compulsory redundancy we will ensure that employees are fully consulted both individually and, if necessary, collectively. A method of selection will be discussed and adopted and availability of alternative work will be considered. We will make sure you are given every opportunity to put forward any views of your own during consultation. No decision on job losses will be made until the end of the consultation period."

6. The respondent freely admits that neither Mr Hill nor Mr Robson looked at that part of its procedure when it came to dismiss the claimant. Rather the respondent's evidence is that there was a downturn in their business generally and that reflected in losses for the offices in question which were the Princes Risborough office where the claimant was until April 2016 and the Aylesbury office, which she moved to in April 2016.

7. Mr Hill had prepared a statement which appeared in the bundle with respect to the accounts of both the princes Risborough and the Aylesbury offices for the financial year January to August 2016. This stated that Aylesbury had made a loss of £42,108.00. Up to June the loss was £6,037.00. Mr Hill goes on: *"Once the decision on the Brexit vote was known the director realised that this would have a negative impact on the business in future months and therefore looked at costs that could be made".*

8. He also repeated the suggestion that the decision to dismiss the claimant was taken after the EU referendum on 23 June. He accepted that was an error as the claimant was told of her redundancy before the EU referendum on 16 June. Mr Hill's evidence was that the downturn in the housing market probably related to uncertainty around the outcome of the vote. The claimant accepts that there was a downturn in business during the middle of 2016 but her evidence was that that is the nature of selling of properties and that the housing market does tend to go up and down.

9. The other piece of information which the respondent included in the bundle were some figures in relation to the Aylesbury branch which shows fairly fluctuating figures from September 2015 through to August 2016 in relation to property sales. In short they cover monthly sales figures as low as £5,000 in November 2015 going as high as £86,000 in April 2016 with a large number of figures in between. Mr Hill's evidence, which I accept, is

that there is a delay between sales being agreed and reflecting in the profits for the respondent because of course they are not paid until money changes hand with respect to the property sales rather than them being simply agreed.

10. The claimant does accept that there was a downturn, although I am not able to say on the basis of the evidence before me whether it was any more serious when the decision was taken in mid-June to make her redundant than it had been earlier or indeed later.

11. In any event, the respondent was concerned about the difficulties in some of the offices and, in particular, in the Princes Risborough office. Mr Robson was in charge of the Princes Risborough and the Aylesbury office and he decided to move the claimant to the Aylesbury office. He accepts that he did not consult with the claimant and she recalls that he told her it was because the Aylesbury office was busier than the Princes Risborough office. She was not entirely happy with that move but she did in fact move to Aylesbury.

12. The evidence of Mr Hill and Mr Robson was that they were concerned about the level of sales and decided to make the claimant redundant. This seems to have been made on the basis of costs saving alone. I have seen no evidence of any comparison with her salary or anyone else's, consideration of her job or what income she might contribute to the business or anybody else's roles by the respondent. As I understand it there were about 8 to 10 people in the Aylesbury office (although that figure may include Princes Risborough). I heard from Mr Hill that around 9 employees were made redundant at this time but I was not told which offices they were in or indeed what their jobs were, whether they were full or part-time. The claimant was part-time and told me that she worked three days a week and one Saturday in every four, but that was not something that was discussed with her.

13. Mr Robson's witness evidence gives me some indication as to his thinking in relation to the claimant. He said in his witness statement that she was *"a luxury employee*". He went on: "*She needed Michael Graham more than we needed her and in the slowing climate, cutbacks were necessary and Susan was the first on my list of employees that we could lose*." He says "*Nice lady and she gets on well with clients. BUT there never was an edge or passion to make a difference"*. He also said in evidence that he and others "*lived, ate and breathed*" work but, for the claimant, "*it was just a job*".

14. However, I have also heard that the respondent was happy with the claimant's performance. They told me that they had no problems with it whatsoever and certainly had not raised it with her. Again, I have not seen or heard anything from Mr Robson about how he might have compared what what work the claimant did as compared to others, save for the fact that she was involved in valuations, as was he. He appears to suggest that he could take over the valuation work that she did.

15. In any event the decision was taken to make her redundant and, without warning, she was called into an office and spoken to by Mr Robson. I can

do no better than read out what he says happened in that meeting and quoting from his witness statement:

> "I said "Morning" and closed the door behind me to give us privacy.
> To the best of my memory I kept it very short and said….
> 'I am afraid I have some bad news Susan in light of the downturn of activity in the housing market, savings and cost cutting measures are being considered throughout the company and unfortunately I have decided to make your position redundant and therefore you are redundant.'
> I paused to allow this to set in and she did seem shocked and started to get teary eyed. I then ploughed on and explained the severance package as outlined above. I did say I was sorry to have to do this but savings had to be made."

16. The respondent accepts that the conversation took place in this way. Although they call this a 'consultation meeting', it does not seem to include any consultation at all. It was clearly a decision that had already been made when the claimant came into the room.

17. I also heard some evidence about advice that the respondent had taken on the process. As I understand it, their HR officer gave some advice, perhaps to Mr Hill and perhaps to Mr Robson but it seems to relate to the number of employees and perhaps to collective consultation rather to the question of individual consultation. As indicated earlier nobody appeared to have considered looking at their own handbook and taking any of the steps referred to there.

18. The claimant was sent a letter confirming the decision by Mr Hill. It says that the claimant's position has been made redundant and "*we are unable to find you suitable alternative employment within the company*". It went on to say that "*some offices are unprofitable and this has resulted in having to reduce costs*". The claimant was thanked for her hard work and contribution to the company. It is clear from what Mr Robson says about the meeting and the letter that she was not informed of any right of appeal. The claimant did work her notice and her employment was then terminated and she was paid the appropriate statutory sums in redundancy payments.

19. I did hear some evidence about someone who was employed a little while after the claimant left. This appears to be an individual called Mr Paul Copping who started towards the end of September. Mr Robson told me that the discussions had started with Mr Robson a couple of months before he started and he said he was taken on after an employee in the Princes Risborough office, who was called Julie, had left. I am not entirely clear whether discussions started with Mr Copping before Julie left but in any event, he started in a very similar role to that carried out by the claimant, towards the end of September in a full time capacity.

The law

20. Redundancy is defined at Section 139 Employment Rights Act 1996 (ERA)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 –

(a) –

(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."

21. If the respondent provides sufficient evidence that redundancy was the reason for dismissal, I would thenconsider under s.98(4) ERA whether the dismissal was fair or unfair. This reads:-

"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"

22. A number of leading cases have guided tribunals over the years as to what is considered to be a fair dismissal where there is a redundancy situation. This will vary depending obviously on the size of the employer, on the number of employees being dismissed and so on. In broad terms, good industrial relations practice is to give as much warning as is possible, to consult individually with individually affected employees and look at means of avoiding redundancy, including looking for alternative employment, in consultation with those employees. That indeed is what the respondent's own procedure envisages.

Conclusions

23. The respondent has not provided sufficient evidence for me to conclude that the dismissal of this employee was because she was redundant under the definition set out in s.139 ERA. As simply as I can put it, I have not heard sufficient evidence that there was a need for employees carrying out work of the kind the claimant was carrying out to be reduced. I am simply not satisfied that that work had ceased or diminished or that it was expected to

cease or diminish because I have not heard any evidence about work other people were doing. Whilst I accept that there was a downturn in the market and losses showing at both these offices, I bear in mind that very shortly after the claimant was dismissed a new employee was employed on a full-time basis carrying out work which she had been doing not very long before that on a part time basis.

24. I appreciate that there might have been a need for cost reductions and there were some financial difficulties. That alone is not evidence of a need to reduce employees. Bearing in mind that the burden of proof rests on the respondent to prove the reason for dismissal, I am not satisfied that the reason for the claimant's dismissal was redundancy under the statutory definition.

25. That means that the respondent has failed to show a potentially fair reason for dismissal under ERA that the dismissal must be unfair.

26. However, it is right that I go on to consider, in case I am wrong this was not a redundancy situation, if it was redundancy, whether the dismissal was fair or unfair under s98(4)ERA. For these purposes I will go through the list of issues and I do not think it will be of any surprise to the respondent given their honest admission that the procedures were not followed correctly.

27. I cannot say that the claimant was sufficiently warned given the complete absence of any warning whatsoever. I cannot say there was meaningful consultation and indeed, there was none at all. I cannot say that the respondent applied its mind to a fair selection pool as there was no pool at all. Nor did they apply fair selection criteria, given the decision to focus solely on the claimant. I cannot say that suitable alternatives were considered and of course the respondent accepts that they did not give her a right of appeal.

28. For all these reasons, this is plainly an unfair dismissal. The respondent not only failed to do any investigation of their own with respect to what would normally be considered to be a fair dismissal in these circumstances, but failed to look at their own policy which would be, one would think, the first place that they would go. I appreciate that it is a relatively small organisation, but there is a considerable amount of readily available material now which can be easily accessed which provides information on how a procedure on redundancy should take place. The respondent's case has not been helped by the respondent's confusion about the reason for the downturn and when the decision to dismiss the claimant was taken, and Mr Robson's comments on the claimant's attitude to work. They have, however, honestly and openly, accepted the failures in the procedure. In any event, having taken into account everything that I have been told, I cannot say that this was a fair dismissal, even if the reason had been redundancy. The claimant's claim for unfair dismissal must succeed.

Remedy

29. After I gave my oral judgment above, we moved on to remedy. The claimant's representative told me that she was not interested in an order for reinstatement or re-engagement, so we moved on to consider compensation. The parties had some time to see whether they could agree net wages and some other points and then I came back and dealt with the matter.

30. The figure for net loss was eventually agreed and it is a weekly amount of £346.15 and that is what I have used for my calculations. The major difference between the parties was the period of time over which I would award loss. I therefore have to consider whether the claimant has mitigated her loss to date and how long into the future I might award loss, assessing when she might find work. There was also the question of whether I could consider an uplift under s.207(A) of the Trade Union Labour Consolidation and Relations Consolidation Act (TULC(R)A) with respect to any failure to follow the ACAS Code on Discipline and Grievances.

31. My **conclusions** on remedy are as follows. I am satisfied that the claimant has mitigated her loss to date. I consider the steps that she has taken to look for work are reasonable. In view of the fact that her employment with the respondent had been on a part-time basis, it was reasonable for her to look for work on that basis after her dismissal for a period of time at least. I am satisfied that the other steps she has taken, including registering with agencies, having gone for one interview and pursued other contacts, is sensible and sufficient mitigation. I am therefore going to award her loss of wages to date.

32. Considering then the future, I understand that the claimant has now extended what she is looking for to include the possibility of full-time work. I bear in mind that she is in her early 60s and that may impact, although it should not, on her ability to secure employment. The respondent produced information on vacancies in the area. The claimant is fairly optimistic about securing employment and I am therefore going to award her 13 weeks' loss from today's date in the hope that she will find equivalent work within that time.

33. As far as the question on the ACAS uplift is concerned, I have decided I cannot apply an uplift in this case. The ACAS Code does not apply to these circumstances. Although I have not been satisfied by the respondent's evidence with respect to this being a redundancy dismissal, neither do I believe that they were contemplating conduct or capability proceedings. This is not a case where the Code applies and I will therefore not apply an uplift to the awards that I make.

34. The net figure for weekly wages is £346.15. I calculate that there are 28 weeks from the date of the end of notice to today so that gives a figure of £9,692.20. I add to that pension loss, I have used the figure of £19. 98 which is a six month figure and I have then calculated that to be a weekly loss of £7.69 so that is also multiplied by 28 and that is £215.32. So the losses to date are £9,907.52. I am going to award a sum of £350 for loss of statutory rights. So that makes a loss of £10,257.52.

35. In accordance with my findings with respect to future loss I have multiplied £346.15 by 13 giving £4,499.95. Also the £7.69 pension loss multiplied by 13 which is £99.97 so future loss is £4,599.92.

36. The total compensatory award is £10,257.52 + £4599.92 which equals £14,857.44.

37. I also award costs for tribunal fees in the sum of £1200. These sums are to be paid by the respondent to the claimant.

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Employment Judge Manley

Date: 8 February 2017

Sent to the parties on: .....

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For the Tribunal Office