



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Gemma Wright

v

DRC Locums Limited

Heard at: Bury St Edmunds

On: 14, 15 and 16 January 2019

Before: Employment Judge Cassel

Members: Mrs C Smith and Mrs L Daniels

Appearances

For the Claimant: Mr B Gray, Counsel

For the Respondent: Mr D Isenberg, Counsel

JUDGMENT

1. The claim of sex discrimination is dismissed on withdrawal.
2. The claimant was not unfairly dismissed from her employment and the claim of unfair dismissal fails.

REASONS

1. The claimant Miss Gemma Wright, brings a claim of unfair dismissal. There was a claim of unlawful sex discrimination but this claim was dismissed on withdrawal.
2. A preliminary hearing took place on 19 June 2018 in front of Employment Judge Ord when the issues were clarified and orders were made. The trial was set down for hearing for three days and took place at Bury St Edmunds Employment Tribunal on 14, 15 and 16 January 2019.
3. We heard evidence from Mr Jason Stewart CEO of the respondent company, Mrs Judy Simpson HR Director, Mr Aydid Hassan Operations Director, the claimant Miss Gemma Wright and from Mrs Sarah Ballantyne who was formerly Operations Director of one of the company's divisions.

We were also provided with a bundle of documents, a chronology prepared by the claimant and a skeleton argument prepared by Mr Isenberg who appeared for the respondent.

The Facts

4. We make the following findings of fact based on the balance of probability, finding those facts which are relevant to the issues in this case.
 - 4.1 The respondent operates a recruitment business specialising in the supply of staff to the medical sector, primarily to the National Health Service Hospital Trusts.
 - 4.2 The claimant was employed from 23 February 2015 to 3 August 2017 as a Team Manager in the Short Shift Team which specialised in sourcing Doctors to fill requests for medical staff.
 - 4.3 Having considered the oral and documentary evidence that was made available to us, we are satisfied that her role and responsibilities remained roughly the same throughout and there was no evidence to demonstrate that her job title had changed.
 - 4.4 She was described as a non-billing Team Manager by the respondent and indeed her responsibility lay principally in managing more junior staff known as recruitment consultants who placed medical staff as required. She was paid a basic salary of £50,000 and provision was made for a bonus payment based on the billable activity of those in her team. She also undertook a role in growth, forecasting and managing and had first hand knowledge of the economic activity of the team.
 - 4.5 Mr Stewart described the costs of the business being principally labour costs which he estimated at between 70% - 80% of the costs of running the business.
 - 4.6 Mr Stewart, as CEO of the respondent, prepared reports for the main board meetings which took place on a monthly basis. Mr Hassan as Operations Director, of the then Nursing Division, also attended those meetings. We understand that he is now the overall Operations Director. Reports prepared by Mr Stewart were exemplified at pages 104AA which is a report from April 2017. That in our judgment was a significant report as it referred to the negative impact of tax changes to the business. We were told the changes to IR 35 provision had reduced the availability of locum medical staff and placed additional requirements on the respondent. In that document to which we have referred, he commented

“the strategy of the business has not changed in the DRC’s transitioning to a high volume, low cost model as margin pressure

and the imposition of a more onerous tax regime continues to impact the market of 2017 and beyond”.

- 4.7 Mr Stewart described the business requiring payments to locum staff on a weekly basis and accounts to client on a monthly basis which resulted in a delay of payments to the company. The impression we were given was that there was particular focus on cash flow which, along with cash savings, were described as priorities.
- 4.8 There was no doubt in the evidence that the respondent was facing substantial challenges. In particular, the income from the Doctor's provision where the claimant was working fell from £388,000 in April 2016 to £137,000 in April 2017. Mr Stewart hoped that there would be a recovery and monitored the situation regularly.
- 4.9 Over a period of 18 months the number of staff was reduced by 40%. Mrs Simpson gave evidence that in June 2017, there were 122 employees and in November 2018 that had reduced to 75. She added that since 2016, 13 employees had left the business due to compulsory redundancy and many of those who had resigned had not been replaced. Mr Stewart told us that 40% staff turnover was considered normal. But on any view there was a substantial reduction in the number of staff engaged within the respondent company.
- 4.10 From April 2017, Mr Stewart identified the claimant's role, among others, as one possibly to be considered for redundancy. There was an email of 20 April 2017 at page 104AE, from Mr Stewart to Mr Hassan referring to a forecast for the business which as he put it would *“result in a redundancy program that would be deep”*. We are satisfied that no mention was made of any decision, or indeed that any decision appears to have been taken and the matter was kept under review.
- 4.11 Mr Woodcock, who was described as a Business Manager in the Mental Health division resigned. Mr Stewart was confused in evidence as to the date of his resignation. There is an email at 104AJ dated 29 May 2017 from Mr Woodcock to Mr Stewart. This email was added to the bundle of documents on application by Mr Gray. The email is in terms, that as of 29 May 2017 Mr Woodcock resigned from his role. Mr Stewart told us that if Mr Woodcock had not resigned, he would have been dismissed by way of redundancy. Miss Ready who worked within the organisation, was promoted to a role that incorporated Mr Woodcock's role and among other things had an additional responsibility to bill for work undertaken. There is a letter of appointment dated 25 May 2017. We remain confused about the apparent timings of the correspondence, but the evidence points to her being in post by 1 June 2017.

- 4.12 (Dated 20 June 2017, at page 105) There was exhibited an email from Mrs Simpson to Mr Stewart which started in the following terms,

“Further to our discussions over the past few weeks and earlier today, GW [our comment: the claimant], is employed originally as a Team Manager reporting to Sarah”.

There was then reference to the claimant's role being at risk of redundancy.

- 4.13 The two witnesses, Mr Stewart and Mrs Simpson, gave consistent and credible evidence that consideration of the claimant's role had been given over a period of time. Mr Stewart referred to the need to have a dynamic response to the changes in market conditions and his decision to identify the claimant's post at risk of redundancy is consistent with the evidence we have as to the changing needs of the business and the financial performance of the claimant's team. The claimant believed that it was a decision based in her boyfriend, Jack O'Connell's decision to leave the business the previous day. It is not the way we see the evidence and we accept the respondent's account and note that neither Mrs Ballantyne, nor Mrs Simpson tried to persuade Mr Stewart to change his mind.
- 4.14 At page 107, which is a letter to the claimant from Mrs Simpson dated 20 June 2017, the claimant was informed that she was at risk of redundancy.
- 4.15 A consultation process was started and Mrs Ballantyne attended the first meeting on 22 June. She was the claimant's line manager. A script of the meeting of likely issues to be raised at the meeting was prepared and produced at pages 108 – 109. The meeting notes of that redundancy consultation meeting of 22 June were exhibited at pages 110 – 112.
- 4.16 We have looked at those notes carefully and considered the evidence of Mrs Simpson and Mrs Ballantyne and the meeting had the hall marks of genuine consultation. Issues raised by the claimant were addressed by Mrs Ballantyne.
- 4.17 At the claimant's request, the second meeting was postponed and was further postponed at Mrs Simpson's request.
- 4.18 Mr Hassan was appointed to deal with the next meeting and the process as Mrs Ballantyne was on holiday. Mr Hassan was an impressive witness. In our judgment he was not influenced in his decision making and had on a previous occasion decided that the role that had been identified at risk of redundancy should not lead to the dismissal of a member of staff. He had attended board meetings for some three to four years and understood the financial

exigencies of the company. He reached his own conclusions that a genuine redundancy situation, as he described it, had arisen, as a result of the decision to *"delete the role of Team Manager for the Short Shift Team"*. He accepted that the role could be absorbed into that of Mrs Ballantyne's and that the claimant was the only person in the role of Team Manager in a non-billing role. He considered whether there were any suitable alternative roles and decided that there were not. He was closely cross examined and was adamant that redundancy was the only reason to dismiss the claimant and that Mr O'Connell's leaving at the same time was just a coincidence. He pointed to other couples or close relations and relatives working within the respondent's organisation and the remaining member's position not being affected by the other member deciding to leave.

- 4.19 The claimant was advised of her right of appeal and exercised that right and her appeal was heard by Mr Stewart. Mr Stewart told us that he removed himself from the process after his decision that the role of the claimant was at risk. He is senior to Mr Hassan and at the appropriate level to hear the appeal. The claimant's two grounds of appeal were considered by him which were summarised as the selection was unfair and that she had been treated unfairly and discriminated against due to her personal relationship with Mr O'Connell. Mr Stewart considered the grounds and rejected them. In a letter written by Mrs Simpson at page 137, the reasons were given.
- 4.20 The claimant was dismissed and the effective date of termination was 3 August 2017.
- 4.21 In evidence we learnt that Richard Little was appointed as Operations Manager to commence on 31 July 2017. His appointment was to a position on a salary 40% greater than that of the claimant at the time of her dismissal. The substantially higher salary, we were told by Mr Stewart, reflected the seniority of the role. He brought a team of Recruitment Consultants with him and was identified as a key employee. We accept the evidence of the respondent that this role was not suitable as an alternative to that previously held by the claimant.

The Law

- 5. The relevant law is that which is contained in section 98 of the Employment Rights Act 1996 which is in the following terms,
 - 98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show,
 - (a) the reason (or if more than one, the principal reason) for the dismissal, and

- (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

98(2) a reason falls within this sub-section if,

- (c) is that the employee was redundant.

98(4) where the employer has fulfilled the requirements of sub-section (1) 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.

6. Under section 139(1)(b) of the Employment Rights Act 1996, redundancy is defined in the following terms,

139(1)(b) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to,

- (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.

7. We are grateful to both Counsel for the very helpful submissions that were made and reach the following conclusions.

Conclusions

8. We remind ourselves it is not for us to describe or to determine how an organisation should be run. Subject of course to the Equality Act 2010 and other statutory provisions, it is the right of the respondent to determine how to run its business. We of course, have to look at the impact of that decision making process and how it is managed.

9. The respondent has demonstrated the need to make the role held by the claimant redundant. There is ample documentary and oral evidence which we referred to in the findings of fact.
10. It is up to the respondent to consider pooling provisions. We remind ourselves that we cannot substitute our own views for those of the respondent. We may have reached a different decision but that is not a matter for this tribunal. The respondent however, has demonstrated that the pool of one was a reasonable pool and it certainly fell within the range of reasonable responses.
11. There is no submission that the Acas guidelines have not been followed.
12. We are satisfied that a fair and reasonable consultation process followed. The claimant understood what was being proposed and was provided with sufficient information on which representations could be made. She was able to be accompanied and she had sufficient time in which to respond. The responses that she gave were considered and we referred to those in our findings of fact. There is nothing in our view to suggest that the procedure was not fair. We are satisfied that the respondent has demonstrated that there were no suitable alternative roles.
13. Finally, it is not for us to determine the outcome of whether the claimant should have been dismissed or not dismissed. In the circumstances it seems inevitable. But in any event, we are in no doubt that the dismissal fell within a reasonable range of responses available to the respondent.
14. We therefore dismiss the claim of unfair dismissal.

Employment Judge Cassel

Date: 14 / 3 /2019

Sent to the parties on: 20 / 3 /2019

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For the Tribunal Office