Case No: 2600926/2017

EMPLOYMENT TRIBUNALS

Claimant	**-v-**	**Respondent**
Ms Lindsey Dawn Price (1)		Tesco Stores Limited
Ms Beth Ealden (2)		

FINAL HEARING

Heard at: Nottingham **On:** 23 January 2018

Before: Employment Judge Evans (sitting alone)

Representation

For the Claimants: In person
For the Respondent: Mr Jack Feeny of Counsel

JUDGMENT

The Claimants were fairly dismissed. The claim of each of them of unfair dismissal fails.

REASONS

Background

1. The First Claimant was dismissed by the Respondent by reason of redundancy on 31 March 2017. The Second Claimant was dismissed by the Respondent by reason of redundancy on 4 May 2017. Following their dismissals, both brought a claim of unfair dismissal against the Respondent.

2. The Hearing of the claims took place on 23 January 2018. The Claimants represented themselves. The Respondent was represented by Mr Feeny of Counsel.

3. Neil Harvey, a People Business Manager, and Rachel Wilby, a Regional People Partner, gave evidence on behalf of the Respondent. The Claimants both gave evidence in support of their claims.

4. The Tribunal had before it an agreed bundle the last page of which was numbered 212. A page 213 was added to the bundle at the beginning of the Hearing with the agreement of all parties. All page references are to the agreed bundle unless otherwise stated.

5. These reasons deal with liability and the reduction of any compensatory award under section 123(1) of the Employment Rights Act 1996 ("the 1996 Act") as a result of the application of the principle derived from the case of Polkey v AE Dayton Services Ltd 1988 ICR 142 ("the Polkey Principle").

The issues

6. There was a discussion of the issues at the beginning of the Hearing. The Claimants agreed that the only claim each of them had brought was of unfair dismissal. There was also no dispute that the reason for each of their dismissals was redundancy.

7. I asked the Claimants to explain why they said that their dismissals were unfair. The Claimants' factual argument was as follows. The redundancy situation resulting in their dismissals had arisen as a result of a business decision by the Respondent to remove the role of People Clerk and to replace it with the role of People Adviser. The new role would encompass various responsibilities which had previously been undertaken by Distribution Centre Managers. In addition, the working hours would change: previously People Clerks had worked Mondays to Fridays (from 07:00 to 15:00 in the case of the Claimants). People Advisers would be required to work shifts and at weekends.

8. The Claimants contended (and this was not accepted by the Respondent) that in January 2017 Mr Andy Roper, the Distribution Centre Manager at the Hinckley Distribution Centre where the Claimants worked, had "presented" them with a new rota and that this would have involved them working both Saturday and Sunday every other weekend, including a late shift. They said that the shift system presented to them was as set out on page 212 and 213 of the bundle. The shift system would mirror that of the Shift Managers, with each Shift Manager having, in effect, their own People Adviser. They had been told that there would be no negotiation about the shift system.

9. The Claimants contended that as a result of the new shift system being presented to them in this manner they both accepted redundancy rather than continue in employment with the Respondent in the new People Adviser roles.

10. The Claimants contended that the shift system which People Advisers had in fact been required to work was not that described to them. The shift system which People Advisers were in fact required to work was as set out on page 211 of the bundle. This did not require People Advisers at the Hinckley Distribution Centre to work Saturdays and Sundays every other weekend. Rather it required them to work from 08:00 to 16:00 on Saturday only every other weekend. The Claimants contended that they would have been prepared to work that shift system. The Claimants contended that if this shift system had been offered to them they would have remained in the employment of the Respondent as People Advisers rather than having chosen to take redundancy.

11. The Claimants argued that the difference between what they had been told by Mr Roper and what had in fact turned out to be the case in relation to the shift system that the People Advisers were required to work meant that their dismissals were unfair. The Claimants were unrepresented and did not put their argument in these precise terms but, realistically, their argument was that this difference meant that their dismissals were unfair either because they had been deceived by Mr Roper or because he had refused to consult with them in a meaningful manner about the details of the shift system that they would be required to work, so removing the possibility of them working shifts that were closer to their personal preferences.

The Law

12. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.

13. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). Redundancy is a fair reason falling within section 98(2).The burden of proof to show the reason and that it was a potentially fair reason is on the employer.

14. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.

15. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

16. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

17. When the reason for dismissal is redundancy, the Tribunal should have regard to the standards set out by the Employment Appeal Tribunal in Williams and ors v Compair Maxam Ltd 1982 ICR 156 in deciding whether the dismissal is fair under section 98(4). These include that:

    17.1. Employees should be warned and consulted about the redundancy;
    17.2. The selection criteria should be objectively chosen;
    17.3. The selection criteria should be fairly applied;
    17.4. If there is a union, its view should be sought;
    17.5. The employer should look to see if there is alternative work for the employees.

Findings of Fact

18. I do not in these findings of fact refer to all the evidence that was before me but I have taken all of it into account.

Collective consultation

19. The fact that the Respondent engaged in collective consultation with the trade union USDAW is not an answer to the complaints made by the Claimants but it was nevertheless the context in which their dismissals took place.

20. I find that the Respondent undertook an extensive collective consultation exercise with USDAW in relation to the replacement of People Clerks with People Advisers. The details of this exercise were set out in some detail in the witness statement of Mr Harvey. Five national collective consultation meetings took place and after each meeting an information pack was sent to local representatives for onwards transmission to and discussion with the affected People Clerks. The 30 day consultation period ran from 13 January 2017.

21. The bundle contained FAQs sent out just before the beginning of the collective consultation process (page 153BY). This included the following explanation of the change to hours:

Why are we changing the People Clerical roles?

Our pilot in Lichfield and Hinckley has shown us that these roles are critical in supporting our Managers and colleagues. To fully realise the benefits of the new structure and to realise our change plans for the people team in Distribution, we have decided to bring this role into scope.
By aligning our People Advisors to support our people on the shifts and times they work, we will be able to answer queries quicker, provide better support to Managers and focus on the things that matter to the people who work in our Distribution Centres.

At the moment they work Monday to Friday 8 – 4 will they have to work weekends?

Yes, the new People Advisor roles are designed to cover all 3 shifts, across all days.
Our people work Monday-Sunday across all 3 shifts, so we need our People Advisors to be flexible and have availability to work weekends.
We will be sending out example rotas in a couple of weeks, as this change will be in the second phase of each wave.

22. As such, the general principle was clear: it was to align the role of People Advisers with the role of Managers so that HR related issues could be dealt with as and when they arose rather than only within the hours of 08:00 to 16:00 Monday to Friday (or 07:00 to 15:00 in the case of the Hinckley Distribution Centre where the Claimants works). I find that this general principle was a matter covered by the collective redundancy consultation process conducted by the Respondent with USDAW.

23. Mr Harvey gave evidence which I accept as true that, subject to the general principle that People Advisers would work a similar shift rota to the Manager they were supporting, the actual rotas to be worked by People Advisers were a matter for the individual Distribution Centre Managers. The details of these rotas were not as such negotiated during the collective consultation exercise.

The background to the introduction of the People Adviser role at Hinckley

24. The Claimants had been requested to take part in a trial or pilot of the People Adviser role at the Hinckley Distribution Centre in October 2016. They had taken advice from their union and had declined to take part. They were hostile to the pilot: they took the view that the Respondent was trying to change their role without consultation of agreement. They did not like the fact that they were being asked to take on some duties previously undertaken by managers without receiving any extra payment. As a result of the Claimants' response to the request that they take part in the trial or pilot it did not take place so far as they were concerned.

25. The hostility of the Claimants to the trial was demonstrated by their completion of a grievance registration form (page 37C) in which they complained of various matters including "nature of role and changes made".

Individual consultation with the Claimants – the informal consultation period

26. An unfortunate feature of this claim was that Mr Roper, the Manager at Hinckley Distribution Centre during the relevant period, had left the Respondent's employment and did not attend the Tribunal to give evidence. However there was a significant amount of documentation concerning the individual consultation process with the Claimants in the bundle which, with the evidence of the Claimants, has enabled me to make the following findings of fact.

27. There were formal consultation meetings with the First Claimant after the conclusion of the collective consultation process on 28 February 2017, 1 March 2017, 7 March 2017, 10 March 2017, 13 March 2017 and 29 March 2017. There were formal consultation meetings with the Second Claimant on 28 February 2017 and 1 March 2017. The Second Claimant went abroad on a six week "Lifestyle Break" in early March and her final consultation meeting took place with her agreement on 29 March 2017 by Skype (although she subsequently took issue with the fact that she was told that the management end of this call had taken place in a public space within the Respondent's premises).

28. However there had been informal meetings involving the Claimants and Mr Roper before and during the collective consultation period which ran from 13 January 2017.

29. So far as the Second Claimant was concerned, I find that on around 9 January 2017 she had a meeting with Mr Roper. I find that there was little substantive discussion at the meeting in part because the Second Claimant wanted to wait until the First Claimant was back from holiday.

30. The First Claimant was back from her holiday shortly after 9 January 2017. Neither the First nor the Second Claimant have precise recollections of the informal meetings that they had with Mr Roper during the collective consultation period. This is understandable, because those meetings were informal and were not documented in any way. However I find that during those meetings:

    30.1. The Claimants asked Mr Roper about the shifts that they would be working. He told them that they would be working shifts similar to the shifts worked by Managers at the Distribution Centre and showed them a document setting out the managers' shifts.

    30.2. The Claimants asked for further details. As a result of this, on 16 January 2017 he sent the email at page 152 and then asked the Shift Managers with whom the Claimants would be working for details of their rota. This resulted in the email at page 153 dated 16 January 2017. This contains the rota which is at page 212 and 213. However the email, from Matthew Mitchell, also states:

        > *As requested below is a copy of our rota, I will say we are currently looking at alternative [sic] because the weekends are draining us working the back to backs but obviously we'll bring it to you once we have something on paper.*

    30.3. Shortly after 16 January 2017 Mr Roper showed the Claimants the shift rota at page 212/213 but did not give them a copy of it. However I find he did not tell them that was the <u>exact</u> shift pattern that they would be working. I make this finding because:

        30.3.1. The email from Mr Mitchell of 16 January 2017 indicated that the Shift Managers were giving active consideration to changes to the weekend shift working so Mr Roper would have been unlikely to present the shift rota contained in that email as being set in stone when speaking to the Claimants about a change that was still some months away;

        30.3.2. On 27 February 2017 the First Claimant emailed Mr Roper (page 154A) stating, amongst other things:

            > *We have asked for rotas and redundancy figures on numerous occasions and we have had nothing…*

            I find that she would not have sent an email in these terms if she had been told that the shift rota that she had been shown was set in stone.

31. Overall, therefore, I do not therefore accept the Claimants' evidence that by 27 February 2017 they had been told that they would be working the shift rota at page 212/213. I find that what they had been told was that if they accepted the role of People Adviser they would be working a similar shift pattern to that worked by the Shift Managers in accordance with the agreement reached at national level as set out above. I find that they were frustrated that Mr Roper had not been more precise, hence the email of 27 February 2017, and also upset because they did not want to work shifts or at weekends.

Individual consultation with the Claimants – the formal consultation period

32. The First Claimant had a brief meeting with Mr Roper on 27 February 2017 to prepare for the formal consultation meeting on the following day. I find that the First Claimant had begun to look for other work as soon as she had discovered that the new People Adviser role would involve working shifts and weekends and that by 27 February 2017 she had received a job offer from Aldi. This explains the frustration in her email of 27 February at the individual consultation period being moved back in time and, also, her question recorded in the note of the 27 February meeting (page 155) "Can I leave early?". I find that by the time of the meeting on 28 February 2017 she had decided to leave the Respondent's employment. I so find because the notes of that meeting (page 159) make clear that she was not interested in other roles at the Respondent and record:

> *Offered post at Aldi would like to leave sooner (end March) informed business agreement following previous consultations.*

33. I note that the First Claimant has signed this and the other notes. I find that by doing so she accepted that their contents were in general terms accurate (although clearly they are not intended to be and are not a verbatim record of what was said at the meetings).

34. I find that at the meeting on 1 March 2017 (page 164) she was provided with details of her redundancy payment but other matters were not discussed. Equally, I find that the meeting on 7 March 2017 (page 165) was concerned only with the redundancy payments she would receive, her notice period and her exact leaving date. I make these findings because that is what the notes of the meetings suggest. They do not in any way suggest that matters relevant to her possible continued employment with the Respondent were discussed.

35. Equally, and for similar reasons, I find that at the meeting on 10 March 2017 (page 167) there was only a discussion about when she would leave and what she would receive. This is also reflected in the email exchanges she had with Sharon Tollett on 10 March 2017: the First Claimant was only concerned with when she would be issued with her "final redundancy notice" and whether she could leave without working her full notice period. There is nothing in the email or meeting notes which suggests that she was at this point pursuing the issue of the exact shifts that she would be required to work if she accepted the People Adviser role.

36. The notes of the meetings the First Claimant had on 13 March 2017 (page 174) and 29 March 2017 (page 184) likewise do not suggest that there was any discussion of the shift rota that the First Claimant would have been required to work if she had accepted the People Adviser role.

37. I accept that the First Claimant did produce her own alternative shift rotas (page 210) around the time of the meetings on 27 and 28 February 2017. In accordance with her evidence, I find that she did not draw this to the attention of Mr Roper (who conducted the one-to-one consultation meetings with her) but rather that she showed it to her own immediate manager, Claire Hourigan. I accept her evidence that Ms

Hourigan said that her proposed alternative would not be acceptable: as the First Claimant said in her own oral evidence, she and the Second Claimant knew that the shifts that they would be required to work as People Advisers would be likely to be 06:00 to 14:00 and 14:00 to 22:00 "because that is how it works at Hinckley" – and that was what the shift patterns they had been shown (page 212-213) reflected. However, none of the alternatives proposed by the Claimant would have involved her working 14:00 to 22:00 at all. As such her proposed alternative did not reflect the general principle that People Advisers would work similar shifts to the Managers that they were supporting.

38. I find that by the time of the first formal consultation meeting the First Claimant had decided that she would take redundancy and leave the Respondent's employment. I found that her decision had been made by this point because: (1) she had found alternative employment with Aldi; and (2) she did not wish to work according to the general principle that her shift rota would be similar to the shift rota worked by Managers. She did not wish to work according to this general principle because it would involve working shifts and weekends. Understandably this was a highly unattractive change given that her previous role had not involved either. I find that her decision did not result from any understanding on her part that she would have to work the exact shift pattern at page 212 to 213 and that there would be no negotiation about that.

39. I do not accept the Claimant's oral evidence that she continued to seek details of the exact shift rotas in March 2017. I do not accept this evidence because it is inconsistent with what the notes of the meetings show and, also, with what was by then the Claimant's decision to leave to work for Aldi. It is clear that in March her preoccupation was with the exact terms of her departure. In particular, she was naturally keen to ensure that the date and terms of her departure did not jeopardise the substantial redundancy payment that she was to receive from the Respondent.

40. The Second Claimant also had a brief meeting with Mr Roper on 27 February 2017 to prepare for the formal consultation meeting on the following day. The notes of the meeting on 28 February 2017 note opposite "Mobility discussed and is:" that the Second Appellant said "none, no weekends". The notes also record that the Second Claimant was naturally preoccupied with the fact that her Lifestyle Break was beginning in three days' time, that she "doesn't want new role/life change". They also record that in light of the Lifestyle Break it was agreed that future consultation/communication would take place by email and post.

41. The Second Claimant had a second and final meeting by Skype on 29 March 2017. This records that her decision was "to take redundancy. Wants to travel".

42. As the Hearing the Second Claimant gave evidence about a dance class commitment at the weekends which meant that she did not wish to work at the weekend.

43. I find that by the time of the first formal consultation meeting on 28 February 2017 the Second Claimant had decided that she would take redundancy and leave the Respondent's employment. I found that her decision had been made by this point because: (1) she was about to go on her Lifestyle Break and understandably wanted to have reached a conclusion before she left the UK; and (2) she did not wish to work according to the general principle that her shift rota would be similar to the shift rota worked by Managers. She did not wish to work according to this general principle because it would involve working shifts and weekends. Understandably this was a highly unattractive change given that her previous role had not involved either and she had other weekend commitments. I find that her decision did not result from any understanding on her part that she would have to work the exact shift pattern at page 212 to 213 and that there would be no negotiation about that.

44. Overall, therefore, I find that by very early on in the formal individual consultation period both Claimants had decided to take redundancy and not to explore further the People Adviser role (or other alternatives). I find that each Claimant had an obvious reason for wishing to reach a speedy decision: in the case of the First Claimant, because she had found another job which would not remain open to her for a prolonged period; in the case of the Second Claimant, because she was about to go travelling overseas for 6 weeks. However I find that the result of each Claimant making their respective decision so early in the consultation period was that they did so before the precise details of the shift pattern that they would be required to work were known. All they knew was that they would have to work according to the general principle described above and that that would include both weekend and shift working.

The actual shift rota for People Advisers

45. The Claimants became aware of the details of the actual shift rotas for People Advisers on 18 April 2017. It was at page 211. It required shift working (06:00 to 14:00 or 14:00 to 22:00) Monday to Thursday and then a day shift of 08:00 to 16:00 on alternating Fridays and Saturdays.

46. Because Mr Roper had not attended to give evidence, I had no evidence before me which explained exactly how and when Mr Roper had come up with this shift rota for People Advisers. However I accept Ms Wilby's evidence that the most likely explanation of this shift rota was that it was Mr Roper's application of the general principle to local circumstances taking into account his own assessment of the needs of his managers for the support provided by People Advisers. I make this finding because the shift rota involves shift and weekend working, so that Managers would not just be supported between 08:00 to 16:00 Monday to Friday.

47. I find that there is no evidence of any weight to support the allegation of the Claimants that Mr Roper had deceived them about the shift system that they would have to work. I find that when Mr Roper spoke to them in January he told them what the general principle was and showed them what the shift patterns of his managers then were. He did not give them any document setting out the shift pattern they would be required to work. I find that both Claimants then effectively curtailed the consultation themselves at the beginning of the formal consultation process at the end of February by taking their decisions. I find that each had good reasons for doing this which I have set out above but the result was that they each decided to leave the Respondent before the final shift pattern they would have to work had been decided. Once they had taken their decisions then it was inevitably going to be the case that they would not be involved in detailed discussions of the exact shift rotas of the roles that they had decided not to accept.

What would have happened if the actual shift rota had been presented at the beginning of the formal consultation process

48. By the time of the Hearing the Claimants both contended that if the actual shift rota had been presented to them at the beginning of the formal consultation process then they would have accepted the new People Adviser roles. I find that in fact there is only a 20% chance that this would have happened in the case of each Claimant for reasons including the following:

    48.1. Both Claimants were hostile to the new role. This was reflected in their attitude towards the pilot and in the grievance they subsequently presented. They objected in principle to the inclusion in the new role of duties previously carried out by managers when the new role did not attract higher pay.

    48.2. The new role did involve a substantial and obviously unattractive changes to working hours even as set out in the actual shift rota, although the weekend

working arrangements were more attractive than those set out at pages 212 and 213;

48.3. The Claimants did not present their case in this way at earlier stages of the dispute. In the original "Letter of Complaint" (page 208A) they suggested that it was simply possible that they might have remained if the actual shift system had been presented to them at the beginning of the formal consultation process:

> *If we had been shown a rota with on Saturday in it, working an 8-4 shift at that, **we may have considered** working the rota and not have felt like we were left with no alternative but to leave…* [emphasis added]

48.4. The Claimants did not present their case in this way in the Claim Form either. They wrote (page 7):

> *If we were offered this rota, we may not have left.*

48.5. As of February 2017, each Claimant would have had fairly strong personal objections to working in accordance with the general principle: the First Claimant because it involved working the 14:00 to 22:00 shift (something she did not offer to do in her alternative shift rota) and the Second Claimant because she had other commitments on Saturdays.

48.6. As of February 2017, there were other factors pushing the Claimants away from remaining in employment with the Respondent. In the First Claimant's case, the fact that she had found an alternative role with Aldi which did not involve working shifts or weekends. In the Second Claimant's case that she was going travelling for six weeks and was thinking in terms of "life change" (see the notes of the meeting on 28 February 2017 at page 157).

48.7. The Second Claimant's employment did not end until 4 May 2017 and yet she did not make any attempt to re-open matters with the Respondent and enquire whether it was still possible to accept the People Adviser role.

Conclusions

49. There is no dispute that the Claimants were dismissed by reason of redundancy and that that is a potentially fair reason.

50. The question for me in light of the issues as set out above was whether the dismissal of either Claimant was unfair when that issue is assessed by reference to section 98(4) of the 1996 Act because Mr Roper (and so the Respondent) had deceived them about the shift system they would be required to work or because he (and so the Respondent) had refused to consult meaningfully with them.

51. I have found above that Mr Roper did not deceive the Claimants and so that is not a basis to find that their dismissals were unfair. I also conclude, in light of my findings above, that Mr Roper did not refuse to consult with them meaningfully. I conclude that he put forward the general principle that would be reflected in the ultimate shift system and that the Claimants then accepted redundancy before that shift system was fleshed out into a specific rota that the Claimants would if they had accepted the People Adviser posts have been required to work. It is important to note in this regard that the formal individual consultation period ran from 28 February 2017 to the end of March 2017 and that notice of dismissal was to run from the end of the formal individual consultation period. The Claimants therefore made their final decisions to leave the Respondent very early in the consultation period. I conclude that if the Claimants had not "jumped the gun", but rather had remained engaged with the possibility of remaining with the Respondent throughout the formal consultation period, then the final shift rotas would have been produced to them for discussion

during that period. I also conclude that the fact that the Respondent did not produce the exact shift rota that the Claimants would have been required to work at the beginning of the consultation period does not result in there having been a failure to consult which makes the Claimants' dismissals unfair.

52. In short, the procedure followed by the Respondent, which was preceded by an extensive collective consultation exercise, was a procedure which a reasonable employer might reasonably choose to follow and the dismissal of each of the Claimants was fair. Their claims therefore fail and are dismissed.

53. However, if I had concluded that the dismissals of the Claimants were unfair because the exact shift rotas that they would be required to work had not been produced to them at the beginning of the formal consultation period, or because they had been deceived, or because Mr Roper had refused to consult meaningfully with them, I would have nevertheless concluded as a result of my factual findings set out above that there would have an 80% chance that each of the Claimants would still have rejected the People Adviser role and would have chosen to be made redundant instead. As such, I would have reduced any compensatory award made by 80% by application of the Polkey Principle.

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Employment Judge Evans

Date: 7 March 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 March 2018

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FOR EMPLOYMENT TRIBUNALS