# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Jenkins

**Respondent:** Kirksaunders Associates Ltd

**Heard at:** Ashford

**On:** 26 October 2018

**Before:** Employment Judge Pritchard

**Representation**
Claimant: in person
Respondent: Mr R Kirk, Managing Director

# REASONS

These reasons are provided pursuant to the Claimant's written request dated 28 November 2018.

1. The Claimant made claims for a redundancy payment, notice pay, and unfair dismissal. The Respondent resisted the claims.

2. The Tribunal heard evidence from Reginald Kirk, the Respondent's Managing Director, and from the Claimant (the Claimant provided a witness statement but the Respondent did not). The Tribunal also questioned both witnesses to gain an understanding of what took place and the parties cross questioned each other. The Tribunal was provided with two bundles of documents to which the Tribunal had regard. At the conclusion of the hearing, each party said a few words by way of submissions.

**The issues**

3. The Tribunal had no need to make any findings in relation to the Claimant's claim for a redundancy payment, by the time of the hearing payment having been made by the Secretary of State.

4. The Respondent conceded that the Claimant was entitled to the balance of her notice pay and therefore the Tribunal had no need to make any determination in this regard either.

5. With regard to the unfair dismissal claim, the Tribunal had to determine:

   5.1. Whether the Respondent could show the reason for the Claimant's dismissal and that it was for the potentially fair reason of redundancy.

Although, at the commencement of the hearing, the Claimant said she accepted she had been dismissed by reason redundancy but that it had been unfairly carried out, the Tribunal nevertheless considered whether the Respondent could show that the dismissal was by reason of redundancy, not least because the Claimant was a litigant in person).

5.2. If so, whether the dismissal was fair or unfair in accordance with section 98(4) of the Employment Rights Act 1996.

**Findings of fact**

6. The Respondent is a relatively small employer with about 26 employees at relevant times. The Claimant commenced employment with the Respondent in October 2004. In 2007 she was appointed as a statutory director.

7. One of the factual issues in the case is whether the Claimant was employed as a Director or a Finance Director. On the Claimant's own case, she was a director only with 20% of her duties involved finance matters. According to Mr Kirk, more than 20% of the Claimant's duties involved finance.

8. The Claimant referred to herself as Finance Director on an organisational chart which was supplied to clients. The Bookkeeper reported financial figures to the Claimant who prepared financial reports. The bulk of the Claimant's duties she herself listed in her appraisal relate to duties relating to finance.

9. Regardless of whether her title was Director or Finance Director, and regardless of the exact apportionment of her finance duties, the Tribunal finds that the Claimant had particular responsibilities for finance which did not fall to the other two directors: Mr Kirk the Managing Director, and the third director Martin Edwards.

10. Towards the end of 2017, the Respondent's financial position was poor and the Respondent appointed insolvency practitioners who advised as to a Company Voluntary Arrangement (CVA). The Respondent was advised that in the event of redundancies, payment of statutory redundancy pay and notice pay would be met by the Secretary of State.

11. The Respondent carried out a review of the business, redundancy selection matrices were completed for staff members, and a utilisation reports were prepared by the technical team leaders to ascertain who was, and who was not, working to capacity in the business.

12. In January 2018, Martin Edwards and the Claimant provided the completed matrices to Mr Kirk. On 22 January 2018, a letter was sent to all employees notifying them of the possibility of redundancies.

13. Mr Kirk took the view that maximum savings could be achieved if the organisation was able to dispense with the services of a director. Each director scored the other two.

14. The selection criteria were: experience in role; job knowledge; qualifications and training; demonstration of effort and flexibility; efficiency; attendance and time-keeping; accuracy and presentation; ability to work under one's own direction.

15. Although Mr Kirk, as Managing Director, oversaw the business, he was scored as a general director as was Mr Edwards. The Claimant was scored on the basis that she had responsibility for finance.

16. Mr Kirk took the view that the organisation could do without a Finance Director, with finance responsibilities subsumed by the bookkeeper. Given that the Claimant had both achieved the lowest score, and the fact that she had particular duties relating to finance which could be undertaken by the bookkeeper, she was selected and placed at risk of redundancy. The Respondent informed the Claimant by letter dated 26 January 2018, among other things:

> *We have now carried out selection against the criteria that was notified to you and it is with regret that as explained to you today after a review of the skills that are required to be retained in the business, I am writing to confirm that your position of Financial Director has been identified as one which may be at risk*

17. The Claimant was not required to attend work thereafter save for attendance at redundancy consultation meetings which took place on 2 February 2018 and 9 February 2018.

18. The Claimant's employment ended on 9 February 2018.

19. On 24 May 2018 the CVA was approved

**Applicable law**

20. Under section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within section 98(2).

21. Section 139(1)(b)(i) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

22. In Murray v Foyle Meats Ltd [1999] ICR 827, Lord Irvine approved of the ruling in Safeway Stores plc v Burrell [1997] ICR 523 and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

23. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation. See: McCrea v Cullen and Davison Ltd [1988] IRLR 30.

Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

24. There is no requirement for an employer to show an economic justification for the decision to make redundancies; see Polyflor Ltd v Old EAT 0482/02.

25. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.

26. In Williams v Compair Maxam Ltd [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:

    26.1. Whether the selection criteria were objectively chosen and fairly applied;
    26.2. Whether the employees were given as much warning as possible and consulted about the redundancy;
    26.3. Whether, if there was a union, the union's view was sought;
    26.4. Whether any alternative work was available.

27. However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in Williams v Compair Maxam will not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

28. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255 it was held that employers need only show that they have applied their minds to the problem and acted from genuine motives. As was said in Capita Hartshead Ltd v Byard [2012] IRLR 814, provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

29. In R v British Coal Corporation [1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in Gwent County Council ex parte Bryant [1988] Crown Office Digest 19 HC, namely that 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. Also see: Rowell v Hubbard Group Services Ltd [1995] IRLR 195; and King v Eaton Ltd [1996] IRLR 199.

30. The Tribunal must judge the question of redundancy selection objectively by asking whether the system and its application fell within the range of fairness and reason (regardless of the whether the Tribunal would have chosen such a

system or apply it in that way themselves; see British Aerospace v Green [1995] IRLR 433. The Tribunal should only investigate marks in a selection exercise in exceptional circumstances such as bias or obvious mistake; see Dabson v David Cover & Sons Ltd UKEAT/0374/10; and Nicholls v Rockwell Automation Ltd UKEAT/0540/11.

31. If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM.

32. The reasonableness of the dismissal is dependent on the situation known to the employer at the time of dismissal. The appearance of an alternative job after the employee has been dismissed cannot make the dismissal unfair: Octavius Atkinson & Sons Ltd v Morris 1989 ICR 431, CA

**Conclusion**

33. The Respondent has shown the reason for the Claimant's dismissal, namely a state of affairs which meant that it no longer needed an employee to carry out work of the kind carried out by the Claimant, namely that of a director with finance responsibilities. The Claimant's finance duties were to be undertaken by the bookkeeper, an existing employee. Further, the Respondent, through its Managing Director, Mr Kirk, decided that making one of the highly paid directors redundant would help alleviate the Respondent's financial difficulties. That was a business decision the Respondent was entitled to take.

34. While it might seem unusual for such a decision to be taken by the Managing Director alone, rather than the board in a collective decision, it is not a decision which can be said to fall outside the band of reasonableness, especially when one of the directors is to be selected.

35. In any event, in putting her case forward, the Claimant conceded that redundancy was the reason for her dismissal. (That was of course sensible: if she had not been dismissed by reason of redundancy, she would have had no right to the redundancy payment she received from the Secretary of State).

36. Redundancy is a potentially fair reason for dismissal.

37. As to whether the dismissal was fair or unfair, the Tribunal first considered the selection criteria which were chosen. The selection criteria themselves, as described Mr Kirk, appear to have been capable of objective measurement and the Tribunal is unable to criticise them.

38. The Tribunal then considered whether the criteria were fairly applied. The Tribunal concluded that they were fairly applied.

39. The Claimant was assessed by reference to her particular finance skills which the Tribunal has found formed a significant area of her responsibilities.

40. Each director scored the other two directors against the set criteria. Mr Kirk included himself in this exercise. The Claimant scored lowest.

41. However, this was not the only reason for the Claimant's selection; she also had special responsibilities and carried out duties relating to financial matters and the Respondent, through its Mr Kirk, decided that such duties could be carried out at a lower level in the organisation.

42. In the Tribunal's judgment, the Claimant was fairly selected to be placed at risk of redundancy.

43. The Claimant complained that being placed at risk of redundancy came as a surprise to her, not least because she had scored other members of staff within the organisation against the matrix and the utilisation report suggested that other staff members were under-utilised such that they should be selected. However, all members of staff, including the Claimant, were told on 22 January 2018 of the possibility of redundancies. An employee at risk of redundancy has to be warned at some stage and is might well come as a shock. The question is whether the Claimant had sufficient warning. In the Tribunal's judgment, she did. She was aware of the financial situation in the business, she was aware that redundancies were proposed, she was individually placed at risk by letter dated 16 January 2018 and dismissed following the final consultation meeting on 9 February 2018.

44. The Claimant was consulted about her redundancy. The Tribunal considered the notes of the 9 February 2018 and observed that the scores were discussed. The Claimant was asked if she had any solutions which might avoid her redundancy and she did not. In the Tribunal's view, there was nothing in the consultation process which might render the dismissal unfair. The Tribunal is unable to conclude that the consultation process was a sham as asserted by the Claimant.

45. Both parties agreed that there was no suitable alternative vacancy into which the Claimant might be re-deployed instead of redundancy. Mr Kirk was questioned about other employees who were retained and the Tribunal was satisfied that the Respondent had reasonable grounds to retain them for the reasons he gave. As far as the Claimant complains that vacancies arose after her dismissal, this is nothing to the point because it is the situation at the date and time of dismissal that is relevant: Octavius Atkinson.

46. The Tribunal questioned Mr Kirk as to whether another employee might be "bumped" i.e. displaced as redundant so the Claimant could take up their position instead. The Tribunal was satisfied by what he had to say that his decision not to displace another employee was reasonable in the circumstances since they had specialist skills not possessed by the Claimant, (such as being an expert witness).

47. The Tribunal formed the view, upon hearing the evidence, that what really aggrieved the Claimant was that the business decision to remove her role was flawed or made in some way to target her. However, a Tribunal is entitled only to ask whether the decision to make redundancies was genuine, not whether it was wise. The question for a Tribunal is to consider whether the dismissal was fair or unfair in accordance with the law described above. In this case the Tribunal concludes that the Claimant was not unfairly dismissed.

**Case No: 2301555/2018**

Employment Judge Pritchard

Date: 4 January 2019