Case Number 2500324/17

EMPLOYMENT TRIBUNALS

Claimant ***Respondent***
Mr J Angus **Cleveland Potash Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at Middlesbrough On 24th & 25th July 2017
Before Employment Judge Garnon (sitting alone)

Appearances
For the Claimant: Mr S Healy of Counsel
For the Respondent: Mr A Sugarman of Counsel

JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed

REASONS

1. The Issue

This is a claim of unfair dismissal. It is admitted the principal reason for dismissal was redundancy. It affected many due to the reduction in potash mining. The only real issue is whether the dismissal of the claimant for that reason was fair within s 98(4) of the Employment Rights Act 1996 (the Act)

2 The Relevant Law

2.1. Section 98(4) of the Act says:
"Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.2. In Langston –v- Cranfield University the EAT said I must look at all ways in which a dismissal by reason of redundancy may be unfair (a) inadequate warning or consultation (b) unfair selection and (c) insufficient effort to find alternatives. Mr Healy wisely does not pursue the last because there were no suitable alternative vacancies.

2.3. The main case on fair consultation is R-v- British Coal Corporation ex parte Price in which fair consultation was defined as (a) discussion while proposals are still at a formative stage (b) adequate information on which to respond (c) adequate time in which to respond and (d) conscientious consideration of the response.

2.4. The main case on fair selection is British Aerospace –v- Green . Provided an employer sets up a selection method which can reasonably be described as fair and applies it without any overt sign of bias which would mar its fairness , it will have done what the law requires.

2.5. In all aspects substantive and procedural Iceland Frozen Foods v Jones (approved in HSBC v Madden and Sainsburys v Hitt) held I must not substitute my view for that of the employer unless its view falls outside the band of reasonable responses.

2.6. Selection criteria which are objective are preferable to those which are subjective, but in Samsung Electronics U K Ltd-v-Monte De Cruz EAT/0039/11/DM Underhill P. said

"Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement, .. Given the nature of the Claimant's job, we see nothing objectionable in principle in his being assessed on "subjective" criteria.

3. Findings of Fact and Conculsions

3.1. I heard the evidence of Matthew Hart, an HR officer of the respondent, Mr Chris Wilson, the manager who did the individual consultations, Mr Nigel Todd who marked the vital part of the selection matrix in conjunction with his manager Mr Simon Hunter, and Mr Andrew Fulton who heard the claimant's appeal against dismissal. I also heard the claimant and Mr Michael Barclay, a Unite shop steward.

3.2 The claimant was born on 27 July 1956. He was employed from 15 August 1988 until his dismissal on 29 November 2016. Having regard to his age and length of service he would probably be one of the most expensive people to make redundant.

3.3. Until 2008 he worked mainly underground. From 1988 to 2004 he had 11 accidents, none of which were taken into account in the marking of the safety criterion in the selection matrix. Between 2004 and 2008 he had five accidents in 50 months. The fourth was on 19 February 2007 which kept him off work sick until September 2008. He brought a claim for personal injury which a judge dismissed saying he was the "author of his own misfortune". On 21 December 2008 he had another accident. He came back for a short time but was off from February 2009 to September 2010. Again he brought a claim for personal injury, but that claim was discontinued.

3.4. Following his fifth accident he had a residual injury so he was moved to the lamp room, possibly as a reasonable adjustment to begin with, but then he obtained a

permanent role there. I accept he was never happy in the lamp room. It is a non-hazardous environment. He applied several times to go back underground but he was consistently refused because of his safety record. He raised grievances which were fully investigated and, on one occasion at least, appealed, all with the same result. The accident investigation reports upon which the conclusion he was at least in part to blame for the accidents he had sustained had been done by a variety of managers.

3.5. I am obliged to both Counsel for agreeing at the outset I am not to conduct five mini personal injury trials. It is not so much a question of "fault" , but of the claimant failing to spot and prevent avoidable risks, called, in the respondent's parlance, "hazard awareness". Under the new regime to be in force after the redundancy exercise there would be less supervision of employees so hazard awareness was more vital than ever.

3.6. The claimant's failure to this day to recognise his own contribution to these earlier accidents is important. He was sent on an IOSH course sometime ago as a result of a grievance he had raised and then he went to see Mr Todd who is a specialist in health and safety, as is his manager Mr Hunter, asking when he could go back underground. Mr Todd discussed matters with him and formed the opinion the claimant had not learned the lessons of the IOSH course. He e-mailed Mr Hart saying he was still unhappy with the prospect of the claimant returning to underground work. To this day the claimant does not accept he was solely to blame for any of the accidents but previously he had not even accepted partial blame. This led Mr Todd to the conclusion that it is not possible to teach a person who does not accept the need to be taught.

3.7. In early 2016 the claimant signed a new contract as an infrastructure miner. In earlier redundancies lamp room staff had been put in a pool of their own. There were four men, each doing 12 hour shifts covering the operation 24/7 all year round with the exception of Christmas Day and Boxing Day. The new regime would mean infrastructure miners would do short stints, maybe two hours, in the lamp room and several other jobs, mostly if not exclusively in hazardous environments.

3.8. In the 2016 round of redundancies during which the claimant was selected for dismissal, there was a single pool of 77 infrastructure miners who had to be reduced to 60. There were 7 four hour collective consultation meetings with the unions which gave rise to selection criteria at pages 100-102. The criterion " training required" produced a low but fair result for the claimant for the simple reason he had spent so many years in the lamp room he would need ordinary refresher training but also need to be trained on a lot of new machinery that had been acquired. On a criterion somewhat confusingly called "ability to undertake future role", the claimant scored poorly because this criterion was to do with physical ability to perform these roles and it was objectively scored having regard to occupational health department records.

3.9. On the criterion "Safety record over the past 24 months (16 August 2014-15 August 2016)", there are five marks, 10 meant "excellent safety record (always works safely and/or undertakes all safety duties)" ; 8 meant "has a good safety record, mostly works safely and/or undertakes all safety duties"; 6 meant "has an acceptable safety

record, often works safely and/or mostly undertakes safety duties"; 4 meant "has a poor safety record (sometimes fails to work safely and/or sometimes fails to always undertake relevant safety duties)"; 1 meant "has an unacceptable safety record (often fails to work safely and/or often fails to undertake relevant safety duties)". There is then a footnote which reads, "Assessment of safety record will be made using a range of information held on pro HSE (which includes accident records and safety audits completed)".

3.10. The claimant scored 4 , which made all the difference . His total was 37 but had he achieved a 6 mark would have been 39, at which point he would have drawn with another person , retained his job on the "tie breaker" criterion of length of service and that other person would have lost his job . Any two year period for assessment really is not logical but is a practical rule of thumb in most cases. It was introduced to ensure the people doing the scoring of what were in total 414 employees did not have to delve into ancient history to make comparisons in the vast majority of cases.

3.11. I have no doubt the scoring under this section was done by Mr Todd and Mr Hunter who were amply qualified people and it was done without bias. It is partially a subjective opinion but entirely evidence based. Those who are very good or are very bad in their safety records tend to be noticed by Mr Todd and Mr Hunter. The claimant does stand out from the crowd. When they came to scoring him they realised the agreed two year period produced an absurd result. They said this in a memo to Mr Hart, at page 98. There was another lamp room worker in respect of whom the result would have been equally absurd but they did not have to score him because he took voluntary redundancy.

3.12. The absurdity can be easily illustrated by an example I invented and put to both the claimant and Mr Barclay. Imagine Man A who, like the claimant, had over 28 years underground, first 26 years with an impeccable safety record. Then for a two year period perhaps whilst suffering the effects of some domestic or health crisis , he loses concentration and has two accidents in two years, both of which he admits were partly his own fault. That person on the face of it would score badly. Imagine Man B with an equal length of service, for the first 26 years of which he had a history of frequent accidents and due to injury , like the claimant, was off work ill and on return taken out of the hazardous areas for whatever reason, maybe a reasonable adjustment for a disability, for two years before the selection. That person would on the face of it score a perfect 10. I put to them this would not be fair either on the respondent **or on the others in the pool**. I go a step further. If Man A had come to the Tribunal and said in reliance on British Aerospace v Green the method of selection could not reasonably be described as fair, his chances of winning would be relatively high. The claimant did see the point when I put it to him but adopted Mr Barclay's view, which I understand, that sticking to what had been agreed in collective consultation is something which the employer should do in the interests of transparency and predictability.

3.13. I reject Mr Healy's submission that paragraph 1702 of Harvey implies what is agreed in collective consultation should always be stuck to. The paragraph says it is

"dangerous" for an employer to depart from agreed selection criteria, because it opens up the argument that they are targeting certain people until they get "the right result" . I am satisfied that was not in fact the case here. In good faith Mr Todd and Mr Hunter both believed the claimant was not suitable for underground work and as fully explained in their memo, page 98-99, saw the agreed criteria as not having addressed the issue which they only spotted when it came to be practically applied. The agreed criteria had simply not taken into account the possibility that in the two year period a particular person would have been out of any sort of hazardous environment. There was a similar occasion in a pervious redundancy exercise where a criterion imposed upon managers, read literally, produced such a distorted result. It was the subject of an earlier case tried by Employment Judge Johnson whose decision was the same as my own .

3.14. Even in commercial negotiations express terms may not always be clear and need to be supplemented by implied terms to make an agreement workable. Lord Hoffman's said in Investors Compensation Scheme-v-West Bromwich Building Society :

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.
The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201:
". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

3.15. Even more so is this the case in a non contractual statement of intent which is what this selection criterion matrix was. In effect the respondent had to find some reliable means of comparing employees on a like for like basis . They chose to look at the period 2004 to 2008 which was, punctuated by sickness absences in the claimant's history, approximately two and a half years of actual attendance at work in a hazardous environment. There were 2 major accidents in the last two years he was underground. There were 5 in a period of 50 months during over 20 months of which he was off sick. The conclusion the claimant should be marked as a 4 on the basis of either period of assessment was well within the band of reasonable responses.

3.16. Mr Healy also made submissions about consultation. I find it was impeccable but Mr Healy says the claimant should have been given a chance to "discuss" the accidents if, as Mr Todd admitted, he looked at the accident investigation reports to help make his decision . In other words Mr Healy was asking for the claimant to be given a further opportunity to disagree he was in some way responsible for those accidents. I cannot accept that submission. By analogy with,Davies v Sandwell Metropolitan Borough Council a conduct case which held the merits of previous written warnings given in good faith should be not be revisited, it seems to me the conclusions of previous accident investigation reports, especially when a County Court Judge has agreed with one after a full trial , should not be revisited.

3.17. Taymech-v-Ryan and other cases all considered in Capita Hartshead-v-Byard UKEAT/0445/11 by Silber J. held in choosing pools for selection an employer has a broad measure of discretion and the important point is it must give some thought to the matter. It did, and the pool chosen was fair, indeed was almost self selecting. Had they put only lamp room men in a pool all of them would have been selected for redundancy.

3.18. My conclusion on the only real point, which was well argued by Mr Healy on behalf of the claimant, that whatever is agreed in collective consultation should be stuck to is that elevates the legitimate aims of transparency and predictability to a paramount and overriding consideration. I do not agree that is the law. To make what was written fair and workable , the respondent , in effect , read into "*Safety record over the past 24 months (16 August 2014-15 August 2016)*" additional words " *or, if the claimant was not in that period working in hazardous environments such other period of similar length during which he was"* Where there are good reasons for departing from what has been written then in my view, as in this case, the decision to adopt a more reliable period of comparison is well within the band of reasonable responses. In those circumstances the complaint of unfair dismissal is not well-founded and is dismissed.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4th AUGUST 2017

JUDGMENT SENT TO THE PARTIES ON

7 August 2017
P Trewick

FOR THE TRIBUNAL