Case Number: 3202937/2012

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EMPLOYMENT TRIBUNALS

Claimant: **Professor F Missirlis**

Respondent: **Queen Mary University of London**

Heard at: **East London Hearing Centre**

On: **1 – 3 August 2017**

Before: **Employment Judge Foxwell**

Members: **Ms J Houzer**
Mr P King

Representation

Claimant: Professor L Fradkin, Lay Representative

Respondent: Mr T Adkin, Counsel

JUDGMENT having been sent to the parties on 4 August 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 This is the remitted hearing of this claim to resolve two issues which the Employment Appeal Tribunal found that this Tribunal had overlooked in its Judgment and Reasons dismissing the claim which were sent to the parties on 19 March 2014. The issues are as follows:

> *1.1.3 Whether the job description of the new post in the School "Lecturer in Cell and Molecular Biology" (Reference: QMUL0973) – advertised by the Respondent on July 11th 2012 – was substantially similar to the Claimant's Lectureship in Cell Biology; and*
>
> *1.2.5 Whether the Respondent considered the Claimant for suitable alternative employment and whether the Respondent's decision to pay the Claimant in lieu of his notice period deprived the Claimant of his redeployment rights.*

2 The fundamental point in the appeal was that this Tribunal had omitted any reference to the posts advertised in July 2012 in its Reasons, rather it had referred to a later round of advertisements in February 2013. The fact of the July 2012 advertisements ("the 2012 posts") gives rise to the following possibilities: firstly, that these posts were suitable alternative employment which ought to have been offered to the Claimant because it was the same as or similar to his previous role; secondly, that the Claimant should, at least, have been offered an opportunity to apply for the posts as a redeployee rather than as a candidate on par with internal and external applicants not at risk of redundancy; and, thirdly, that the decision to dismiss the Claimant with pay in lieu of notice was intended to frustrate any chance of him being retained as an employee because of the existence of suitable alternative employment. These possibilities touch on the test of fairness contained in Section 98(4) of the Employment Rights Act 1996 and might arguably affect our finding on the reason for dismissal. Unsurprisingly, therefore, the EAT (His Honour Judge Richardson) remitted the matter to us to consider the omitted issues and to make such further findings of fact as are necessary to resolve them. Judge Richardson also gave the parties permission to adduce further evidence on the remitted issues and this has resulted in a significant quantity of new material for the Tribunal to consider.

3 The Claimant had pursued much wider appeals to the EAT and beyond but these were unsuccessful. In these circumstances our previous findings need only be disturbed insofar as is necessary to deal with the remitted issues. It is important, therefore, to read these Reasons in conjunction with our earlier ones.

The Hearing

4 The Tribunal heard further evidence from the parties. Mrs Samantha Hogan, an Assistant HR Partner, gave evidence for the Respondent. She had been employed by the Respondent at the time of the Claimant's dismissal but was not directly involved in the redundancy and restructure which led to it. She did not give evidence at the first hearing.

5 The Claimant gave further evidence in support of his claim and produced a medical report dated 14 November 2016 from Dr George Fieldman, a Consultant Chartered Psychologist. This report shows that the Claimant was suffering from an undiagnosed impairment, ADHD, in 2012.

6 Because of the complex and technical nature of their evidence we asked each witness to read their witness statement to the Tribunal. They were cross-examined on this. By agreement the Respondent gave evidence first, although the Tribunal reminded the parties that there is no burden of proof under Section 98(4) of the Employment Rights Act 1996.

7 In addition to this evidence the Tribunal considered the documents to which it was taken in a bundle prepared for this hearing. References to page numbers in these Reasons relate to that bundle and not the previous trial bundle.

8 Finally, both parties made closing submissions. Professor Fradkin had prepared a written closing which she read. She had also prepared an opening skeleton argument and provided a copy of her written submissions for the original hearing which we considered too. Mr Adkin had prepared a written skeleton which he spoke to.

9 The parties referred us to the relevant legal principles; these are summarised in our first decision but additionally Professor Fradkin relied on *Société Générale v Geys [2013] 1 AC 523* in support of her argument that the Claimant did not accepted termination of his employment on 29 June 2012 with pay in lieu of notice and, therefore, his employment continued during his notice period. She also referred to the provisions of the Health and Safety at Work Act 1974 as part of her argument that the Respondent owed, and had breached, a duty of care to the Claimant because of his undiagnosed medical condition. A further aspect of this submission was that the Respondent should and would have diagnosed this condition and made adjustments for it had the Claimant been interviewed for the 2012 posts.

10 Finally, the Tribunal looked at the witness statements and its notes of evidence from the original hearing. Remarkably little is said about these two remaining issues, particularly in the Respondent's witness statements, despite their importance. No doubt this was because they were subsumed in the many other controversies generated by this case.

The Basic Facts

11 The basic factual background is not in dispute. On 11 July 2012 the Respondent placed an advertisement to recruit two professors and up to seven lecturers or readers to the SBCS under reference QMUL0973. The advert said as follows (page 246-247):

> ***"Cell and Molecular Biology: QMUL0973***
>
> *We are looking to recruit at least two professors and up to seven posts at lecturer/senior lecturer/reader level. SBCS has research strengths in cell and molecular biology, including:*
>
> - *Photosynthesis*
> - *Biomedical sciences; where are collaborate with Barts and the London SMD*
>
> *In this division we have a particular interest in emphasising informatics (we anticipate appointing one professor in this are to help build a joint initiative with Barts and the London SMD) and the biomedical sciences; particularly human molecular biology, bioinformatics, immunology and infectious diseases. Further expansion in this division is anticipated over the next three years as a result of our new joint venture to teach biomedical sciences with Nanchang University in China.*
>
> *…….*
>
> ***Applicants to all divisions:***
>
> *Successful applicants will have a proven ability to conduct world-class research; the ability to maintain an internationally competitive research group and to secure the funding to support this research activity. Applicants must have the ability to teach in relevant areas. We will also be happy to consider applications from people with their own funding who wish to explore proleptic positions in the*

School."

12 The advertised posts were full-time and were expected to start in January 2013.

13 The Claimant was dismissed with pay in lieu of notice on 29 June 2012 (pages 241 – 242) and was not an employee at the time when this advert was placed. He nevertheless applied for the role as an external candidate but was not shortlisted for interview (page 257). The shortlisting was done by Professor Ruban, Professor Evans, Dr Stollewerk and Dr Wilkinson.

14 A second, similar recruitment exercise for lecturers was conducted in February 2013 (pages 266A – F). The Tribunal made findings about this previously and it is not part of the Claimant's case that these posts, when advertised in February 2013, were suitable alternative employment for an employee made redundant in 2012. He relies however on the fact that this was a re-advertising of some of the July 2012 posts and argues that what was done in the 2013 recruitment round is valuable evidence of what might have happened had he been given a redeployment opportunity, such as a trial period or a ring-fenced interview, in 2012.

The Claimant's Arguments

15 The Claimant contends that the job advertised in July 2012 was suitable alternative employment for him for the following reasons.

16 Firstly, that his work with fruit flies (drosophila) falls within the concept of *"bio-medical science"* referred to in the advert, particularly with regard to areas such as immunology and infectious diseases. He referred to statements from fellow researchers and extracts from newspaper and journal articles in support of this. He suggested also in this context that Professor Evans had misled the Respondent about this.

17 Secondly, he argues that the evidence shows that aspects of his teaching work had had to be done by a new recruit after he left; this was the evidence of Dr Curran who was called at the previous hearing.

18 Thirdly, he says that he was close to meeting the research quality criteria in the redundancy process at the time because he had a paper under consideration for publication in a high-impact journal (unfortunately, the article was not accepted by that journal for publication).

19 Fourthly, he says that an employer acting reasonably would have interviewed him for the post and perceived his undiagnosed mental health issue, ADHD, for which it would have made adjustments.

20 Fifthly, he says that an employer acting reasonably would have reduced the essential requirements for the job in the case of a redeployee and taken account of the Claimant's other attributes, for example the fact that he had supervised a PHD student (a criterion applied to staff with longer service than him but which he had not been required to meet).

21 The Claimant goes further than simply arguing that this was suitable alternative employment. He says that the new job was his old job repackaged (issue 1.1.3) and this was a reflection of Professor Evans' desire to get rid of him. A component of this case is the fact that a decision was made to dismiss him with pay with lieu of notice at the end of June 2012 rather than to permit him to remain an employee and therefore a potential redeployee for the full three months of his notice period.

22 Further aspects of trh Claimant's case that the application process was rigged against him relates to the treatment of two applicants in the 2013 round. These applicants were interviewed despite working with fruit flies and, in one case, despite the applicant meeting only one of the three relevant criteria, output, quality and grants. Although neither of these candidates was appointed, the Claimant argues that the fact that they were interviewed shows a degree of flexibility which should have afforded him an interview in July 2012. He also says that this illustrates that the study of fruit flies falls within the scope of bio-medical science.

23 A further strand of the Claimant's arguments concerns the performance management of another lecturer, NK, in 2013 (after the Claimant's dismissal). The Claimant argues that the Respondent did not adhere to the redundancy criteria rigidly when dealing with this performance issue as NK met only one of the three criteria used in the redundancy process. Nevertheless, Professor Evans treated NK as having passed the performance assessment when taking into account *"non-standard"* aspects. The Claimant says that this is evidence that different standards were applied at different times and shows that there was every possibility that he would have been found to have met the criteria for appointment to the 2012 posts in a *"non-standard"* way had he been afforded an interview.

24 The Claimant has adduced a substantial body of new evidence, which we considered, to support these arguments as summarised at paragraph 4 of his witness statement dated 2 July 2016.

The Respondent's Arguments

25 The Respondent's case is a simple one. It says that the July 2012 posts were ones created under the restructure that was part of the redundancy process which led to the Claimant's dismissal and that, as the Claimant had been considered for redeployment within the redundancy/restructure process but was found not to meet the required criteria, this could not be suitable alternative employment. Mr Adkin emphasised that the purpose of the redundancy/restructure was to improve the Respondent's research profile so that it came within the top 10% of UK universities.

26 The Respondent relies on the Tribunal's findings about the Claimant's disruptive conduct prior to his dismissal in support of its case that it was reasonable to dismiss with pay in lieu of notice in his case rather than to allow notice to run its ordinary course.

27 The Respondent denies that the new roles were simply the Claimant's job repackaged, referring to the requirement for proven ability to conduct world-class research.

Analysis and Further Findings of Fact

28 The Respondent has a redeployment policy which applies where an employee is at risk of redundancy and where formal consultation has ended (pages 121 – 130). The policy defines a suitable alternative role as follows:

> *"A suitable alternative role is one that an employee can reasonably be expected to undertake where:*
>
> - *the job is broadly similar in nature to the employee's current role or can be regarded as within the career path of the employee's profession*
>
> - *there is no significant difference between the essential criteria of the role and the redeployee's qualifications, skills and experience*
>
> - *the employee is able to meet the requirements of the person specification within the trial period and with reasonable support of training*
>
> - *the job is on the employee's current grade or no more than 1 grade below it*
>
> - *any loss in status can be eased by allowing the employee to grow in the job following development activity*
>
> - *the new post causes no significant disruption to the employee's personal circumstances arising out of the working arrangements e.g. working hours and location."*

29 The policy specifies that the trial period referred to in this rule should be between 4 and 12 weeks long.

30 Managers with staff to redeploy have an obligation to actively support such redeployees, including advising them of vacancies. Furthermore, the HR Department maintains a redeployment list and redeployees can register to be notified of opportunities. We accept Mrs Hogan's evidence that this is more suitable for administrative jobs than academic posts and note that the decision whether academic and research positions are suitable alternative employment rests with the vice-principal or equivalent for that sector. Redeployees should be invited for interview if they meeting the essential criteria for a role or might reasonably be expected to do so (see paragraph 6 of the redeployment process at page 126). These provisions may be described as the Claimant's *"redeployment rights"*. A key element in our judgment is the requirement to meet *"the essential criteria".*

31 We turn then against this background to our further findings of fact.

32 We find that Professor Evans <u>was</u> aware of the impending July 2012 posts when the Claimant was dismissed. In fact, he had envisaged the creation of some posts as part of the restructure (see pages 144-160) and the number of vacancies was a consequence of the Claimant and others having been assessed as not meeting the essential criteria within the redundancy process.

33 None of the fresh evidence or further submissions we have heard leads us to change our previous conclusion that the principal reason for dismissal was redundancy. Furthermore, nothing we have heard during the remitted hearing changes the conclusion at paragraph 192 of our earlier Reasons: the decision to dismiss with pay in lieu of notice was because of the manner of the Claimant's opposition to change, which was highly personal.

34 We do not find on the balance of probabilities that a reason for dismissing the Claimant with pay in lieu of notice was to defeat his redeployment rights. In our judgment the Respondent considered that the Claimant had already been assessed as unsuitable for the new roles in the restructure (the July 2012 posts) as part of the redundancy process (see paragraphs 90 – 93 of our previous decision).

35 We have considered the Claimant's argument that his employment did not end on 29 June 2012 because he did not accept the Respondent's repudiatory breach of contract but we reject it. This may be the position at common law under the principle in *Geys* but we are dealing with a statutory right and the issues under Section 98 of the Employment Rights Act 1996 must be decided as at the effective date of termination (which is defined in the Act).

36 We do not accept the Claimant's case that the lectureships advertised in July 2012 were simply his job repackaged. There were, of course, elements which were similar, for example the requirements to teach and to conduct research, but the quality and output of research was to be measured by new standards using *metrics* (see our previous Reasons for the definition of *metrics*). This approach may have been controversial but it was one which was open to the Respondent. An assessment of the Claimant had been undertaken by a faculty panel on an anonymised basis against criteria which had been published and consulted upon: he did not meet the criteria for appointment to the new structure in a Teaching & Research (*"T & R"*) role (which the July 2012 posts were). Furthermore, he scored too low compared with other at-risk workers to secure one of the few Teaching & Scholarship (*"T & S"*) roles. The outcome would have been the same had he been placed not in organismal biology (where there were redundancies) but in one of the other groups which were expanded but restructured (see paragraph 93 of our previous Reasons).

37 Because the new roles required holders to demonstrate they had met identified criteria, we do not find that that the new role was identical or substantially similar to the Claimant's previous job. It would have driven a coach and horses through the restructure to allocate the new roles to employees who had been assessed as not meeting the essential criteria which were central to the strategy for improving the Respondent's ranking.

38 We are satisfied that the evidence still shows (as we found previously) that there was no suitable alternative employment at the time of the Claimant's dismissal. This was unchanged after the dismissal: no evidence has been produced of any other potentially suitable posts apart from the July 2012 ones which arose during the three-month redeployment period the Claimant would have had had he not been dismissed with pay in lieu of notice.

39 We also observe that the July 2012 advert was for vacancies arising in January

2013 so there was no immediate vacancy in any event.

40 We found previously that, having regard to the Claimant's conduct prior to dismissal (for which he has now apologised), it was reasonable for the Respondent to dismiss with pay in lieu of notice when it did. We do not find that this was intended to deprive the Claimant of the benefit of the redeployment process although this had that effect. We are satisfied that there was no suitable alternative employment as the advertised posts arose out of the restructure which was part of the redundancy exercise and this restructure was predicated on meeting standards which the Claimant did not meet (see *Morgan v Welsh Rugby Union [2011] IRLR 376*).

41 We do not find that there was any prospect of the Claimant being appointed to the July 2012 posts. His case that his application would have been looked at in the context of an undiagnosed medical condition and/or by reference to modified criteria used in the 2013 round or when performance-managing NK is based on layers of speculation which we find unconvincing. More fundamentally, this ignores the point that these jobs arose from the restructure which was part of the redundancy exercise which led to his dismissal in the first place.

42 In reaching our conclusions we have considered the evidence the Claimant adduced to show that fruit fly research is relevant to, and may be regarded as part of bio-medical science. We accept this but have also had regard to his descriptive evidence that research is a spectrum with the ends - pure and applied - coming together to form a circle. It is a matter of judgment, in this case the employer's, where a field of research falls within this spectrum and we cannot say on the evidence presented that no reasonable employer would have regarded the Claimant's application for the July 2012 posts as failing to demonstrate the essential requirements. After all, the other applicants who had done research on fruit flies were not appointed either. So, insofar as it may be relevant, we find that the Respondent's decision not to short-list the Claimant for interview after his dismissal is not outside the band of reasonable responses of an employer. We have noted that other fruit fly specialists were interviewed in the second round in 2013 but were not appointed to the post.

43 For these reasons we remain of the view that the Claimant's dismissal was fair. Were we wrong in our conclusions about the substantive procedural fairness of the Claimant's dismissal we would have found that there was no prospect of the Claimant being offered the July 2012 roles for the following reasons:

43.1 He did not meet the research quality or funding criteria that had been applied.

43.2 There was no realistic prospect of him achieving either of these targets in a 4 to 12 week trial under the redeployment policy. He had had time before the redundancy selection to achieve these targets but had not done so.

43.3 The Respondent would have had regard to the Claimant's disruptive and offensive behaviour in the months before his dismissal.

44 Accordingly, our previous decision is affirmed.

Employment Judge Foxwell

15 August 2017