EMPLOYMENT TRIBUNALS

Claimant: Mrs B Fairbanks

Respondent: David Ross Education Trust

Heard at: Leicester

On: Thursday 14 September 2017

Before: Employment Judge Vernon (sitting alone)

Representation
Claimant: Mr E Brown (Trade Union Representative)
Respondent: Mr M Palmer (Counsel)

JUDGMENT having been sent to the parties on 11 November 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By an ET1 Claim Form, presented to the Tribunal on 12th May 2017, the Claimant has presented a claim of unfair dismissal. The Claimant's claim, in summary, is as follows. She was informed by letter dated 12th October 2016 that her employment was to be terminated by reason of redundancy and that her employment would end on 31st December 2016. The Claimant alleges that her employment was not in fact redundant, and that in any event, she had not been warned that her role was at risk of redundancy. She asserts that she had not been meaningfully consulted prior to being dismissed, that the Respondent had not fairly applied objective selection criteria prior to dismissing her, and that the Respondent had failed to find or look for suitable alternative employment for her.

2. On 7th June 2017, the Respondent filed an ET3 Response in which it denied that the Claimant was unfairly dismissed. The Respondent asserted that the Claimant was dismissed either by reason of redundancy, or for some other substantial reason, namely a restructuring of the staffing resource at Charnwood College. The Respondent also asserts that a fair procedure

was followed and that accordingly the Claimant was dismissed fairly. Alternatively, the Respondent says that, if the Claimant's dismissal was unfair due to some procedural defect, then the principles of the case of **Polkey v A E Dayton Services Limited [1988] 1 AC 344** apply; the Respondent argues that the Claimant would have been dismissed in any event, either at the same time as she was dismissed or soon thereafter, and in any event by 31st August 2017.

Correct Respondent

3. The claim presented by the Claimant named the Respondent as The Governors Charnwood College. Following presentation of the ET3, correspondence was received by the Tribunal from the David Ross Education Trust ("the Trust"), indicating that The Trust was in fact the correct Respondent to these proceedings. Opportunity has been given both in writing and as part of this hearing to the Claimant to contest that. I was informed during the course of the hearing by Mr Brown that that position is not challenged. Therefore, the name of the Respondent in these proceedings is amended to be "David Ross Education Trust". References in these reasons to the Respondent are references to the Trust.

The Hearing and Evidence

4. The Tribunal was provided with witness statements from a) the Claimant and b) Mr Richard Widdison, who is the Head of HR for the Respondent. Both of those individuals gave oral evidence. Both confirmed the truth of their witness statements and were cross examined by the opposing party. I was also provided with a relatively small bundle of documents, running from page 1 to page 75.

Issues

5. A suggested list of issues was prepared by Mr Palmer (Counsel for the Respondent). That list had been seen and read in advance of the hearing by Mr Brown, the Claimant's representative. I was informed that the suggested list of issues was agreed between the parties, and accordingly I have adopted it as the basis for my consideration of the claim.

Facts

6. The Claimant was appointed as a teacher at Charnwood College on 26th August 2014. A copy of her statement of terms and conditions appears in the bundle at pages 28 to 34. That document indicates that she was appointed to the post of teacher. The role was not given any more specific definition. She was employed on a 0.7 Full Time Equivalent contract. She actually commenced working at Charnwood College on 1st September 2014.

7. It is not in dispute that the Claimant worked in the Design and Technology Department at the College. The Department offered a number of subjects including Food Technology, Art, Textiles, Graphics and Resistant Materials, the latter being more commonly known to those of a slightly older generation as woodwork or metalwork.

8. The Claimant spent the majority of her time teaching Food Technology. Her evidence is that approximately 80% of her time was spent teaching that subject. During the remaining periods she also taught other design and technology subjects.

9. It was common ground between the parties that all staff in the design and technology department had a particular speciality subject, but that all staff were able to teach, and on occasion taught, other design and technology subjects according to the needs of the department.

10. In April 2015 Charnwood College became part of the Respondent. The Respondent is a multi-academy trust which is made up of a number of primary and secondary schools in the Lincolnshire area.

11. During the time that the Claimant was employed by the Respondent, three redundancy exercises were carried out, the first of which took place in July 2015. During that exercise, the Claimant was required to complete a skills audit. She was told her post was safe on the basis that she was the only Food Technology teacher at the school.

12. The second exercise took place in March 2016. The Claimant again completed a skills audit. She was again told that Food Technology would continue to be taught at the school and so her post was not at risk of redundancy.

13. Prior to that second redundancy exercise, the Claimant had commenced a period of sickness absence as a result of a problem with her back. That period of absence commenced on 25th January 2016.

14. Prior to that period of sickness absence, an options exercise was undertaken at the school on the 21st January 2016. The Claimant gave evidence that there were 15 students who had chosen Food Technology as an option for the following academic year i.e. 2016/2017. At that time, according to the Claimant's evidence, she was already teaching 12 to 13 students on a GCSE course based on Food Technology.

15. By the summer of 2016, the Respondent had determined (for financial reasons) that it was necessary to make savings in the school. Mr Widdison gave evidence that the school had the lowest ever number of students on record, and as a result had sustained a drop in its budget of over £700,000.

16. As a result, the Respondent took the decision that it was necessary to reduce the staffing numbers, both in terms of teaching staff and support staff.

17. A framework document was drafted, which appears in the bundle at pages 35 to 39. The document identified that there was a need to reduce staff, including a need to reduce the number of teaching staff at the school. The document included a table under the heading 'Teaching Staff reductions', which indicated that the areas or subjects that were to be reduced were "All Faculties". The reduction in resource was to be 5.00 Full Time Equivalent.

18. The document also indicated that a consultation period would run until 30th September.

19. The document was sent by email to all staff on 30th August 2016, using the work email addresses of the staff.

20. On the evidence that I have heard and seen, it would appear that the Claimant either did not receive that email, or at least did not see it, given that a) it had been sent to her work email address and b) she was off work on sickness absence at the time. However, it is common ground that the Claimant was sent a further copy by email to her personal email address on 14th September.

21. The approach adopted by the Respondent was to ask for volunteers for redundancy initially. Thereafter, if there was a still a need to make redundancies, the Respondent would further consider the position.

22. On 22nd September 2016 the Respondent wrote a further email to all staff confirming that the consultation period would come to an end on 30th September.

23. It is common ground that the Claimant did not apply for voluntary redundancy.

24. A meeting with staff members took place on 3rd October 2016, the purpose of which was to discuss the outcome of the consultation.

25. Prior to that meeting, the Respondent had made a decision to stop offering classes in Food Technology. The evidence that I received as to what that means was slightly unclear. Mr Widdison's witness statement indicates that no classes in food technology were to be offered. However, on 13th October 2016, when confirming the termination of the Claimant's employment and the reasons for it, Mark Sutton, who is the principal of Charnwood College (or who was the principal at that time), said the following:

> "*As a result I can confirm that due to the college's financial situation, as outlined in the consultation, and the need to provide academic provision on a limited budget, there will be no examined courses on the curriculum for Food Technology going forward. This therefore means that your post of Teacher of Food Technology is to be made redundant from 31 December 2016.*" (emphasis added)

26. On the basis of the evidence I heard, I find that the decision to stop offering classes in Food Technology is most likely related to the GCSE courses that were offered by the college, rather than more generally to include the Food Technology element of teaching provided to pupils in years 7 to 9 at the school. I received no specific evidence from the Respondent indicating that that element of teaching, namely Food Technology for the younger pupils, was also to come to an end.

27. It is again common ground that the Claimant was unable to attend the meeting on the 3rd October due to her ill-health.

28. A further consultation document had been drafted for the purposes of that meeting. That document confirmed the need to make savings at the college. It confirmed the need to reduce the numbers of teaching staff at the college, and that the need for reduction would potentially affect all faculties. It further identified that the need to reduce teaching staff resources had reduced from 5 to 4.1 Full Time Equivalent roles.

29. That document, and a PowerPoint presentation was the focus of the meeting on 3rd October. Both documents were subsequently sent to the Claimant with a letter dated 6th October. That letter invited the Claimant to a one-to-one consultation meeting which was scheduled to take place on 12th October.

30. Thereafter, there was an exchange of emails between the Claimant and Mrs Phillips, a Personnel Assistant at the school. The Claimant indicated that she would like her trade union representative to be present at the consultation meeting, but that her representative could not make a meeting on 12th October. In response, Mrs Phillips said that the school was unable to offer another date for individual consultation meeting with the Claimant but could offer to explain to her in writing how the consultation process would affect her role. The Claimant agreed to receive the relevant information in writing.

31. What then followed was a letter dated 12th October 2016. That letter included the following as its opening paragraph:

> "*Further to consultation period held from 30 August until 30 September 2016 to explore alternatives of redundancy and ways to save significant amounts of money for Charnwood College and the meeting held on 3 October 2016, I can confirm that it is with much regret that I have no alternative to issue you with notice of termination of employment on the grounds of redundancy.*"

32. That letter was drafted in the name of, and was signed by, Mark Sutton. The letter also provided details of the redundancy payment which would be made to the Claimant.

33. As a result, the Claimant's employment came to an end with effect from 31st December 2016, that being the end of the Claimant's period of notice as set out in the letter from Mr Sutton.

34. After 31st December 2016, it is again common ground that Food Technology classes continued at the school, including classes on the examined courses. Those classes were provided by a Mr Gillespie, another member of the teaching staff in the design and technology department. The evidence of Mr Widdison was that, of Mr Gillespie's 50 teaching slots each week, 3 of those slots involved him teaching Food Technology after 31st December 2016.

35. It is also common ground that, as of September 2017, no GCSE Food Technology courses are taught at the college.

36. In addition, the Respondent says that there were no other alternative posts available for the Claimant by way of suitable alternative employment, either

at the school itself, or within the multi-academy Trust. As I understood the Claimant's position, she did not seek to challenge that assertion. In her evidence, she could provide no evidence of any vacancies that existed at Charnwood College and appeared to accept that there were no other vacancies within a reasonable travelling distance for her within any other school within the Trust.

Applicable Law

37. The Claimant's claim is one of unfair dismissal. Unfair dismissal claims are governed by the provisions of Section 98 of the Employment Rights Act 1996.

38. Consideration of claims under that Section involve a two-stage process. Firstly, it is for the Respondent employer to show the principal reason for the decision to dismiss an employee, and that that principal reason falls within one of the potentially fair reasons for dismissal set out in Section 98(1)(b) or 98(2) of the 1996 Act. As stated earlier, it is the Respondent's case that the Claimant was dismissed either by reason of redundancy or for some other substantial reason. Therefore, the Respondent relies on either Section 98(1)(b), or Section 98(2)(c) of the 1996 Act.

39. If the Respondent is able to discharge its burden, the Tribunal must then consider whether the decision to dismiss the Claimant for that reason, is fair or unfair pursuant to the provisions of Section 98(4) of the 1996 Act.

40. As the Respondent relies on redundancy as the reason for the Claimant's dismissal, it is necessary to consider the provisions of Section 139 of the Employment Rights Act 1996, which defines redundancy for the purposes of the 1996 Act. The Respondent relies upon Section 139(1)(b)(ii) of the Act. That section provides as follows:

"*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:*

…

the fact that the requirements of that business:

…

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."

41. If dismissal is by reason of redundancy, then when considering the reasonableness of such a decision to dismiss, the Tribunal should have regard to the authority of **Williams v Compair Maxam Limited [1982] ICR 156**. In that case, the Employment Appeal Tribunal said that, in general terms, certain principles should be considered in any redundancy dismissal case when considering the reasonableness of any dismissal, including the following:

    41.1 whether selection criteria were objectively chosen and fairly applied;

    41.2 whether there was warning and consultation regarding potential redundancies;

41.3 whether any trade union had been consulted; and

41.4 whether there was any alternative work available.

42. I pause at this stage to note that it is not for the Employment Tribunal to impose its own standards on any employer or employee when considering a claim of unfair dismissal. The question for the Tribunal is whether what the Respondent did fell within a range of conduct which a reasonable employer could have adopted in the circumstances.

43. In the event that the Tribunal concludes that a dismissal is unfair because of some procedural defect, I must also go on to consider the principles set out in the authority of **Polkey**. Those principles require me to consider the chances, in percentage terms, that the Claimant would have been dismissed in any event even if a fair procedure had been followed.

44. In considering that issue, I must also have regard to the case of **Software 2000 Limited v Andrews [2007] ICR 825**. In effect, that case indicates that, even in circumstances where it is not clear what would have happened, the Tribunal should enter into some degree of speculation on the basis of the evidence available to it in order to make a decision as to what would have happened had a fair procedure been followed.

Analysis and Conclusions

45. The Respondent's primary case is that the Claimant was dismissed by reason of redundancy. As set out above, it is for the Respondent to show the reason for its decision to dismiss, and that that reason falls within one of the potentially fair reasons for dismissal.

46. I am satisfied, on the basis of the findings made above, that the factual reason for the Claimant's termination of employment was the decision taken by the Respondent to cease to provide an examined course in Food Technology with effect from September 2017.

47. I come to that view because that is exactly what is stated in the letter drafted in the name of Mr Sutton dated 13th October 2016 which appears at page 65 of the bundle. That letter confirms to the Claimant that her employment has been terminated and provides reasons for that decision.

48. The question then is, does that decision amount to redundancy as defined by Section 139 of the Employment Rights Act, and specifically Section 139(1)(b)(ii), given that that is the subsection relied upon by the Respondent.

49. As set out above, Section 139(1)(b)(ii) applies where the requirements of a business 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.

50. I have considered carefully whether such diminution can include a situation where the number of employees required to teach a subject remains the same, but the extent of hours spent teaching it are reduced.

51. Having carefully considered the position, I am satisfied that such circumstances do fall within the definition of redundancy within Section 139(1)(b)(ii). In my judgment, the diminution referred to within that subsection can occur in one of two ways. Firstly, it can occur where the amount of work required to be done remains the same, but the number of employees required to fulfil the requirement reduces. Secondly, it can occur where the number of employees remains the same, but the amount of work required to be done reduces.

52. As I have already indicated, I am also satisfied that it was the decision to reduce the amount of time spent teaching Food Technology in the school which was the reason for the decision to dismiss the Claimant. I am therefore satisfied that, in this case, the Claimant was dismissed by reason of redundancy. Redundancy is a potentially fair reason for dismissal pursuant to Section 98(2)(c) of the Employment Rights Act 1996.

53. The next issue is the reasonableness of the Respondent's decision to dismiss the Claimant by reason of redundancy.

54. I start by finding that there was no failing on the part of the Respondent in either looking for or providing suitable alternative employment for the Claimant. As indicated earlier, in her evidence, the Claimant effectively conceded that a) there were no other vacancies available for her at the school, and that b) there were no other vacancies within a reasonable distance from Charnwood College which could have been made available to her.

55. Therefore, the issues which I have primarily considered are the issues of: a) warning of redundancy; b) consultation; and c) the need to apply objective selection criteria.

56. It has been argued on behalf of the Claimant that there was a failure to warn her of the risk of redundancy which she faced. I do not accept that. I am satisfied that the consultation document drafted by the Respondent at the outset of the selection exercise did not expressly say that Food Technology as a teaching area was at risk. However, it was clear from the document that there was a risk or need to reduce teaching staff, potentially affecting "All Faculties" to the tune of 5.0 Full Time Equivalent members of staff. By the time redundancies were actually made, that had reduced to 4.1 Full Time Equivalent teaching staff. However, even at that stage, the consultation document indicated that "All Faculties" were potentially at risk.

57. In my judgment, the Claimant was simply not entitled to assume that Food Technology as a teaching area was unaffected by that, even in circumstances where Food Technology had been unaffected by the earlier redundancy exercises. In those circumstances I find that it is not right to say that she was not warned of the risk of redundancy, albeit that the risk was only set out in general terms. As I indicated earlier, it is not for the Tribunal to impose its own standards, but to consider whether what the Respondent did was within a range of reasonable conduct. For the reasons I have given, I am satisfied the Respondent did act within such a range in warning the Claimant of the risk of redundancy.

58. The remaining issues therefore are consultation and the identification and application of objective criteria. I will consider those issues in reverse order, dealing firstly with objective criteria.

59. The Respondent says that no objective criteria were applied in the Claimant's case. The Respondent says that there was no need for objective criteria, given that the Claimant was the only person affected, in effect occupying a pool of one for redundancy. That was the evidence of Mr Widdison in his witness statement.

60. I am satisfied that the basis for the Respondent's position is that the Claimant was the only teacher who spent the majority of her time teaching Food Technology. That much is uncontroversial. However, I am also satisfied a) that Food Technology classes were offered by the school to pupils in years seven to nine and would continue to be offered, and b) that the GCSE Food Technology course was to continue to be provided after 31st December 2016 for the remainder of that academic year. It is also not in dispute that other staff at the school within the Design & Technology Department occasionally taught Food Technology, and similarly, that the Claimant occasionally taught other design and technology subjects.

61. In those circumstances, in my judgment, it was outside of the range of reasonable approaches for the Respondent to treat the Claimant as being in a pool of one for redundancy. In my judgment, it was unreasonable a) not to include all design & technology teachers within a pool and b) to fail to carry out a skills audit of the design & technology department as had occurred in previous selection exercises and to look at how to achieve any necessary reduction in the staffing resource thereafter.

62. In addition, having considered the issue of consultation, I also find on the facts of this case that the Claimant was not meaningfully consulted in relation to her redundancy. In my judgment, consultation in these circumstances should reasonably comprise both group and individual consultation. I am satisfied that the Claimant was offered an individual meeting which was to take place on 12th October. However, the date of that meeting was not convenient for reasons given above. No further offer of an alternative date for that meeting was provided by the Respondent. There is no clear explanation as to why a further date could not be offered. The Respondent indicated that it was in the middle of conducting interviews in relation to other departments affected by the redundancy exercise, but in my judgment, that does not adequately explain why the decision had to be taken at that time, and why a further meeting could not have been offered to the Claimant.

63. Further, it was Mr Widdison's evidence that the purpose of the meeting scheduled for 12th October was a discussion regarding the letter dated 12th October which appears in the bundle at Page 62. As set out earlier, that letter begins by saying that it provides confirmation that the college has no alternative but to issue the Claimant with notice of termination of her employment on the grounds of redundancy. In my judgment, an assessment of that evidence indicates that that letter was drafted on the basis that there was no other option but for the Claimant to be dismissed by reason of redundancy. If that was to be the basis of any discussion at the meeting on 12th October, it is difficult to see what prospect there was for the

Claimant to persuade the Respondent to take a different course. That does not amount to meaningful consultation on an individual basis regarding redundancy.

64. For the reasons set out above, I find that the approach taken by the Respondent was not within a range of reasonable conduct which a reasonable employer could have followed. For those reasons I find that the decision to dismiss the Claimant for redundancy was unreasonable and unfair.

65. I must next go on to consider the issue of **Polkey**. In terms, I must consider what would likely have happened if the Claimant had been consulted and/or the Respondent had adopted a pool approach to the redundancy selection process, as I have found would have been reasonable. In other words, would the Claimant have been dismissed in any event and/or what are the percentage prospects that she would have been?

66. In considering this issue I have taken into account the following matters:

    66.1 The Claimant was the only staff member who spent the majority of her time teaching Food Technology. It was her own evidence that 80% of her time was spent doing so.

    66.2 Other staff were capable of teaching Food Technology, including the GCSE course. Mr Gillespie taught that subject at GCSE level after the termination of the Claimant's employment.

    66.3 There was a clear need to reduce costs at the college.

    66.4 That resulted in a decision to reduce the teaching staff at the college by 4.1 Full Time Equivalent teaching staff members.

    66.5 The GCSE course was not to be offered with effect from September 2017.

67. I pause to indicate at this stage that it is not for the Tribunal to question business decisions made by Respondents in terms of decisions to make redundancies.

68. Taking into account all of the factors set out above and acknowledging that I have had to speculate in considering this issue, in my judgment it is highly likely that the Claimant would have been dismissed by reason of redundancy in any event. The prospects that the Claimant would not have been dismissed by reason of redundancy are, in my judgment, limited. Doing the best I can, taking into account the factors that I have outlined, I would place those prospects in percentage terms in the region of 10%.

69. However, I find that that position could only have reasonably and fairly been reached once a skills audit had been carried out and a selection exercise been carried out within the design & technology department. The amount of time that that would have taken is a little unclear on the evidence, but again, doing the best that I can on the evidence I have, it appears that interviews in relation to other departments at the school occurred within two weeks of the outcome of the consultation exercise. Thereafter, I would realistically

expect another two weeks to be taken to make a decision as to what should happen following the redundancy selection exercise.

70. Therefore, in my judgment, a four-week period is a likely period during which any such skills audit and selection exercise would have taken place.

71. For all of those reasons, I am satisfied, subject to any arguments about the amounts involved, that the Claimant is entitled to an award for unfair dismissal including any earnings that she would have received during that four-week period, and 10% of any earnings that she would have received thereafter for a period that is to be the subject of further submissions from the parties.

Remedy

72. After orally delivering my decision on the issues of liability, including the issue of **Polkey**, I gave the opportunity to the parties to seek to agree an amount of financial compensation to be paid to the Claimant to reflect the findings and conclusions set out above.

73. Having done so, the parties came to an agreement. I was informed by Mr Palmer that the parties agreed that the Claimant should receive a compensatory award in the sum of £2,500. It was agreed that there was no basic award payable to the Claimant.

74. It was also agreed that the provisions of the Recoupment Regulations do not apply to this case.

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Employment Judge Vernon

Date 6 April 2018

REASONS SENT TO THE PARTIES ON

07 April 2018

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FOR THE TRIBUNAL OFFICE