



EMPLOYMENT TRIBUNALS

Claimant: Mr C Davies

Respondent: DL Insurance Services PLC & Others

Heard at: Liverpool **On:** 19, 20, 21 and 22 March 2018

Before: Employment Judge Robinson
Mr R Cunningham
Dr L Roberts

REPRESENTATION:

Claimant: In person

Respondent: Miss R Wedderspoon of Counsel

JUDGMENT

The reserved judgment of the Tribunal is that the claimant's claims for unfair dismissal succeeds and the direct sex discrimination claim fails and is dismissed.

REASONS

The Issues

1. The claimant has a claim for unfair dismissal on the basis that the redundancy process was unfair. He also has a sex discrimination claim which is a direct discrimination claim on the basis the comparator, Miss Hutchin, was mapped or aligned to the new structure improperly and that she should have been in the pool with the other Area Managers.

The Facts

2. The claimant was an Area Manager with the respondent.

3. Up to 2013 there were five Area Managers. Mr Davies dealt with the North of England from his base on the Wirral and another Area Manager also covered Scotland and the North of England from his home in Glasgow.

4. There was a redundancy process in 2013 and the only two people in the pool were the two northern managers. Mr Davies was not made redundant; his Scottish colleague was.

5. The other three managers, namely Chris Leech, Matthew Lake and Christine Hutchin, were not in that redundancy pool as they dealt with, in the main, the Midlands, the South East and South West of England.

6. Mr Davies was not happy that he was in a pool of two during that process and complained to his manager, Mr Chiappino who was the National Manager for the Claims Inspectors. The Inspectors investigated suspicious insurance claims.

7. After the process Mr Chiappino sought to smooth things over with Mr Davies and assured him that just because he had gone through one redundancy process that did not put his job at risk in the future.

8. Mr Davies, on the other hand, felt that he would be the next to go during any subsequent business reorganisation, because the other three Area Managers had not been in the pool with him and the Scottish manager. Mr Davies became stressed during the period from 2013 through to 2016 and was for a short time seemingly obsessed by what he saw as a flawed redundancy process in 2013.

9. Mr Chiappino was supportive and, eventually, Mr Davies decided that he would forget the 2013 redundancy and move on.

10. In 2016 there was another business reorganisation. The decision made was to reduce the number of Area Managers, yet again, this time from four to three.

11. In September 2016 the Claims Inspector Managers received a briefing pack, as did the Claims Inspectors as there was to be a reduction in Inspectors in the field as well. Those inspectors were managed by the claimant and the other Area Managers. The respondent, for business reasons, decided that the need for field investigation and statement gathering had diminished. Mr Davies accepted there was a redundancy situation.

12. Initially the decision to choose the Area Manager to go was based on the appraisals of the four managers. All four managers were very close with regard to annual performance. It was decided that the two criteria to be scored should be performance with regard to fraud case referrals and productivity per net productive day figures.

13. On 5 September 2016 Mr Chiappino spoke to all four Area Managers. Chris Leech had been seconded into the National Claims Manager role in place of Mr Chiappino (Mr Chiappino had moved to a different role in Birmingham) and Mr Leech's role had been given, in the short-term, to a Claims Inspector. Technically, therefore, Mr Leech was not an Area Manager at that time.

14. Ms Hutchin was taken out of the pool. That made little sense as that decision by Mr Chiappino was predicated on the assumption that fewer Claim's Inspectors were to be made redundant in the South East. The decision seems to have been taken for purely geographical reasons. Initially Mr Chiappino told all four Area Managers that the selection criteria would be 'performance' and 'skill set'. Other

criteria had not been set up. There was an option for voluntary redundancy but none of the four Area Managers wanted to volunteer.

15. In the end Mr Chiappino only scored three Area Managers and did so according to their appraisal rating. All three scores were very close and at that point Mr Chiappino took Mr Leech out of the process on the sole basis that he was acting up as National Manager. He was scored higher than Mr Lake and the claimant, in part, because he had acted up.

16. Mr Chiappino then considered what criteria would be used to differentiate between Mr Lake and Mr Davies.

17. Those criteria included innovation and blue sky thinking, organisational skills, embracing change, decision making, stakeholder management engagement, stakeholder comments, risk, coaching and leadership, engagement and values.

18. Mr Lake won 8:1, with 'embracing change' as equal. Mr Chiappino did not score the two candidates, but just decided who won and who lost in each of the 10 categories. Applying that crude system, Mr Chiappino came to the conclusion that it would be the claimant who went. The claimant was paid the redundancy payment due to him.

19. The claimant appealed. Ms Hulme dealt with the appeal and once she had heard the claimant's views, she then telephoned Mr Chiappino to get from him his answers to the claimant's concerns.

20. In his appeal letter dated 18 October 2016 the claimant complained about the pooling process; that team performance was not considered and he gave his metric of what he felt the relevant team performances were. He also gave feedback as far as his management of his team was concerned, which was positive, and he also complained that the criteria that had been used were subjective. In short, therefore, he felt that there should have been four Area Managers in the pool; that Mr Chiappino made his decision on a purely subjective basis; that the professional relationship between himself and Mr Chiappino over the three years since the last redundancy had deteriorated; there was a misjudgement with regard to the way in which Mr Chiappino dealt with the geography of the country with regard to each Area Manager, and finally that the claimant felt that he had a demonstrably stronger performance matrix than the other candidate left in the pool.

21. When discussing the redundancy process with his team, the team felt that it was the more senior managers who had caused the problems rather than the Area Managers such as the claimant.

22. Mrs Hulme was diligent in listening to the claimant's views and then carried out further investigations. She discussed matters with Mr Chiappino on the telephone. She heard from Mr Chiappino that the reason Christine Hutchin was not included in the selection pool was because she was based in the South East of England. Mr Chiappino said to Miss Hulme that a manager needed to be based in that region owing to the large number of claims inspectors that were working there. Why Ms Hutchin was ring-fenced as the only Area Manager who could manage the South East was not explained to us.

23. Mr Chiappino felt it preferable for managers to be based closed to their claims inspectors. However Mr Chiappino was clear, in any event, that Ms Hutchin was the best performer over the last three years.

24. Mr Chiappino suggested to Mrs Hulme that there were three people in the selection pool and that Chris Leech had the highest ratings over three years so he was taken out of the pool, leaving the claimant and Mr Lake in that pool. He then explained that against the two performance metrics that were originally decided upon both Mr Lake and Mr Davies scored the same, and therefore he decided to use other criteria as set out in paragraph 17.

25. Mrs Hulme challenged Mr Chiappino about some of his attitudes to, for example, Mr Steve Miller, who was a disabled colleague of the claimant who the claimant thought had been dealt with inappropriately by Mr Chiappino. Mr Chiappino had allegedly made fun of Mr Miller's stress related illness.

26. Mrs Hulme therefore discussed matters with regard to Steve Miller with Matthew Lake, Chris Leech and Christine Hutchin. In the telephone call that she had with the other Area Managers, Matthew Lake and Christine Hutchins could not recall any untoward incident. Matthew Lake said that he found Mr Chiappino to be supportive of Mr Miller. Mr Leech was the only one who said anything further, and he said that he thought that Mr Chiappino was light-hearted about Mr Miller's illness and that all the managers went along with that attitude. He said, with hindsight, it was probably inappropriate banter.

27. Mrs Hulme did not uphold his appeal. She concluded that Christine Hutchin had been excluded from the pool based on her geographical location. She also concluded that the claimant's team had achieved some good results but that ultimately it was for Mr Chiappino to decide which criteria were important for the business moving forward. She felt that he had sound business reasons for choosing the particular criteria that all the three Area Managers in the pool were assessed against in their performance reviews. She was not uncritical of Mr Chiappino as she felt he should have provided the claimant with a hard copy of the scores during the redundancy consultation process. She did not accept that Mr Chiappino had scored the claimant only after the dismissal hearing to back up his own subjective views about the claimant.

28. Further, she decided that the 2013 redundancy and the dispute between Mr Chiappino and the claimant had not influenced Mr Chiappino's decision making. In short she found that Mr Chiappino was best placed as the people manager to carry out the scoring exercise.

29. Mr Davies did not mention, at the appeal, that Christine Hutchin was excluded from the selection pool because she was a woman. It was only when these Tribunal proceedings were issued that Mrs Hulme realised that the claimant was claiming that he had been sexually discriminated against.

30. Those are the facts.

The Law

31. The law that we considered with regard to each of the allegations is as follows.

32. The burden is upon the respondent to show that they dismissed for a potentially fair reason. Under section 98(1) and (2) of the Employment Rights Act 1996 redundancy is a potentially fair reason to dismiss someone. Where the employer has fulfilled the requirements of subsection (1) (in other words shown that they have dismissed for a potentially fair reason) “the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer (in this case redundancy) depends on whether 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 shall be determined in accordance with equity and the substantial merits of the case” (section 98(4) ERA 1996).

33. In redundancy situations the Tribunal should decide whether there was a redundancy situation, whether the selection criteria were objectively chosen, fairly applied, whether employees were warned and consulted about the redundancy, and finally whether there was alternative work available.

34. Procedural fairness is an integral part of the reasonableness test found in section 98(4) as set out above, and in the House of Lords ruling in **Polkey v A E Dayton Services Limited [1998] ICR 142** their Lordships decided that a failure to follow correct procedure was likely to make a dismissal unfair unless the employer could reasonably have concluded that doing so would be utterly useless or futile. This is not one of those cases where going through a process was utterly useless or futile. Proper procedures had to be followed, and those procedures had to be fair overall.

35. With regard to pools for selection, it is imperative that the employer identifies the group of employees at risk and that thereafter the selection criteria are reasonable and that they are clear and transparent, and they must be objective.

36. The Tribunal must not substitute its view for the views of the dismissing officer and subject the selection criteria to minute scrutiny. All that a Tribunal has to do is satisfy itself that the method of selection was not inherently unfair.

37. When it comes to using performance, skill or knowledge as one of the criteria, it is imperative that the person deciding who has the best performance skill and knowledge should know how that performance, skill and knowledge is measured. If the subjective opinion of an employee’s manager takes precedence then it may well be that the redundancy is unfair.

38. With regard to a claim of direct sex discrimination, the claimant must be able to compare himself with a comparator who is someone in similar circumstances. On such a comparison of cases there must be no material difference between the circumstances relating to each case.

39. If there are facts from which the Tribunal could decide in the absence of any other explanation that the respondent contravened a provision relating to discrimination, the Tribunal must hold that the contravention occurred unless the respondent can show that they did not contravene the provision. In other words, the

claimant has to establish the detrimental action relied upon and prove facts which could amount to direct discrimination, in this case, on the grounds of the protected characteristic of his sex.

40. If the Tribunal finds that the respondent did treat the claimant less favourably than it treated or would treat the comparator, and there is no material difference between the comparator and the claimant, and the Tribunal finds that the less favourable treatment is because of the protected characteristic and there is no explanation from the respondent which satisfies the Tribunal, then the claim for direct discrimination will succeed.

41. Employment Judge Horne (on 9 May 2017) ordered a deposit be paid by Mr Davies in order to continue with his sex discrimination claim. We must consider why Employment Judge Horne thought there was little reasonable prospect of success with regard to that claim.

42. Rule 39 of the 2013 Regulations provides that if a Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order, then the following occurs:

“The paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 unless the contrary is shown” and

“The deposit shall be paid to the other party (or if there is more than one) to such other party or parties as the Tribunal orders”,

otherwise the deposit shall be refunded.

Conclusion

43. Applying the facts set out above to the law we came to the following conclusions, and for ease of presentation further facts are set out below.

44. We deal first with the claim for sex discrimination. We came to the same conclusion with regard to that element of the claim as Employment Judge Horne did in May 2017.

45. The claimant compared himself in the way he was treated to the treatment of Ms Hutchin who was an Area Manager like him. However unfair we have found Mr Chiappino’s decision not to put Ms Hutchin in the “at risk” pool, it was not because she was a woman. Mr Chiappino took Mr Leech out of the pool, so another Area Manager who was a man, was not in the pool as well as an Area Manager who was a woman.

46. Furthermore, Mr Chiappino decided not to put Ms Hutchin in the pool because there were geographical reasons where she was aligned to a role in the new structure set up by Mr Chiappino. Although that decision was, as explained below, for an unfair reason there was a gender neutral explanation for the difference in treatment. Ms Hutchin dealt with the South of England. The area was less affected by the restructure geographically than the North of England, and the geographical

demarcation seems to have been for genuine, if unfair, business reasons. There were more Claims Inspectors who would lose their jobs in the north than there were to be in the south.

47. We have not therefore heard from the claimant any facts upon which we could conclude that his sex was the reason for the difference in treatment, and consequently that claim fails.

48. However, the claim for unfair dismissal succeeds.

49. There are a number of reasons why.

50. Mr Davies accepted there was a redundancy situation. Therefore at least one of the Area Managers was going to lose their job. Mr Davies was at risk of losing his job but the percentage chance of whether he would lose his job or not will be dealt with when we come to remedy. The pool selected should have been all the Area Managers, and if two Area Managers were being taken out of the pool it should have been made crystal clear to Mr Lake and Mr Davies exactly why that was the case. Part of the business reorganisation was to reduce the number of Claims Inspectors and consequently there was a business need for fewer Area Managers and to reduce their number, managing those Claims Inspectors, from four to three.

51. The process was started on 5 September 2016 and the PowerPoint presentation was produced to the four managers. We find that there was no indication that the pool would comprise only of three at that point. It was only after the four Area Managers went to the pub to discuss the situation after that meeting with Mr Chiappino that they discovered Christine Hutchin was mapped into her role. It eventually dawned on the claimant that there would be only two people in the pool, namely him and Matthew Lake, because, within a very short time of the process starting, Mr Leech was also removed from the pool. That limiting of the pool was unfair..

52. The selection criteria that were to be used according to Mr Chiappino would be the performance and skill set of the managers.

53. The pack that was given to the managers showed details of any vacancies that were available and there was the option of voluntary redundancy. However, none of the Area Managers opted for voluntary redundancy.

54. Christine Hutchin was excluded from the pool because her geographical location was different to the claimant's and that of other Area Managers as she was based in the South East. Although other managers were to have a much reduced number of Claims Inspectors to manage there seemed no legitimate or fair reason why Ms Hutchin was not kept in the pool until scoring was done. Mr Davies' argument was that he had a large geographical area to cover so why could either Mr Lake or Mr Hutchin cover a similarly large area. That seemed a compelling argument.

55. Despite Mr Leech carrying out Mr Chiappino's old job as Mr Chiappino moved onto another role, the three Area Managers, other than Miss Hutchin, were scored. Mr Chiappino concluded that they were all good performers and there was nothing between them.

56. The next stage was for Mr Leech to be taken out of the pool because he was acting up in another role. That left two Area Managers, Mr Lake and the claimant. Mr Chiappino said that Mr Leech, in any event, had scored higher with regard to his appraisal ratings than Mr Lake or the claimant.

57. Consequently Mr Leech was safe in his seconded job as National Area Manager. He had been in that role for over a year.

58. Mr Chiappino stated that if the same selection criteria had been applied to Ms Hutchin she would have been the highest scorer of all four Area Managers.

59. We found that the piecemeal way of taking managers out of the pool and scoring them was not fair to Mr Lake and the claimant. However, for the purposes of the remedy hearing, we find that it would have made no difference. Both Mr Leech and Ms Hutchin scored better than Mr Lake and the claimant. Both would have survived the redundancy process.

60. What all this meant was that Mr Lake and the claimant were now in a face off for the last job. Mr Chiappino told us, and we accepted this, that they had scored equally on their appraisals.

61. At this point Mr Chiappino decided that he would decide the issue on a whole host of criteria which were largely subjective. That was unfair.

62. We heard much during the course of the hearing (indeed we went back into the Tribunal room to hear more evidence) about the way in which Mr Chiappino scored Mr Lake and the claimant. His explanation was unconvincing and did not make sense. Mr Chiappino himself accepted that the claimant scored higher than Matthew Lake in fraud identification, and that Matthew Lake scored slightly higher in terms of productivity. That should have been the end of the process. On an objective basis Mr Davies was the better candidate.

63. Yet despite that fresh criteria were drawn up which appear at pages 267 and 268 of the bundle. Those criteria had never been agreed prior to the process starting. Furthermore Mr Chiappino decided who won between Mr Lake and the claimant in each of the categories but without scoring them.

64. Although Mr Chiappino gave us long explanations as to why he felt that Mr Lake was a stronger candidate in eight of the ten criteria, and that the only criterion that the claimant won was decision making, the process smacked as being a subjective analysis by Mr Chiappino. He chose the person he wanted to keep. The way he decided on the criteria and then implemented the decision through those criteria was not clear or transparent. Mr Chiappino's subjective view took precedence.

65. Moreover, Mr Chiappino took into account Mike Brown's view. He was Head of the Counter Fraud Intelligence Unit. Neither Mr Lake nor Mr Davies were able to make observations on Mike Brown's comments.

66. Mr Brown told Mr Chiappino that Matthew Lake was a superb manager, great at collaboration, "super engaged with CFU" and a visible presence.

67. Apparently, Mr Brown thought that Mr Davies was a very good manager, diligent and competent, but did not have the same level of enthusiasm and engagement as Mr Lake. That was a purely subjective comment by Mr Brown which Mr Chiappino accepted yet never allowed either Mr Lake or Mr Davies to discuss that with him.

68. More importantly, Mr Brown had more contact with Mr Lake on a day-to-day basis than he had with Mr Davies. That placed the claimant at a disadvantage and was unfair.

69. Mr Chiappino ignored the employees' representative body when deciding on selection criteria. The redundancy policy provides:

"If a redundancy situation arises we will follow a fair and consistent procedure in line with our values. This will include consultation with your ERB representatives."

70. That was not done, and therefore that makes the decision unfair.

71. The consultation process does go on to say:

"Where more than 20 employees but less than 100 are affected we will usually consult for a minimum of 30 days and for 45 days if 100 or more redundancies are proposed."

72. The respondent witnesses attempted to persuade us that those two sentences were all one and that therefore it was only when 20 employees or more were affected that the ERB should be involved. That is not what the policy says.

73. The policy requires managers to consult with the ERB on the selection methods to be used in the business area on a case by case basis.

74. Mr Chiappino took a long time to produce the information that the claimant needed. What he should have done, in order to be fair, was to have the scores available to both Mr Lake and Mr Chiappino at the time that he met them to tell them whether they had been successful in keeping their jobs or not.

75. Mr Chiappino also got it wrong over the issue of recording interviews and the use of tablets to do so. That was a project that the claimant led. Mr Chiappino thought that that was not the case. Indeed he suggested that one of the Claim's Inspectors was the lead with regard to that process. That made the claimant's position vulnerable because, whereas a positive issue for the claimant was ignored, Matthew Lake was credited with pioneering the pay review process.

76. Although we were given a large amount of data with regard to the performance of both Mr Lake and Mr Davies, it was not clear to us, and the burden was upon the respondent to prove this, as to why Mr Lake should prevail with regard to performance. Indeed, over two years, the data demonstrated that, with regard to fraud referral percentages, it was the claimant who was the better performer rather than Mr Lake. For a reason known only to Mr Chiappino, he limited his analysis of the data to a very short period in 2016 rather than looking over a longer period. Mr Chiappino could not explain to us why he had done that.

77. There is also some evidence to show that with regard to performance it was Mr Davies' team that was the better team than Mr Lake's.

78. Overall, therefore, it was unfair the way Mr Chiappino had set about choosing between Mr Lake and the claimant. We noted we must not substitute our views for the views of Mr Chiappino, we recognise that a business must be allowed to retain its best employees and we must not re-run the redundancy process. But this was not a transparent process, dealt with objectively by Mr Chiappino and in those circumstances we find that Mr Davies has been unfairly dismissed.

79. The matter will now proceed to a hearing where all issues of remedy including re-engagement requested by the claimant, Polkey and the percentage chance of the claimant losing his job in any event will be dealt with. If the Tribunal decides to award compensation then that will be done on a just and equitable basis. Any issue with regard to the deposit and costs will also be dealt with then.

80. The parties should inform the Tribunal administration by no later than 25 May 2018 their availability between 4th June and 28th September 2018 for a one day remedy hearing.

01-05-18

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 May 2018

FOR THE TRIBUNAL OFFICE

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