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EMPLOYMENT TRIBUNALS

Claimant: **Ms A Warden**

Respondent: **Montague Foreman Farms**

Heard at: **East London Hearing Centre**

On: **29 September 2017**

Before: **Employment Judge M Brewer**

Representation

Claimant: In person

Respondent: Mr Paul Powlesland (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The claim for unfair dismissal fails and is dismissed.**

2. **The claim for statutory redundancy pay fails and is dismissed.**

REASONS

Introduction

1 The Claimant brings the following claims:

1.1 that she was unfairly dismissed because:

1.1.1 there was no genuine redundancy situation;

1.1.2 that the procedure followed was unfair; and

1.2 that she did not receive the correct amount of redundancy pay.

2 The Claimant represented herself and gave evidence on her own behalf. The Respondent was represented by Mr Powlesland of counsel. I heard from Anabel Barker, partner, Mr David Webber, Farm Manager and Ben Howard, Assistant Farm Manager. I had a bundle of documents and written witness statements from all of the witnesses and I heard oral submissions at the end from both parties.

Issues

3 The issues in this case are:

3.1 What was the reason for dismissal and is that a potentially fair reason within the meaning of Section 98(2) or 98(1)(b)?

3.2 If there is a potentially fair reason, was the procedure followed within the band of reasonable responses?

3.3 If the Claimant was made redundant, did she receive the correct amount of redundancy pay?

The Law

4 The relevant provisions, in relation to the fairness of any dismissal, arise out of the Employment Rights Act 1996 {ERA) and are the following (s,98);

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—…
>
> (c) is that the employee was redundant,
>
> (4) In any other case 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."

5 Thus, there is an initial burden of proof upon the respondent in a claim for unfair dismissal to establish a potentially fair reason for dismissal pursuant to s.98 (1) and (2). Should the respondent establish a potentially fair reason, then the test on overall fairness is neutral; there is no burden of proof on either side. Overall fairness is determined having regard to the requirements of s.98 (4),

6 I have considered the following principles from case law.

7 In De Grasse v Stockwell Tools Ltd UKEAT/529/89, the EAT noted that the employer's size and administrative resources were relevant to the question of reasonableness and could therefore affect the nature and degree of formality of any consultation. However, this does not excuse a small employer from failing to consult at all.

8 In order for an employer to consult properly, it must have an open mind and still be capable of influence about the matters which form the subject matter of consultation. This suggests that consultation will only be meaningful if it happens at a formative stage rather than when there is a fait accompli. As was stated in R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72:

> "Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting."

9 The key components of fair consultation were further identified in British Coal as:

- Consultation when the proposals are still at a formative stage
- Adequate information on which to respond
- Adequate time in which to respond
- Conscientious consideration of the response to the consultation.

10 There are no prescribed timescales within which consultation should take place, but as a rule, the shorter the consultation, the more likely it is that its quality may be called into question. In Rogers v Slimma Plc UKEAT/0168/06 and 0182/07, the EAT held that the tribunal had been entitled to find on the facts of the case that seven days' consultation

with individuals was the "bare minimum" but was nevertheless an adequate period.

11 There are no fixed rules about how the pool should be defined (Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255 (CA)) and, unless there is a collectively agreed or customary selection pool, an employer has a wide measure of flexibility in this regard. However, the following principles have emerged from case law:

11.1 In deciding whether a redundancy selection was unfair, a tribunal must decide whether the employer's choice of pool was within the range of reasonable responses; it should not substitute its own view as to what the pool should have been (Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM);

11.2 The question of how the pool should be defined is primarily a matter for the employer to determine and, provided an employer genuinely applies its mind to the choice of a pool, it will be difficult for an employee (or a tribunal) to challenge that choice;

11.3 A particular set of circumstances may give rise to a variety of permissible pools and there is no legal requirement that a pool should be limited to employees doing the same or similar work.

12 The fact that employers can choose a redundancy pool that is the same size as the number of redundancies to be made was confirmed by the EAT in Capita Hartshead Ltd v Byard [2012] IRLR 814. It has been held to be fair to place employees in a pool of one in the following cases:

12.1 An export manager who covered a particular geographical territory, even though there were eight export managers covering other territories who could also have been included in the redundancy exercise (see Alvis Vickers Ltd v Lloyd EAT/0785/04);

12.2 An employee who had been posted to China from the UK business, when the employer decided to outsource the Chinese work (see Halpin v Sandpiper Books Ltd UKEAT/0171/11);

12.3 A golf club steward who was the only employee carrying out that role (see Wrexham Golf Club Co Ltd v Ingham UKEAT/0190/12).

13 A dismissal is likely to be unfair if, at the time of dismissal, the employer gave no consideration to whether suitable alternative employment existed within its organisation. The case of Vokes Limited v Bear [1973] IRLR 363 established this principle, on the basis that the availability of alternative employment was relevant to all the circumstances of the case (having regard to the statutory test).

Findings of Fact

14 I make the following findings of fact in this case. The Respondent is a partnership. Mr Foreman, Ms Barker and Ms Gooch are the partners.

15 The Claimant was employed by the Respondent from 1 August 2014 to 1 December 2016. At the date of termination of her employment she was employed as the Livery Yard Manager.

16 Prior to the termination of the Claimant's employment there were three employees of the Respondent being Mr Webber, the Farm Manager, Mrs Webber, the Office Manager and the Claimant. Work on the farm was also undertaken by a mix of casual and seasonal workers and contractors.

17 Prior to the start of what the Respondent says was the redundancy process, it sought to establish the costs of making the Claimant redundant.

18 The reason given by the Respondent for what is says is the redundancy situation in this case is the need to future proof of the business by two things: first taking some costs out of the business and, second, and related to that, rationalising the structure. That would enable it for example to use less casual staff and contracted labour. In short the proposal was to go from the three employees referred to above, to two, at least in the immediate term, by removing the job of Livery Yard Manager.

19 The Claimant's duties as Livery Yard Manager encompassed all aspects of that role including dealing with chemicals for weed killing, some fencing work, removing horse manure and all of the things one would expect that comes with that role.

20 At some point in the redundancy process a job description for a new assistant farm manager role was created. That role was eventually filled on 1 July 2017 by Mr Ben Howard.

21 Having determined that the Claimant was at risk of redundancy the Respondent entered a period of both formal and informal consultation with the Claimant. There were what might be termed formal consultation meetings on 13 October 2016 and 27 October 2016. The dismissal meeting itself took place on 1 December 2016. In between those formal meetings there were a number of less formal meetings between Ms Barker and the Claimant.

22 On 1 December 2016 the Claimant was dismissed, the Respondent says, by reason of redundancy and she was paid three months in lieu of her notice, she was paid for accrued untaken holiday at the termination date and she was paid a statutory redundancy payment in the sum of £2,260.50.

23 The dismissal was carried out at a meeting held with the Claimant by both Ms Barker and the farm manager, Mr Webber.

24 The Claimant was offered and took up the right of appeal against her dismissal. That appeal took place on 21 December 2016. Ms Barker and Mr Webber also heard the appeal. That appeal was in the end unsuccessful.

25 These are then the brief and essential facts in this case.

Discussion

26 The first issue the Claimant raises is whether there was a genuine redundancy situation in this case. I am entirely satisfied that there was. The definition of redundancy in Section 135 of the Employment Rights Act 1996 is clearly met, in that the employer required fewer employees to do work of a particular kind. The work of a work of a particular kind was the job of Livery Yard Manager. In short the proposal was to remove the Claimant's role. It transpired that as a result of the Claimant's dismissal her job did in fact cease to exist. The various functions of the Livery Yard Manager continued of course, and they were carried out in part by Ms Barker, who did the broadly administrative work of the role, the more labour intensive work was carried out by Mr Webber and some of the farm's casual workers. Indeed, since the Claimant accepted this, it was very difficult to understand the Claimant's position on why she said there was not a genuine redundancy in this situation. She seemed to suggest that because the Respondent had sought information about the costs of her redundancy before talking to her about this, somehow this impugned the process. She also referred to the decision about removing her role being 'deliberate'. Neither of those things are surprising. It would be odd if a business seeking to cut costs, or rationalise its structure, or reorganise in circumstances where fewer people might be employed would not, in advance, consider the costs and implication of doing that and of course by definition that is a deliberate act. In my judgment nothing turns on that at all.

27 I am entirely satisfied that post the dismissal of the Claimant there is no one undertaking the role of Livery Yard Manager, that the role was removed and that the reason for the Claimant's dismissal was redundancy.

28 Redundancy is obviously a potentially fair reason for dismissal under Section 98(2)(c) of the Employment Rights Act 1996 and the question of fairness essentially turns on three key things. These are: the pool for selection, selection and consultation.

29 I am satisfied that the Claimant was in a unique post and in a pool of one. It was perfectly reasonable given the size of this employer that it should undertake the exercise in that way. It follows from that, that no issue of selection criteria arises.

30 So far as the consultation process is concerned, it seems to me that for an employer of this size the process undertaken more than meets the standard of what is reasonable in all the circumstances; it was clearly in the band of reasonable responses. The Claimant was first told at the beginning of October 2016 that she was at risk of redundancy. There followed two formal consultation meetings and a number of informal meetings. If the notes of the meetings are anything to go by, and the Claimant has accepted, albeit rather late in the day, that the notes are accurate, there was clearly an exchange of views about the proposal, although I accept entirely that the Claimant was upset by the process and did not contribute as much as she would perhaps have liked during those meetings. Having said that she was clearly more relaxed during the less formal one-to-one meetings with Ms Barker, and I am satisfied that overall there was a fair process of consultation in this case.

31 The one matter that gave me pause for thought is the fact that both Ms Barker and Mr Webber carried out the dismissal and the appeal. That is obviously not ideal. On the whole somebody hearing an appeal should not be the same person who took the original

decision. However there are two reasons why in a redundancy case, particularly given the nature of the employer in this case, I find that the process followed was reasonable. First reason is that a fair redundancy procedure does not in fact require an appeal in the same sense as that required in, say, a conduct dismissal. The test for me to consider is whether overall, taking into account everything that was done, the procedure followed by the Respondent was fair. The 'appeal' in a redundancy case is another meeting at which the dismissed employee has an opportunity to make any further representations about what happened to them. In many redundancy cases this final meeting happens prior to dismissal but in my view nothing turns on that. The second reason is the size of this employer. I accept it would have been possible for example, for Mr Webber to have dismissed the Claimant and for Ms Barker to have carried out the appeal or alternatively for Ms Gooch to be involved, although on the evidence I heard she is not particularly involved in this business. As to My Webber dismissing the Claimant, since the Respondent is a partnership the partners are the employers with joint and several liability and thus Mr Webber could only have dismissed with the authority of the partners in any event. I have looked at the process in the round to see whether what took place was fair and reasonable particularly looking at the content of the consultation, dismissal and appeal meetings and I am satisfied that it was. The Respondent explained to the Claimant the reasons for its proposals, there were a number of meetings, admittedly not very long meetings but nevertheless, looking at the notes, the content was what one would expect in a redundancy case, and for all those reasons it seems to me the process to that stage, notwithstanding my reservations about the participants of particular points in time was fair and reasonable.

32 The issue of alternative employment has taken up some time today but in my judgment this is something of a red herring. Although the Respondent presented the Claimant with what was a draft job description of an assistant farm manager, but was then firmed up rather latterly although it did not change so, and although the Claimant gave evidence that she could have fulfilled that role, the fact remains that the role was not filled at the date the Claimant was made redundant nor was it filled for some time afterwards, not until 1 July 2017. Even if the Claimant had taken the point that payment in lieu of notice was unreasonable given that that the new post was filled latterly, had she worked her notice she would have left at the beginning of March 2017 still some four months before the assistant farm manager post was filled. Nothing about the creation and filling of that post comes close to making the Respondent's process unfair. *Absent* the assistant farm manager role there were no vacancies in the Respondent business.

33 The other matter raised by the Claimant was about the tone and location of the consultation meetings. I am satisfied that although she found the meetings difficult and distressing after having been employed for 12 years and essentially having all of that taken away, which included housing, and although no doubt the meetings could have been held elsewhere, it was not unreasonable of the Respondent to want to hold them at its location to suit the running of its business. This did not come close to making the process unfair.

34 The final matter in this case is the question of statutory redundancy pay. Initially the Claimant's concern was that the Respondent has underestimated her earnings because it had excluded from the calculation the livery costs that she was charged. The Claimant had three horses at the Respondent's livery yard for which she paid. Had the Respondent deducted or reduced by deduction the amount of the Claimant's pay by the

costs of her livery, I would have been with the Claimant. However my understanding of the evidence was that was not the case. The Respondent has set out at page 135 of the bundle a summary of the Claimant's earnings and I am satisfied that they accurately reflect what she in fact earned. She paid for her livery, the costs were not deducted from her pay. Because she did not earn sufficient to go past the individual personal tax threshold her gross and net earnings are the same. Having gone through the calculation with the parties I am satisfied given 12 years' service, with 10 of those at 1.5 weeks pay and 2 at 1 week's pay, the correct statutory redundancy payment of £2,269.50 was made.

35 For all those reasons both the claim for unfair dismissal and the claim for a redundancy payment fails and are dismissed.

Costs

36 The Respondent through Mr Powlesland made an application for costs limited to the costs of his attendance today in the sum of £1,250. I heard submission from him and also enquired as to the Claimant's means. I note that by Rule 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 I may have regard to the paying party's ability to pay and in this case I have done so.

37 Mr Powlesland's application is that the Claimant behaved unreasonably once it became clear how weak her case was. She was sent a letter "without prejudice save as to costs" on 3 August 2017 setting out the weaknesses in her case which are similar to my findings today. The pillars relied upon by the Claimant in her case fell away one by one as she essentially conceded a number of key points which I have set out in my judgment. The fact that she did not take legal advice was her risk. The Claimant says that she continues to feel strongly that the new job was engineered for Mr Howard and that he stepped in to do her role. However she has conceded that her role as it had existed when she did it, no longer exists. There is a central contradiction in her position and despite it being gone through in some details today she maintains something which is manifestly wrong. The Claimant is in work. She hopes to get a promotion in due course and although she pays for her accommodation and has only a small disposal income given my findings and the way the Claimant puts her case, and given the very clear costs warning, I am satisfied that in the circumstances she did behave unreasonably in continuing this case beyond the point at which she was threatened with costs during the Respondent's attempt to settle. That being the case I order the Claimant to pay costs to the Respondent in the sum of £1,250.

Employment Judge Brewer

6 November 2017