

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 5 July 2013

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

STEPHENSON COLLEGE

APPELLANT

MR A JACKSON

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Employment Tribunal decided that the employer/Appellant's decision to dismiss the Claimant for redundancy when a co-worker had volunteered for redundancy was one that no reasonable employer would have taken and was therefore unfair. On a fair reading of the Tribunal's decision they had not wrongly taken into account the co-worker's subsequent resignation and their decision was one that was open to them on the facts.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by Stephenson College who are the Respondents below against a decision of Employment Judge Evans in the Nottingham Employment Tribunal which was sent out to the parties on 9 October 2012. It is not disputed that the Claimant was dismissed for redundancy with effect from 31 May 2012. The particular finding that Stephenson College appeal against is that the dismissal was nevertheless unfair because another employee called Mr Cooper who was within the redundancy pool applied for voluntary redundancy in the course of the redundancy exercise and the Employment Tribunal found that the decision to refuse Mr Cooper's voluntary application was one that no reasonable employer would have taken so that the decision to dismiss Mr Jackson by way of compulsory redundancy was unreasonable and therefore unfair.

2. The relevant findings of fact are as follows:

“6. The Claimant was employed by the Respondent as a trainer in brickwork maintenance operations from 26th April until his dismissal.

7. The Respondent undertook a review of its activities in order to identify how its outgoings could be reduced. The review began in early 2012 and resulted in various costs savings measures being introduced.

8. The document setting out the results of the review stated “The review of this area has identified that brickwork has more capacity of training assessing than required. The ER caseload report indicates that there is an over capacity of 51 case loads which equates to one post” The Tribunal finds that this was an accurate reflection of the position in the brickwork section. The review document was dated 19th March 2012.

9. The review document proceeded on the basis there would be redundancies, set out various pools for selection; that of the Claimant was as follows “construction in the brickwork area. All lecturers, trainers, trainer B's will be placed at risk. A group consultation meeting will be held followed by an individual consultation meetings within two to three days.

11. On 19th April 2012 the Claimant had an individual consultation meeting with Mr Hinds who explained that the Claimant was at risk of redundancy [I should say that Mr Hinds was the faculty head for construction and while I am on the identity of personnel, Miss Thompspon-Windley was the Human Resources Manager]. A copy of the selection criteria was provided to the Claimant, he is recorded as saying that he had almost completed his HNC Level 4 qualification. The Tribunal finds that at this meeting the Claimant actually told Mr Hinds that he had completed the second year of his level 5 HNC and he expected to receive a certificate showing that he had been given the qualification shortly. The Tribunal finds Mr Hinds told the Claimant that he would not receive any score for this HNC because he had not at the point of time when the scoring was taking place obtained the qualification. The Tribunal also finds that Mr Hinds was of the view that the Claimant was likely to have the HNC Level 5 qualification in the near future. Finally, the Tribunal finds the Claimant had not at the point of this meeting obtained a level 4 qualification although it may have been the

case that completing the first year of the HNC Level 5 was akin to having obtained level 4, the Claimant had not actually obtained a level 4.

14. On or around 4th May 2012 Mr Hinds carried out the redundancy scoring for the Claimant's pool. The Claimant scored ten points, the worst score in his pool (the higher the points the worse the score), Mr Cooper scored nine points, the second equal worst scores and the scores of the other employees in the pool were nine, eight, seven, seven and six [I just interpose there that the scores are set out in a document that I have seen at pages 85 and 86 of the bundle and it is perfectly apparent that Mr Jackson, the Claimant, and Mr Cooper scored the same on all heads except for subjqual, which I am told relates to qualifications and in that respect Mr Cooper got zero points because he had the HNC Level 4, Mr Jackson got one point which was what took him one point over Mr Cooper which made him come out worse in the redundancy score process].

15. On 9th May the Claimant had a meeting with Mr Hinds and the Vice-Principal, Mr Kelly, at which he was informed he had been selected for redundancy.

3. And then reading on to paragraph 20 under the heading, "Mr Scott Cooper's Application for Voluntary Redundancy":

"20. Mr Cooper applied for voluntary redundancy in April 2012. The Tribunal finds that Mr Cooper was unhappy in his role and struggling with it and that this was known to Mr Hinds who did not believe that Mr Cooper was performing well. For example, Mr Cooper had asked Mr Hinds via another employee whether he could have some support with administrative work. Mr Hinds had considered that Mr Cooper had as much support in this respect as other employees and commented in his evidence, "I didn't think he was utilising his admin time efficiently" Mr Cooper resigned and left the Respondent shortly after the conclusion of the redundancy exercise.

21. Turning to the reasons why Mr Cooper's application for voluntary redundancy was refused, Mr Hinds, the manager of Mr Cooper, said that he had, "No idea". It was not his decision, he said. Further, the Tribunal finds that Mr Hinds had no input into the decision. Mr Hinds commented that the skill sets of Mr Cooper and the Claimant were very similar and that the only real difference was that Mr Cooper already had a HNC Level 4 qualification although he did not suggest that there was in practical terms any particular advantage to this. Miss Thompson-Windley who was at the senior management team meeting at which the decision was taken said that 'it seemed to come down the qualification'. Previously she said in answer to a question by the Tribunal that it came down to the Respondent wanting to retain Mr Cooper's 'skill set', but when asked what she meant by that she said 'she would defer to Mr Hinds' (who had not at that point given evidence) by which the Tribunal understood that Miss Thompson-Windley had little knowledge of the relative skill sets of the Claimant and Mr Cooper.

22. Further, it was clear that both Mrs Thompson-Windley and Mr Hinds thought there was little to divide Mr Cooper and the Claimant. Mrs Thompson-Windley commented that 'it was a close call as to which member of the brickwork team was ultimately selected for redundancy'. Mr Hinds commented that 'As the scoring was so close I met with the HR Consultant a second time to verify the scores that I have given.

23. The Respondent did not put in any evidence before the Tribunal in relation to the reason that the application for voluntary redundancy of Mr Cooper was rejected and so the Claimant was selected for redundancy beyond the difference in qualification, for example the Respondent did not argue that the Claimant was in some way a fundamentally unsatisfactory employee, that this was reflected in his low score and this is why Mr Cooper's application had been rejected."

4. Then the relevant conclusions on this point are at paragraphs 49 to 52.

“49. The Tribunal noted that there are many reasons for an employer to decide not to accept a volunteer for redundancy and, instead, to make a different employee compulsorily redundant. The employer may conclude that the volunteer has skills which it cannot afford to lose, or that he is generally a more satisfactory employee than the employee who will otherwise be selected. In most circumstances, the dismissal of the employee originally selected will be fair. The Tribunal concluded that it should indeed be slow to conclude that a dismissal in these circumstances was unfair, and should in particular bear in mind that it should not fall into the trap of the substitution mind-set [I should interpose that paragraph 49 is under a heading which is a submission made by the Claimant to the effect that his dismissal was unfair because the Respondent did not accept the voluntary redundancy application of Mr Scott Cooper which if accepted would have meant that the Claimant would not have been dismissed].

50. However, in this case, as the Tribunal has found, the volunteer, Mr Cooper, was actually the next in line to be selected for redundancy, having scored (jointly with the other employee) the worst score after that of the Claimant. The evidence of Mr Hinds and Mrs Thompson-Windley was, in effect, that there was very little between them. Further, Mr Cooper was not performing his role in a particularly satisfactory manner. Equally he was unhappy in his role as evidenced by his resignation which took place soon after the redundancy exercise, and the Respondent knew this.

51. Further, there was no evidence that the employer actually attached any real value of the qualification that Mr Cooper had (and in any event it knew that the Claimant would in all likelihood soon have the same qualification), although this was said to be the only reason for rejecting his application for voluntary redundancy. Finally, the Respondent did not argue that the Claimant was an unsatisfactory employee and should, as such, remain selected.

52. In light of these matters, the Tribunal concluded that the decision of the Respondent to refuse the application for voluntary redundancy of Mr Cooper and make the Claimant redundant was a decision that no reasonable employer would have taken. Accordingly the Tribunal concluded that the dismissal of the Claimant was unfair.”

5. Before leaving the facts, I could not help noticing a document in the papers, which I am not sure if the Tribunal refer to but it is in there at page 46, which is the Stephenson College redundancy policy and that says unsurprisingly, towards the bottom, “The college will endeavour to avoid compulsory redundancies by using the following strategies ...” and one of them is seeking volunteers for redundancy or early retirement.

6. The first ground of appeal is that the Tribunal failed to consider the totality of the process. They found that the scoring system was a sensible one, that it was carried out carefully and conscientiously and that it follows Mr Jackson scored lowest (or highest) and that therefore on the face of it he should have been the one made redundant.

7. I was referred to a case in this context called **Taylor v OCS Group Ltd** which talks about the need to look at the totality of the process. **Taylor v OCS** was a conduct case

concerned with the nature of the internal appeal within the respondent in that case. It does not seem to me that it has really got anything to do with this case for the reason very succinctly put by Mr Henderson. In this case the Tribunal did not find that the process of scoring or anything like that was unfair. What they found was unfair was the substantive decision to choose the Claimant rather than Mr Cooper for redundancy.

8. The second ground of appeal relates to Mr Cooper's subsequent resignation which is referred to twice in the passages from the reasons that I have read out, once at paragraph 20 and again at paragraph 50 of the reasons. I agree entirely with Mr Williams, who appears for the Appellant, that the fact that Mr Cooper resigned shortly after the conclusion of the redundancy exercise was wholly irrelevant to the issues that had to be decided by the Employment Tribunal and that it would have been an error of law to have taken that matter into account.

9. Reading the two paragraphs in context, however, I am quite satisfied that the Tribunal did not take the fact of resignation into account when reaching their decision. They made a clear finding of fact that Cooper was unhappy, was struggling and had a problem with administrative work and that Mr Hinds knew all those things at the time of the redundancy exercise and well before Mr Cooper decided to resign. They perhaps gratuitously but understandably threw in to the story the fact that he did then resign: that fact confirmed the finding that he was unhappy but it is clear the Tribunal found that Mr Hinds already knew about that unhappiness. So I am quite satisfied that they did not take that impermissible factor into account at all.

10. The other two points raised by the Appellants seem to me really to amount to attacks on findings of fact. It is not being suggested that the Tribunal's decision was perverse and the finding that no reasonable employer would have taken the decision to make the Claimant rather than Mr Cooper redundant was one that seems to me to have been quite open to the Tribunal in

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the particular circumstances of this case. What the case came down to was that Mr Hinds, the relevant manager, could not see any difference between them that was material and had no idea why Mr Cooper was not selected given that he was volunteering. The other person who was called to support the decision, Ms Thompson-Windley, had no first hand knowledge as to why it was made and deferred to Mr Hinds. Given that that was the evidence it seems to me the decision by the Tribunal on the facts is completely unchallengeable.

11. I therefore reject this appeal.