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EMPLOYMENT TRIBUNALS

Claimant: **Mr R Kraus**

Respondent: **Mulalley & Co Ltd**

Heard at: **East London Hearing Centre**

On: **1 August 2018**

Before: **Employment Judge Ross (sitting alone)**

Representation

Claimant: In person

Respondent: Mr Cifonelli (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The complaint of unfair dismissal is not upheld.

(2) The claim is dismissed.

REASONS

1 The Claimant was continuously employed by the Respondent as a lorry driver from January 2014 until 3 November 2017. Having complied with the early conciliation provisions the Claimant presented a claim on 3 May 2018 and complained of unfair dismissal.

The issues

2 At the outset of the hearing, a list of issues was agreed with the parties. This was drafted by myself and a copy provided to the parties after lunch. This list of issues appears at Appendix 1 to this set of Reasons (with two typographical errors as to dates corrected).

The evidence

3 I read and heard oral evidence from the Claimant and the following witnesses for the Respondent:-

3.1 Angela Bowen, Associate Director Human Resources and Training;

3.2 Colin Watson, Operations Director.

I also read a witness statement for Eamon O'Malley. I attached such weight to this witness statement as I thought fit.

4 There was a bundle of documents prepared by the Respondent. Page references in these Reasons refer to pages in that bundle. The Claimant also prepared a bundle of documents but did not bring a copy for the witness stand (and the copy he gave to the Respondent had different pagination to that given to me). Practical steps overcame these difficulties.

5 Where there was any conflict of relevant fact I preferred the evidence of the Respondent's witnesses for the following reasons:-

5.1 I found both Ms Bowen and Mr Watson to be honest witnesses, having seen them in cross-examination.

5.2 The evidence of the Respondent's witnesses generally was supported by contemporaneous documentary evidence whereas the evidence of the Claimant was not so supported.

5.3 The Claimant felt so strongly that he had been victimised and suffered injustice that his emotion coloured his recollection.

5.4 From what I saw the Claimant had strong emotions, in part at least due to the ill-health of his father, and that this had been ongoing since at least August 2017.

5.5 The Claimant spent a considerable time in evidence and cross-examination trying to established that he had been dismissed as an act of victimisation. He alleged that he had always been treated less favourably than other workers but did not explain why he had been recruited at all or why he had been treated less favourably from the start if this had been the case. In particular, in October 2016, Mr Taylor, the Director of the warehouse and stores division, had allowed him two days of sickness absence due to a tooth operation, so that he could recover before going on a holiday brought for him by his wife for his 50th birthday; but the Claimant later contended that Mr Taylor had done this to enable his dismissal on redundancy grounds due to an incident that occurred in April 2017 involving Mr Taylor. This was illogical, and unlikely, given the chronology.

6 The Claimant also alleged that he had been dismissed as an act of victimisation because he had not been dismissed earlier following misconduct allegations made by Mr Taylor. From the evidence I heard, the Claimant honestly believed this, but there was a lack of factual and documentary evidence to form a basis for that belief. Moreover, as the Respondent submitted, it was difficult to understand why the Claimant was not found to have committed any misconduct at all at a disciplinary hearing on 26 May 2017 if the Respondent had wanted to victimise him.

Findings of fact

7 The Claimant was employed as an HGV lorry driver.

8 The Respondent is a construction company. It has a board of eight directors; four directors are part of a family. Each director is the head of a division. Ron Taylor is Head of Stores which includes warehousing. Mr Watson is the Director for Planned Maintenance. The Respondent employs about 450 people, but is still run as a family business. It only employs three drivers; other employees drive vehicles but only as a small part of their roles, such as a site manager or an assistant manager driving around site.

9 Due to a reduction in work, the Respondent decided that it needed to review the needs of the Stores division. I find that the Claimant accepted at the time of the redundancy that there was a downturn in work, as evidenced in the notes of the consultation meeting 9 August 2017 (page 36, point 6). The lack of work is consistent with the evidence of Mr Taylor in the investigation on the misconduct issue (see page 3 of the Claimant's bundle).

10 The Respondent invited all the employees in the Stores division to a meeting on 24 July 2017. All staff were warned at this meeting that the division was under review and all positions were at risk of redundancy. This was confirmed by a letter which advised that the Respondent would look to avoid redundancy and that consultation with individuals would take place (see page 35).

11 On 9 August 2017, the Claimant attended a consultation meeting with the HR Director Ms Bowen and was invited to put forward any alternatives to avoid redundancies. The Claimant did put forward suggestions as the notes of the meeting at pages 36 to 37 demonstrate, but these were not adopted by the Board of Directors. When invited to produce evidence of other qualifications, having stated that he had many training certificates, the Claimant said that he had not provided them to the company because they were not relevant to his job (see page 37).

12 On 23 August 2017, the Claimant was informed by letter that the Directors had concluded their review and the Claimant was invited to attend a meeting on 31 August 2017 with the warehouse director and the human resources director to discuss the review. This was to be an individual consultation meeting.

13 The Claimant was absent sick from 31 August 2017 until 15 September 2017. During this time individual consultation meetings took place with the other drivers at risk of redundancy.

14 Because it had not been possible to arrange a further consultation meeting with the Claimant, by letter of 12 September 2017, the Claimant was informed that the directors' review had concluded that due to a downturn in work it was necessary to reduce the head count of drivers in Stores by one.

15 I find that the Respondent employed three drivers, all in the Stores division, including the Claimant. The other drivers had additional skills and duties including a fitter/driver and a driver/yardman.

16 This pool for selection, the drivers within the Stores division, was a reasonable pool for selection because the downturn in work was in the Stores division alone. I accepted Ms Bowen's evidence that it was more cost-effective for contractors to deliver materials to the Respondent and for the Respondent site staff to take smaller items (such as provisions like tea bags and coffee) to the site in the site van, not a lorry.

Selection process

17 As I have explained, the pool for selection was well within the band of reasonable responses open to this employer on the evidence that I heard.

18 The Respondent decided to use its standard redundancy selection criteria, and a copy of this criteria is set out at page 25. This criteria in matrix form was sent to the Claimant with the letter of 12 September 2017 (the matrix is dated January 2017). From the "Selection Matrix" the company selection criteria for redundancy is as follows:

- *"*Attendance Records*
- *Disciplinary Records – (last 12 month period)*
- ***Length of Service*

> ****Attendance Levels:***
> *The number of spells (occasions) of absence for the past 12 month period.*
>
> *Days absent will <u>not</u> be taken into consideration so staff with long term illnesses are not treated less favourably.*
>
> *Any absences relating to caring responsibilities (flexible working) or a reason which relates to an employee's disability will not be taken into consideration.*
>
> *****Length of Service:***
> *Where a tie break situation arises where more than 1 employee has the same score, the length of service criteria will be taken into consideration.* ***<u>This criterion will only be used where there is a tie break situation</u>****."*

19 The Claimant did appeal the criteria. In his appeal, he disputed that length of service was a fair criteria and explained why in his view: see page 40. The appeal was not upheld with reasons being provided: see the email letter from Teresa Taylor 26 September 2017:

> "*I write to advise that after careful consideration the Board of Directors have rejected your appeal based on the following:*

1. *The length of service is just one area of the selection criteria and is only used if there is a tie break situation.*

2. *It measures length of service in an objective manner which assists us to maintain a stable workforce during a redundancy exercise.*

3. *All criterion in the matrix is objective and can be validated by documented evidence.*"

20 The selection criteria are not, on their face, unfair or lacking in clarity. I find that they are well within the band of reasonable responses open to this employer. The explanation for the criteria was coherent and they were precise enough to determine the outcome of a redundancy exercise.

21 Ms Taylor, Financial Director, directed that the selection process continue.

22 The selection criteria were applied to the three drivers in the pool. This was done by Teresa Taylor and checked by Ms Bowen who ensured that all relevant documents and facts were taken into account.

23 The result was that the scores were set out at page 65. The Claimant finished in the lowest position.

24 The Claimant alleged that the selection criteria of sickness record had been improperly applied. He alleged that because his sickness absence on 12 and 13 October 2016 was authorised (evidenced by the document at page 72) it should not have been included in the scoring. Had this been done, the length of service criteria would not have been relevant, so one of the other two drivers would have been dismissed.

25 I accepted the clear evidence of Ms Bowen and Mr Watson on this issue. I found the selection criteria were fairly applied for the following reasons:-

25.1 The Selection Matrix shows the selection criteria. The period used for the attendance record was 12 months evidenced by oral evidence of Mr Watson and the "Leave History" document at page 66. This showed the period used: month 1 was September 2016 and month 12 was August 2017.

25.2 As explained by Ms Bowen, days of absence such as for caring responsibilities or family emergencies were ignored. Days of sickness absence (recorded by payroll as "SU") were included for the purpose of the Respondent's redundancy process. Days of absence were recorded by payroll as "AU" and were not included.

25.3 In the relevant 12 month period the Claimant had one spell of sickness absence, 12 to 13 October 2016. This was recorded as one spell and the Claimant scored accordingly being awarded two marks. The Claimant also had periods of unpaid absence (AU) where he had had time off

because of his father's ill-health in Germany. These periods were not taken into account.

25.4 The Claimant was unable to accept that, just because his sickness absence in October 2016 was authorised and paid, it could still be counted for redundancy procedure purposes. He gave no persuasive basis in fact by reference to documents why it should not be included by his managers.

25.5 The Leave History of the remaining employees showed that they each had one spell of sickness absence. There was a tie break situation.

25.6 The selection criteria required that in these circumstances length of service should be taken into account. Both the other drivers had longer service with the Respondent, or, in one case, the Respondent's predecessor (this driver having transferred under a TUPE transfer). The Claimant complained it should have been length of service as a driver that counted; but this is not part of the criteria and this feature did not take the length of service criteria used by the Respondent outside the band of reasonable responses open to it.

26 On about 2 October 2017, the criteria were applied, because the Claimant was invited to a meeting with human resources on 6 October 2017 to discuss the marking applied to the Claimant (see page 44).

Consultation meeting 6 October 2017

27 The Claimant attended the meeting on 6 October 2017. I find that this was a genuine consultation meeting as the other meetings had been. This was individual consultation with the Claimant to go through the marking with him.

28 The meeting was conducted by Ms Bowen, Mr Gristey Associate Director, attended as a note-taker. He did not leave the room as the Claimant stated but made a note. Ms Bowen clearly recalled this and that she went through the notes with him.

29 At this meeting, Ms Bowen showed the Claimant the scoring and explained he was at the bottom. I find the minutes of the meeting at page 46 are accurate if not verbatim. I find it inherently unlikely having seen Ms Bowen give evidence that this meeting lasted two minutes as the Claimant claimed, and equally unlikely that he was not given any explanation for the decision to select him for redundancy.

Alternative work

30 Before the meeting on 6 October 2017, Ms Bowen adopted the Respondent's usual procedure by approaching the Heads of each division to see if there was any alternative work for the Claimant who had been selected for redundancy. She was informed that the only roles were for Quantity Surveyors and "design and build" positions, for which the Claimant was not qualified.

Appeal

31 The Claimant's appeal by email on 11 October 2017 was sent to the Company Secretary Eamon O'Malley (see pages 48 to 53). This long email was a narrative account alleging victimisation due to several past matters, most of which were raised before me. It did not explain why the decision to select him was incorrect save that he was being victimised because he had told the truth in a disciplinary process and Ron Taylor (who had made the allegations against him) had not.

32 In measured evidence, despite the raised voice of the Claimant, Mr Watson explained that the Board of Directors had taken the decision to make one driver in Stores redundant. He accepted that this proposal had come from Mr Taylor, but this was usual because it was his division, and the duty of directors was to look at the business needs and requirements of their divisions in order to keep cost down.

33 Having seen Mr Watson give evidence, I did not accept he would have been part of a conspiracy or unfair treatment directed at the Claimant as alleged. He said he had been a director for 10 years and not seen any such unfair treatment and I accepted this.

34 At the appeal, the Claimant became heated and raised his voice. Mr Watson tried to understand the grounds of appeal.

35 Mr Watson did not uphold the appeal. He reported his decision to the Company Secretary. His report is at pages 60 to 61. Mr Eamon O'Malley upheld his decision and dismissed the appeal.

36 The appeal was fair and part of a fair process overall. In particular:-

36.1 Mr Watson considered if any form of victimisation was shown against the Claimant and decided that there was none.

36.2 Mr Watson found that the Respondent had applied its redundancy process.

36.3 Mr Watson investigated the number of consultation meetings because the Claimant had alleged he had only had three. He found out the chronology above: the Claimant had been offered four but only attended three.

36.4 Mr Watson investigated the pool for selection.

36.5 Mr Watson considered whether the selection criteria had been properly applied and concluded that it was.

36.6 Mr Watson considered use of the length of service in the tie-break situation was a fair way to reach a decision.

The law

37 In determining whether unfair dismissal, it is for the employer to show the reason for the dismissal is a potentially fair reason within s.98 ERA. A potentially fair reason is one which relates to redundancy s.98(1)(b) ERA.

Statutory Definition of Redundancy

38 The definition of redundancy in section 139(1)(b) of the Employment Rights Act provides as follows:

> *"(b) the fact that the requirements of that business –*
>
> *(i) for employees to carry out work of a particular kind, or*
>
> *(ii) 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."*

39 The correct approach to determining what is a dismissal by reason of redundancy in terms of s.139(1)(b)(1)(i) is:

(1) was the employee dismissed?

(2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished?

(3) if so, was the dismissal of the employee caused wholly or mainly by that state of affairs ?

40 This is the approach set down in **Safeway Stores v Burrell** [1997] IRLR 200, upheld in **Murray v Foyle Meats** [2000] 1 AC 51.

Duty to consult

41 I found the summary of the law in **Mugford v Midland Bank** [1997] ICR 399, 406-407, most helpful:

> "(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.
>
> (2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.
>
> (3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so

inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

42 The requirements of fair consultation in the employment context are summarised in **R v British Coal ex p. Price** [1994] IRLR 72 at para 24:

"fair consultation means

(a) Consultation when the proposals are still at a formative stage.

(b) Adequate information on which to respond.

(c) Adequate time in which to respond.

(d) Conscientious consideration by an authority of the response to consultation."

Scope of the principles in Williams v Compair Maxam

43 Although it was impossible to set out detailed procedures which all reasonable employers would follow in all circumstances in a redundancy situation, in general, reasonable employers should act in accordance with the following principles, if circumstances permit:

43.1 The employer will seek to give as much warning as possible of impending redundancies;

43.2 Whether or not an agreement as to the criteria to be adopted has been agreed with a trade union or employees, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

43.3 The employer should seek to ensure that the selection is made fairly in accordance with these criteria.

43.4 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

See **Williams v Compair Maxam** [1982] ICR 156.

Choice of Selection Pool

44 The following summary of the law in respect of the choice of selection pool is taken **Fulcrum Pharma (Europe) v Bonassera** UKEAT/0198/10:

44.1 The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to

challenge it, where the employer has genuinely applied his mind to the problem (citing with approval **Taymech Ltd v Ryan** [1994] UKEAT/663/94).

44.2 The pool should include all those employees carrying out work of that particular kind, but may be widened to include other employees such as those whose jobs are similar to or interchangeable with those employees.

Selection criteria

45 I reminded myself that a Tribunal cannot substitute their own selection criteria for that of the employer, but can only interfere if the selection criteria adopted are such that no reasonable employer could have adopted them in the way in which the employer did: see **Earl of Bradford v Jowett no.2** [1978] IRLR 16.

Test of Fairness

46 I directed myself to section 98(4) of the Employment Rights Act 1996 which I will not repeat here. I reminded myself that the burden of proof on the issue of fairness was neutral. The principles which I must apply when applying section 98(4) are:

46.1 In applying section 98(4) the Employment Tribunal must consider the reasonableness of the employer's conduct.

46.2 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

46.3 On the issue of liability the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

46.4 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See **Foley v Post Office and HSBC Bank plc v Madden** [2000] IRLR 3.)

47 In **Langston v Cranfield University** [1998] IRLR 172, EAT, the Appeal Tribunal considered that the principles of law relating to unfair redundancy dismissals were 'encapsulated' in the words of Lord Bridge in *Polkey*. In the EAT's view, it was therefore 'implicit' that unless the parties had agreed otherwise, an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, whether or not each of these issues was specifically raised before the employment tribunal. Thus, it was incumbent upon the tribunal to consider each issue, in much the same way as it would consider each of the three elements of the test in **British Home Stores Ltd v Burchell** [1980] ICR 303, EAT, in a case of dismissal for misconduct. While the burden of proof under S.98(4) ERA was neutral, the EAT considered that an employer could normally be expected to lead some evidence as to the steps it had taken to select an employee for redundancy, consult with him or her (and his or her union, if applicable), and to seek alternative employment for him or her. Furthermore, an employment tribunal could normally be expected to refer to these three issues on the facts of the particular case in

explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy.

48 I reminded myself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see **Sainsbury plc v Hitt** [2003] ICR 111.

Submissions

49 I heard oral submissions from the parties. The fact I do not refer to each and every point does not mean that all points were not taken into account.

Conclusions

50 Applying the above findings of fact and law to the issues outlined in the agreed list I concluded as follows:-

Issues 1.1 and 1.2

51 The reason for dismissal was the downturn in driving work in the Stores division, as the Claimant himself admitted at the first individual consultation meeting on 9 August 2017.

52 The requirements of the business for employees to carry out driving work had declined. The statutory test for redundancy within section 139(1)(b)(i) Employment Rights Act 1996 was proved.

53 The Respondent had shown the reason for dismissal was the potentially fair reason of redundancy.

Issues 1.3 and 1.4

54 I found the decision to dismiss both procedurally and substantively fair. The decision to dismiss was well within the band of reasonable responses open to this employer.

55 The pool for selection were the drivers within the Stores division. These were the only workers in the Respondent's business who had driving as a main part of their duties even if other employees did drive such as around site in the role of Site Manager. The pool for selection was within the band of reasonableness. Indeed, the pool seems the most appropriate in the circumstances where only the Stores division was affected by the drop off in work.

56 The selection criteria were objective. The Claimant did not argue that the successful drivers did not have greater length of service. He argued that length of service was not fair but he was unable to explain why it was not objective. I find this was because it clearly was an objective criterion.

57 The Claimant was fairly selected in accordance with the Respondent's published selection criteria for the reasons given above. The Respondent was entitled to take into account the one spell of sickness absence on 12 to 13 October 2016.

58 The Respondent carried out more than adequate consultation as set out above. There was:-

58.1 Collective consultation on 24 July 2017 at which fair warning of the risk of redundancy was given to all in the Stores division.

58.2 Individual consultation before the criteria were applied at the meeting on 9 August 2017.

58.3 The opportunity of a further consultation meeting as set out in the letter of 12 September 2017. This letter in a real sense replace the meeting that Ms Bowen had tried to arrange on 31 August 2017 and offered the Claimant the opportunity of a further individual consultation meeting. The Claimant did not ask for a further meeting but did put in an appeal in writing. This appeal was dealt with fairly.

58.4 The Claimant had a further individual consultation meeting on 6 October 2017 after his selection for redundancy. At this meeting he was informed of the selection and the lack of alternative work. He did not question selection nor make any suggestions. In any event I consider that the appeal with Mr Watson would have cured any defect at the consultation stage. The fact is that the Claimant did not raise anything on appeal that would have affected the decision to select him.

59 There was no suitable alternative employment for the Claimant after he was selected for redundancy for the reasons set out above. Moreover, although the Claimant stated in evidence that he had many skills and could do many jobs he was unable to explain why he had not provided any proof of this when the first consultation on 9 August 2017 took place or thereafter.

60 I have considered the Claimant's genuine belief in victimisation by Mr Taylor. I did not accept he had been victimised as alleged or at all. He raised several irrelevant matters, but I accepted Ms Bowen's evidence about them. Moreover I find there was no victimisation because:-

60.1 There was no evidence of the conspiracy required for it. The Claimant's case would have required all the directors to act in concert. I could not accept that Mr Watson had done so.

60.2 The Claimant's complaints had a tenuous connection to the decision to dismiss him. Some of the matters relied on went back to 2014. I could see no reason why any manager would want to victimise him at that point.

60.3 In October 2016, when the Claimant had had two days absence, his evidence was that he offered to work but Mr Taylor said that he did not need him to attend, because the Claimant was about to go on holiday for his 50th birthday present. Mr Taylor did not sound like the type of manager who would, a few months later, conspire to dismiss the

> Claimant on fabricated grounds even if the Claimant had not been disciplined as a result of his complaint. But if Mr Taylor had been prepared to conspire over the redundancy, it is difficult to follow why he would not have conspired over the disciplinary matter and had the Claimant dismissed at that point.

61 Despite the Claimant's submissions, inviting me to substitute his view of what a fair selection criteria should have been and what absence should or should not have been taken into account, I found the decision to make the Claimant redundant fell well within the band of reasonable responses open to this employer.

62 Given the above conclusions, there is no need for me to consider issue 1.5.

Summary

63 In conclusion, the complaint of unfair dismissal is not upheld.

APPENDIX A

AGREED LIST OF ISSUES – LIABILITY HEARING ONLY

1. The issues were as follows

   1.1 What was the reason for dismissal?

   1.2 Was it for a potentially fair reason? The Respondent contends that it was for the potentially fair reason of redundancy. The Claimant contends that the redundancy exercise was a smoke-screen and that the real reason for his dismissal was a reason related to a false allegation of misconduct in April 2017.

   1.3 Was the decision to dismiss procedurally fair?

   1.4 If procedurally fair, did the Respondent act reasonably by treating that reason as sufficient reason for dismissal, i.e. was the decision to dismiss within the band of reasonable responses open to the employer?
   As for particulars of unfairness, it would be fairer to put these together because the line between procedural and substantive unfairness may be an illusory one in some cases. The particulars of unfairness provided lead to the following sub-issues:

      1.4.1. What was the pool for selection? Was this within the band of reasonable responses open to this employer?

      1.4.2. Were the selection criteria objective and fair?

      1.4.3. Was the Claimant fairly selected in accordance with the criteria? The Claimant alleged that the criteria were applied unfairly and he should have been given 4 points (not 2 points) because a spell of authorised sickness absence (2 days, 12-13 October 2016) over the relevant period should have been excluded.

      1.4.4. Whether there was a lack of or inadequate consultation. The Claimant admits he attended a consultation meeting on 6 October 2017, but contends that he was never shown his scores; and he contended he was not given a consultation meeting prior to selection.

      1.4.5. Whether the employer failed to seek alternative work for the Claimant. The Claimant contended that the Respondent was recruiting whilst at the same time making him redundant.

1.5 If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event had a fair procedure been adopted?

Employment Judge Ross

5 September 2018