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EMPLOYMENT TRIBUNALS

Claimant: Mr J Hubbard
Respondent: University of Essex Campus Services Ltd
Held At East London Hearing Centre
On: 01 June 2018
Before: Employment Judge PSL Housego

Representation

For the Claimant: Mr M Raffel
For the Respondent: Mr S Margo, of Counsel, instructed by Mills & Reeve, solicitors

JUDGMENT

The judgment of the Employment Tribunal is that:-

1. The claimant was not unfairly dismissed.
2. The claim for breach of contract is dismissed on withdrawal by the claimant.

REASONS

1. In this case the claimant claims that he was unfairly dismissed. He accepts that the reason was redundancy, but says that it was unfair for him to be dismissed. The respondent says that the dismissal was a fair redundancy which complied with the relevant policies and with the ACAS code and ordinary principles of fairness.
2. I have heard from the claimant and David Parry for the respondent.

Summary of decision

3. Mr Hubbard had worked for the respondent for a long time, 17 years. He managed a gym, and was at a senior management level. Dr Parry was put in post as Director of Sport to run that part of the respondent and re-organise it. He did so, and removed Mr Hubbard's post. Mr Hubbard could have put in for another post, but that would have reported direct to Dr Parry. He did not want to do so as

he regarded Mr Parry as hostile. There were other roles, but they were several grades below and although they were not offered, he would not have wanted them. Mr Hubbard agreed that the post was genuinely removed, although he thought this was because he was the post holder, and Dr Parry aimed the re-organisation at him. Mr Parry had concentrated his efforts in putting a business case to reverse that re-organisation. When that decision was maintained he left without being asked to work his notice, with a curt note round from Dr Parry saying only that he had left.

The hearing

4. There was little conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanor in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties. Where there was a divergence of evidence I preferred that of Mr Hubbard, whom I found a witness of transparent honesty, which is not to say that Dr Parry was not, but rather to observe that Mr Hubbard's evidence was conspicuous by its objectivity and candour.

Facts

5. The respondent is wholly owned by the University of Essex and manages various activities for the University. Mr Hubbard was involved in the sporting side of the respondent's activities. He was a grade 8 health and fitness manager. He managed a gym at the University, and had worked there since 01 July 2000. Mr Parry was put in post as Director of Sport in May 2016. He was asked to review the way the service was delivered. He spent a year observing and then proposed an alteration.
6. Mr Hubbard found Dr Parry unwelcoming. He would walk past him in the mornings without a greeting. There was little or no personal warmth displayed by him towards Mr Hubbard. At a presentation given by Mr Hubbard, Dr Parry gave external indications of being bored by it. Mr Hubbard had spoken to support services in the University about whether this was bad enough to amount to bullying, but he had not taken any formal action at any time.
7. On 06 November 2016 he was told by letter to attend a meeting at 1pm. Everyone else was called to be at a meeting at 2pm.
8. His proposed change is at pages 73-74. There was a performance sport manager and one general manager reporting to Dr Parry. Six people reported to the general manager, one of them being Mr Hubbard. Dr Parry decided that the work load on the general manager was too large, and that there should be a sport development manager and a business development manager reporting direct to that manager. He decided that Shaun Conlon, sport development officer, should be offered that post. It was a promotion, but Mr Conlon was already working at a level that merited a re-grading of his post, and Dr Parry had been in the process of so doing. Accordingly this was not much of a change. He decided to remove Mr Hubbard's post of health and fitness manager and replace it with a business

development manager. The people reporting to Mr Hubbard were a senior sport supervisor and health and fitness senior supervisor, and the reception supervisor. The health and fitness supervisor would be managed by the sport senior supervisor, and he would report to the general manager instead of to the health and fitness manager. The reception supervisor would also report to the general manager. The administration manager would report to the new business development manager. It was still 7 posts, with one role given greater status, reporting lines changed, and Mr Hubbard's post replaced with a business development manager. In addition a smaller gym at Southend, where Mr Hubbard spent up to a day a week had been closed.

9. The business development manager was to look outwards to seek new business. Mr Hubbard had done some of that but was primarily concerned with looking after the staff and the customers using the gym (who include the public).
10. On 06 November 2017 Dr Parry required Mr Hubbard to meet him on 07 November 2017 at 1pm. He called every one else to a meeting at 2pm the same day. At the 1pm meeting Mr Hubbard was told by Dr Parry of the proposed changes and that he was at risk of redundancy. Mr Hubbard took exception to being singled out, and asked to come to the 2pm meeting also, to which Dr Parry agreed. Dr Parry told Mr Hubbard of Mr Conlon's re-grading. Mr Hubbard said words to Dr Parry words to the effect that if Dr Parry had thought Mr Hubbard was capable of doing the business development manager job he would have offered it to him at the meeting, as he had done for Mr Conlon. Dr Parry replied to say that Mr Hubbard was probably right.
11. At the 2pm meeting Mr Conlon was told of his promotion, and the others advised of the proposed changes.
12. Mr Hubbard set out a detailed response to the changes proposed, with particular reference to his existing role. (102-113). It dealt with practicalities specific to the respondent, and generalities. There was a need for what he did in the gym, and only small hotel gyms did not have a manager doing what he did.
13. Dr Parry responded at some length, not agreeing and referring to Bournemouth University and Nottingham Trent not having gym managers with the acerbic comment:

"Surprising you are not more aware of the sector." It also referred to "...failures of supervision management that will be directly addressed through the restructure."
14. There was then a second meeting on 23 November 2017 between Dr Parry and Mr Hubbard. The proposals and response were discussed briefly. Mr Hubbard said that he was not interested in the role of business development manager. He gave a reason, that it would be desk based and not something that was suiting his future career aspirations. In fact he had talked over the situation with those close to him and decided that he really did not want to have Mr Parry as his line manager, given Dr Parry's attitude towards him.

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15. There was then discussion with human resources about redeployment to a grade 5 role, but human resources said that this was outwith the policy and the only thing that would be wrong would be to force him into such a role. If he was to be appointed it would be a new appointment with a two week gap and the redundancy payment would be paid.
16. James Lee, health and fitness senior supervisor, at grade 5, resigned.
17. On 28 November 2017 Dr Parry emailed human resources about this. Human resources replied to say that redeployment with one year salary protection was outside policy because of the grade differential, but it could be offered as redeployment with no salary protection and no redundancy payment, or Mr Hubbard could be allowed to apply for it. The second was the human resources preferred option. However on 01 December 2017 human resources told Dr Parry that Mr Hubbard should be made redundant and then apply in open competition if he wanted that job, and if successful there would be a two week gap and no continuity of service.
18. Shortly before the restructure was announced Melissa Neal, administration manager at grade 7 resigned. Her replacement was in post on 12 December 2017.
19. At about this time the respondent was advertising for an IT manager. Someone with experience in the system used by the respondent was appointed. Mr Hubbard expressed no interest in these roles at the time. He would have needed retraining to undertake the role of IT manager which was very different to his role as the manager of a gym.
20. At a meeting on 05 December 2017 Dr Parry, with Alex Boardley of human resources, met Mr Hubbard and his representative Colin McAuley. The minutes at 129/130 are accepted as accurate. They say that Mr Hubbard had opted not to apply for redeployment to the business development manager role. The fact of the resignation of James Lee was stated, and that it was *“not deemed a suitable option”* for redeployment so that Mr Hubbard would have to apply for it alongside others. It was recorded that Mr Hubbard and his representative agreed that it was not a suitable post, and this is also set out in Mr Hubbard’s letter of 07 December 2017 to human resources.
21. Dr Parry said that this concluded matters. Mr Hubbard was not required to work his notice. His employment was terminated with immediate effect. It would be necessary to take his keys from him and his staff card. His pay and P45 would follow.
22. Dr Parry then sent an email headed *“Justin has left”* (123a) to the rest of the staff saying no more than that Mr Hubbard had left with immediate effect.

Policies

23. The respondent uses the University of Essex policies.

24. There is a policy about restructure. If a job substantially overlaps there is a right to be “*slotted in*” to the new job as someone having “*successor rights*”. That undoubtedly applied to Mr Conlon. It did not apply to Mr Hubbard.
25. There is a “*Managing Structural Change Policy*” (38 et seq) which sets out these “*successor rights*” at 12.3.1. It applies where the majority of essential elements of an abolished post are contained in the job description of a new post.
26. At paragraph 7 of the policy is redeployment. Vacant posts are to be allocated as redeployment if they are “*suitable alternative employment*”.

Submissions

27. The representative for Mr Hubbard said that there was no real consideration of the pool for selection. There were several people at grade 4 and 5, and Scott Tatum, senior sport supervisor before and after the restructure was on a plus 10% pay rate, so nearer to Mr Hubbard than the grades would suggest. Bumping had not been considered. The redeployment policy had not been effected. The tension between them had affected Dr Parry’s approach. Ms Neal’s job had become vacant. Mr Conlon had been promoted and re-graded upwards so he was a person who should have been in the pool. There had been no proper consultation. There was no evidence of any consideration of what the pool should be, and there had been no consultation about it. There was no evidence of what criteria were utilised. This was a substantial organisation but human resources had not been utilised much, relevant to s.98(4). They had failed to follow their policies and the dismissal was outside the range of reasonable responses of the employer to the redundancy situation.
28. Counsel for the respondent referred to the opening note provided. The claimant was asserting that this was a sham process engineered to get rid of him. However at page 64 onwards of the bundle was the analysis of what the roles were. It was not a reverse engineered process to get rid of Mr Hubbard, but a genuine business review. Mr Conlon’s re-grading was already in process, and was simply overtaken by the restructure. It was obvious that he fell within the successor rights policy and had to be slotted in to the new role, as in large measure he was doing it already. The witness statement of Dr Parry gave a clear rationale for the decision. The email 123a announcing Mr Hubbard’s departure was clearly unfortunate, in particular in not stating that the reason was redundancy. But Dr Parry had taken that criticism on the chin. It would be a huge leap to infer back from that that the process was a sham.
29. As to bumping the union were involved. They had asked for a year’s delay but not for bumping. This was a small team, and it was not surprising that the pool was small. The union had not suggested that it was unfair. The claimant’s case was a moveable feast, with different grades and tasks put forward at different times. It was not compulsory to consider bumping - *Samuels v University of the Creative Arts* [2012] EWCA Civ. 1152. [Paragraph 31: “...it is not compulsory for an employer to consider whether he should bump an employee.”].

30. As to wider re-employment issues Mr Hubbard had made it clear he wanted a job “*on the floor*”, and so the respondent was not to be criticised for not suggesting jobs in administration. The evidence now offered was after the event consideration. While Mr Hubbard may have been under stress the message he was sending was very clear and consistent. He did not want the business development manager role as he did not want to be managed by Dr Parry, although he did not give that as the reason at the time. Nor did he want the grade 5 roles. All his eggs were in a redeployment on protected terms one grade below or to seek to reverse the planned re-organisation. He was placed on the redeployment register, but nothing came up.

Conclusions

31. Dr Parry had made his mind up about the restructure and had no place for Mr Hubbard in the organisation. He told Mr Conlon that he (Mr Conlon) would be slotted in to the upgraded post, but very telling for Mr Hubbard was Dr Parry’s affirmative reply to Mr Hubbard’s question which said that if he thought Mr Hubbard could do the business development manager job he would have slotted him in to it as he did with Mr Conlon.
32. This is consistent also with Mr Hubbard finding Mr Parry at best distant. It is also consistent with the sarcastic observation in Mr Parry’s response to Mr Hubbard’s business case for his job to be retained (115) and the email announcing Mr Hubbard’s departure, which was insultingly terse, after 17 years service.
33. Whether the motivation for the change was as Mr Hubbard thinks, to get rid of him, or not is not actually to the point, for in fact his post was removed. Funding a business development post by abolishing an internal post and removing a layer of management by so doing is not illogical, and actually occurred. That Dr Parry was pleased with the result, or even desired it, does not render the decision to dismiss Mr Hubbard unfair, as the re-organisation was logical and was effected.
34. Mr Hubbard might have had a good claim if he had applied for, but not got, the business development manager post, but he made clear that he did not want it, the real reason being that he did not want to report direct to Dr Parry.
35. Mr Hubbard could not reasonably have been regarded as likely to be interested in a post two or three grades below his grade 8 post, and so not offering them would not make the dismissal unfair. It was not fair to say that while Mr Hubbard was entitled to be given a post one grade below but would have to apply as with anyone else for a post below that (121c and 129), but that is not relevant, as Mr Hubbard was not interested in such a post.
36. Human resources were in error (121a and b) in saying on 01 December 2017 to Mr Oldham that Mr Hubbard would have to apply for a grade 5 role and that he would not have continuity of service, after reversing an email of 29 November 2017 (121c) which got it right, saying that if he wished Mr Hubbard could be redeployed to James Lee’s grade 5 post as an alternative to redundancy, and this was (then) their preferred option. It was not shown why the position of human resources changed.

37. On 01 December 2017 Dr Parry met Mr Hubbard again. The record of that meeting states: *“As you may be aware, James Lee has resigned and so his grade 5 post is vacant. Due to your gradient current role being substantially different, it is not deemed as a suitable option via the redeployment process, however you will be able to apply for the role externally alongside other candidates should you wish to do so.”* There is then in parentheses the observation that both Mr Hubbard and his representative agreed that the post would not be suitable. Mr Hubbard accepted in the hearing that he had said this. He was not thinking clearly at this point, being in the process of losing the job he loved after 17 years service.
38. It is clear that Dr Parry was, putting it neutrally, not encouraging him to accept it. Dr Parry had no wish to retain Mr Hubbard. There was no encouragement from Dr Parry to seek to find a niche for Mr Hubbard or to explore whether he wanted to remain in a customer focussed role at a lower level instead of having no job. The snide remark in the response to Mr Hubbard’s paper (which set out why his role was important) *“Surprising you are not more aware of the sector”*, the summary ending of his employment on 05 December 2017 without working a period of notice, effectively being told to clear his desk that day and hand over his staff card, and the email (123a) which made it look as if Mr Hubbard had been dismissed summarily for gross misconduct all clearly point to Dr Parry actively wished that Mr Hubbard would leave his employment, and I so find for those reasons.
39. Dr Parry accepted that the criticism in the response paper was inappropriate, and that the email indeed looked like Mr Hubbard had left under a cloud. After 17 years, simple humanity makes it obvious that Mr Hubbard should have been invited to leave before the end of his notice period, rather than compelled not to work his notice. By this he was denied the opportunity to talk to his colleagues before leaving - they might have wanted to give him a card, or have a *“leaving do”*. Instead, he was almost literally frog marched off the premises. Dr Parry accepted in oral evidence that his role is a people management role (so that proper treatment of people is not outside his skill set), and that there was no call for such treatment of Mr Hubbard.
40. I have no doubt that Dr Parry was pleased to have Mr Hubbard leave, for no reason that I can discern. However the re-organisation was a genuine one. The gym does not have a manager now. Mr Hubbard’s role was genuinely redundant and he does not seek to say otherwise. He disputes the wisdom of it, but that is not to the point. The statutory definition of redundancy is met.
41. For entirely sound personal reasons Mr Hubbard did not want to report direct to Dr Parry, and so he did not want the business development role. Nor did he want the grade 5 role of James Lee.
42. It was asserted in the hearing that there were two other roles that might have suited him, that of an IT coordinator (job description at 174) and that of Melissa Neal, administration manager. Both of these became available during the relevant period. The person appointed to the former had much experience in the role in another employment, and Mr Hubbard had only been a user of the system. Melissa Neal was not in a health and fitness role, and Mr Hubbard had given as a

reason for not wanting the business development role that it was not customer focussed. The respondent cannot be fairly criticised for not offering either of these roles to Mr Hubbard.

43. There is criticism of the pool for selection. An employer who devotes rational thought to the question is not to be found to have dismissed someone unfairly because another pool might be considered preferable. Mr Hubbard suggested that Suzy Davies, performance manager sport, should have been included in the pool for selection. Her role was unaffected by the changes. There can be more than one fair pool for selection. The decision not to include her in the pool did not render the dismissal unfair. There was no other grade 8 level person who might be included. It was a rational decision to have a pool of one.
44. For Mr Hubbard it was contended that someone else should have been “bumped”. It is not clear precisely who that should have been, but it is not an unfair dismissal not to have dismissed someone whose role was not made redundant instead of Mr Hubbard. The general manager was on grade 9, and would not have been in any reasonable pool for selection.
45. The pay grades at 192 show that there was a big pay gap between Mr Hubbard and grade 5s, as he was being paid about 50% more than them (both grades have pay bands), and so there is difficulty in contending both that they should be in the same pool, or that they should be “bumped” for him. A chain of bumping to move several people a grade down is also unrealistic. Bumping is not an employer obligation (*cf Samuels*).

Relevant law

46. Having established the above facts and considered the submissions, I now apply the law.
47. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 (“the Act”). It is not disputed that this was the ground put forward. The Claimant accepts that there was a genuine re-organisation and that his post was removed from the structure. Accordingly the respondent meets s.98(2) of the Act.
48. Accordingly I must consider section 98(4) of the Act which provides:

“.... 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”.*

49. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
50. A dismissing employer must follow a fair procedure throughout (*Sainsbury’s Supermarkets Ltd v. Hitt* [2001] UKEAT 887). While a post may be redundant that does not inevitably mean that the post holder is to be dismissed.
51. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer’s conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee’s conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

Application of the law to the facts

52. Applying the law to the facts, and having assessed all the evidence my findings are these:
 - 52.1. This was a genuine redundancy situation.
 - 52.2. Dr Parry was pleased to see Mr Hubbard leave, for reasons unknown.
 - 52.3. Mr Hubbard did not want to work directly to Dr Parry.
 - 52.4. He was not encouraged to accept a lower level post.
 - 52.5. In any event Mr Hubbard said at the time that he did not want a lower level post.
 - 52.6. The suggestions made for an IT or administration post were not made at the time, and it would be unreasonable to expect the respondent to have thought that Mr Hubbard might be interested in either.
 - 52.7. The IT role was not one that the respondent can be criticised for not offering to Mr Hubbard as it required technical expertise which Mr Hubbard did not possess.
 - 52.8. The administration role was not a role in which Mr Hubbard expressed any interest and nor did he apply for it or ask to be considered for it, and he had

said that he wanted contact with the public as part of his job. He has fitness qualifications and it is not obvious that he might be interested in an administration role.

52.9. While Dr Parry wanted Mr Hubbard to leave, there is logic in the restructure and it was genuinely implemented.

52.10. The promotion of Mr Conlon was in part a recognition of what he was already doing, and so not a parallel with Mr Hubbard.

Conclusion

53. The dismissal was by reason of redundancy which is a potentially fair reason for redundancy. The pool of one for selection was not unfair. As Mr Hubbard stated that he wanted neither the business development manager role nor a lower grade role the dismissal for that redundancy situation was not unfair. The other vacancies were known to Mr Hubbard and he was not interested in them at the time. The procedure was technically not unfair, as the steps in it (and in the ACAS code) were followed. That Dr Parry wanted Mr Hubbard not to work for the respondent does not mean that the implanted decision to remove a senior level management post focussed on the internal workings of the organisation and replace it with a business development role was unfair.

The breach of contract claim

54. The representative for Mr Hubbard stated that this claim was not being pursued.

Employment Judge Housego

18 June 2018