Case No: 2500600/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Sturrock**

Respondent: **Contract Joinery (NE) Limited**

Heard at: **North Shields Hearing Centre** **On: Tuesday 3 July and Wednesday 4 July 2018**

Before: **Employment Judge Speker OBE DL**

Representation:

Claimant: In Person
Respondent: Mr M Howson, Consultant

JUDGMENT

1) The claimant was unfairly dismissed and accordingly his claim succeeds.

2) The respondent shall pay to the claimant compensation in the sum of £14,292.66

REASONS

1) This is a claim of unfair dismissal brought by the claimant Mr Peter Sturrock against his former employers Contract Joinery (NE) Limited trading as Grafton and Co. The claimant alleges that he has been unfairly dismissed in relation to his selection and dismissal for redundancy. I heard evidence of three witnesses for the respondent, Kenneth Smith, the managing director, Michael Morritt, production manager and Mark Burns, production manager. The claimant gave evidence himself and called one witness, Wayne Larmouth and employee of the respondent company who attended in response to a witness order obtained Mr Sturrock. I was provided with a bundle of documents running to 110 pages. I found the following facts. The respondent company is in the business of manufacturing joinery substantially for the bar and leisure industry. Work

from Weatherspoons has been approximately 50 per cent of the companies turnover. In the premises in Felling the company has a joinery shop and a polishing shop. The claimant worked as a French polisher in the polishing shop, initially he was a contractor from 2015 and then from approximately 2015 he was an employee. There is some doubt about the actual date because in the claim form the claimant states that his employment commenced on 17 April 2015 but in the response document the respondent states that the employment commenced on 29 May 2014, however there is no suggestion other than that the claimant has over two years qualifying service entitling him to be able to present a claim for unfair dismissal. He has worked as a French polisher for 49 years and is clearly proud of his long career in that capacity. In the polishing shop there had been day shift and a night shift four polishers on the day shift and two on the night shift. The claimant worked on day shift where extra labour was needed some polishing work was sub contracted to a company called Gordon Richardson French Polishers Limited. During 2017 the respondent company experienced a reduction in turn over with falling sales and the company was recording losses. In November 2017 Weatherspoons indicated that they would be placing no new orders until the end of March 2018. The company was endeavoring to attract other work and to restore it to profitability. It was decided that steps needed to be taken to protect the company to enable it to survive and this included making savings on labour. A decision was taken to terminate the night shift for the polishing shop because the night shift workers attracted a higher rate of pay. This meant that all six polishers would be working on the day shift. In December 2017 a three day week was introduced in the polishing shop from 12 December on short term basis. A briefing was given to the work force on 8 December 2017 with an indication that the company may need to consider redundancies. The claimant was briefed separately on that day a letter was sent by Mr Smith to the claimant and presumably others on 8 December 2017 stating that if things did not improve for the company the claimant would be at risk of redundancy. By 4 January 2018 the situation had not improved the directors met and decided upon pursing the redundancy process and complied a redundancy matrix downloaded from the internet, the suggestion being that this was being approved a form of it was approved by ACAS. There was no evidence of consultation with the workforce, the claimant or any trade union as to the matrix or the policy. On 12 January 2018 Mr Smith wrote to all employees referring to redundancies and stating that the company intended to make redundancies in the business and that those selected would be contacted the following week.

2) During the discussions by the company as to redundancy in the polishing shop it was decided that John Richardson, the foreman would not be included in the pool for selection as his post was needed in order to operate the shop going forward. Two of the polishers in the shop Arthur Darrington and Paul Clark were not employees although they had been at some stage in the past, they were designated as self employed contractors that had worked in the polishing shop for the company for a number of years. It was decided that they would be included in the pool of five polishers from whom the selection for redundancy was to be made. Questions were asked to whether the company had a policy with regard to selection for redundancy and whether the selection matrix was part of it. No evidence was given as to this but in the bundle of documents and in

particular the company's hand book on page 34 there is a redundancy policy which states as follows:-

> *"It is the policy of Grafton and Co by careful planning to ensure as far as possible security of employment for its employees. However, it is recognised that there may be changes in the competitive conditions, organisational requirements and technological developments which may effect staffing needs. It is the aim of the company to maintain and enhance the efficiency and profitability of the company in order to safe guard the current and future and employment of the company's employees, the company in consultation with any trade union, heads of department and any elected employee representative will seek to minimize the effect of redundancies through the provision of sufficient time and effort to finding alternative employment for surplus staff. Where compulsory redundancy is inevitable the company will handle the redundancy in the most fair, consistent and sympathetic manner possible and minimise as far as possible any hardship that may be suffered by the employees concerned."*

It was decided that Michael Morritt, John Richardson and Mark Burns would carry out the scoring for the polishing shop. The used the matrix referred to. That matrix set out 10 hearings within which scoring was to be undertaken the headings were:-

1) Job Performance
2) Job Knowledge
3) Skills
4) Experience
5) Company investment / training
6) Attendance
7) Team Player / Communicator
8) Cost of redundancy
9) Over time
10) Flexible working

In the first column there was the possible mark which could be scored for each employee operative some of these being positive scores and some negative and then producing scores at the foot of the form which were to be compared for the purposes of selection.

3) Having utilised the matrix the conclusion was reached that the claimant and Ray Harrison scored lowest and therefore were to be selected for redundancy. On 17 January 2018 Mr Smith wrote a letter to the claimant stating that with regret and due to lack of work Mr Sturrock's employment was being terminated, that his three weeks notice commenced on 8 January 2018 and that he would receive redundancy and holiday payments on the Friday one week after leaving. The claimant ultimately received a redundancy payment of £1,755.00. He made enquires after about the possibility of a role as a labourer but he was told that he did no have the necessary skills including a driving license and that there was no

vacancy in any event because of natural wastage. Following termination there was a temporary uplift in work due to an order for a kitchen in Wales and following the breakdown of the CNC machine this produced overtime in the polishing shop and some work was sub contracted to Gordon Richardson but no work was offered to the claimant.

4) Submissions

Mr Howson made detailed submissions and helpfully referred to a number of cases and the relevant legislation. He submitted that there was clearly a redundancy situation as the company needed to reduce the number of French polishers on the site. There was six polisher and the company only needed four and it was necessary for there to be two redundancies. As to the pool for selection he referred the case of Capita Heartshead Limited v Ms C Bayard Appeal Number UK EAT 044511RN 2012 WL488483 the judgment having been given by the Honorable Mr Justice Silver. He referred this case in relation to the two issues as to the exclusion of Mr Richardson the foreman from the pool and the inclusion of the two contractors. He emphasized that retention of Mr Richardson as foreman was essential for the running of the company and that Mr Richardson was best placed in order to judge the merits of the polishers for the selection process. He argued that the company had properly applied its mind to the issue in deciding to retain the foreman. As to the inclusion of Mr Darrington and Mr Clark, Mr Howson suggested that this was a reasonable step for a reasonable employer and that the facts of the too many questions were unique and that they had been with the company for a number of years. He also referred to recent supreme court cases with regard to status namely the Pimilico Plumbers and Uber cases and the fact that the labeling of persons in the work environment cannot necessarily be the proper test with regard to their legal status. He suggested that the decision taken by the company with regard to inclusion of the two contractors was a reasonable one and that it was fair for them to be included in the pool. Mr Howson also reminded me of the role of the Tribunal under Section 98 4 of the Employment Rights Act as set out in British Areospace and Green 1995 RLR and that it was not appropriate for the Tribunal to embark upon an “over minute investigation of the selection process by the Tribunal which may run the risk of defeating the purpose which Tribunals were called into being to discharge namely a swift, informal disposition of disputes arising from redundancy in the workplace so in general the employer who sets up a system of selection which reasonably described as fair and applies it without any overt signs for conduct which mars its fairness will have done all that the law requires. Reference was also made to the need to judge the matter on the basis on whether the actions of the company were those which could have been undertaken by a reasonable employer and that the Tribunal must not embark upon a rescoring exercise. For these reasons he suggested that the inclusion of the two contractors was justified. He also submitted that the operation of the selection process in the matrix was fair and that it is not for the Tribunal to minutely criticise this but look at the matter in the round. He made this point with regard to the training category where it was suggested that only the apprentice was separately identified and he pointed out that the same matrix had been used when making a selection

in the joinery shop. The selection matrix had been operated fairly in a committee process with the appropriate knowledge.

5) With regard to the cost of redundancy

Whilst it did appear to be reverse Mr Howson suggested that the claimant would still have been one of the lowest scoring despite the marks in that schedule and that there would be an argument under the Polky principal with respect to consultation he submitted that Mr Sturrock had been consulted about short term working and redundancy and that he had been told his scores if consultation had been inadequate would still be a Pokly argument that the outcome would have been the same. Mr Howson also pointed out that this was the first redundancy at this site which is a small site and that there is no HR person, it is therefore appropriate to take into account the definition under Section 98 4 to have regard to the size and administrative resources of the respondents undertaking. The claimant submitted that during his employment he did speak his mind and would go to the office to speak up for himself and others and he should not have ridiculed for that, he did not get on well with some of the management, he felt there was an age issue, he had initially been a contractor but had gone on the books to gain security, however when he left, the company kept the contractors on and it was after that they went on to the books. The company was also subcontracting work out and not offering it to him. He had not received a pay rise for three years although the rest of the factory had received such rises, he approached Mr Morrit about this on a number of occasions but this was ignored and no reasons were given. In his 49 years of work, he had never been treated in this way, he had expected that he would have been reinstated when work picked up. He was, he said, known through the factory as an excellent worker with a good character.

6) The Law

The statutory definition of redundancy is set out in Section 139 (1) of the Employment Rights Act 1996. For the purposes of this Act, an employee who is dismissed shall be taken as dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (a) the fact that his employer has ceased to intends to cease (i) to carry on the business for the purposes of which the employee was employed by him or (ii) to carry on that business in the place where to the employee was so employed or (b) the fact that the requirements of their business (i) for employees to carry out work of a particular kind or (2) 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. The test of fairness in relation to dismissal is set out in Section 98 of Employment Rights Act 1996 (4) 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 employers 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.

7) Findings

I acknowledged the role of the Tribunal in unfair dismissal cases is not to submit its own decision and in selection for redundancy cases not to substitute its own scoring for that which has been undertaken by the employer. I find that the substantial reason for the dismissal in this case was redundancy. There was a redundancy situation in that the company needed less operatives because of a slump in its turnover, this included less French polishers. This initially was dealt with by the company in stopping the night shift and controlling overtime. It must be bourn in mind that redundancy protection is a concept which has been within English law since the redundancy payment act 1965 and was one of the first rights given to employees to make claims in employment tribunals or industrial tribunals as they initially were. The statutory definition of redundancy under Section 139 to which I have referred mentions repeatedly employees. This emphasises that redundancy is a protection given by employees namely those under the statutory definition who are engaged under contract of service rather than whose have a different capacity such as self employed persons or sub contractors. The law and practice and the ACAS guidelines expect that employers will do what they can to avoid the need to make employees redundancy knowing that employees and their families do expect and hope to have security of employment. The companys own policy in the hand book to which I have made reference makes this same point the final line being “minimises as far as possible any hardship that may be suffered by the employees concerned”. It is implicit in this security is given to those who are employees and are therefore in a different category to those who are for what ever reasons work in a different capacity not as employees. This is directly relevant to one of the issues in the case namely whether it was appropriate to continue with the engagement of two self employed polishers in this polishing shop and to retain them when in many situations it is considered to be an appropriate step to take where redundancy may occur to discharge or cease to use either self employed contractors or sending work out to sub contractors. Whilst I note Mr Howsons reference to the supreme court cases this is not something which has been argued in full in the present case so as to determine whether the two individuals themselves could or might be legally categorised as employees . There appears to be no argument at all that at the relevant time they were not employees where as Mr Sturrock and his other colleagues were employees and therefore eligible for the protection from redundancy which the law provides. It is the security to which Mr Sturrock alluded when he gave his evidence. I find on the clearest of evidence that this redundancy dismissal was seriously flawed by including the two contractors within the pool and not deciding to discontinue with their engagement which would have meant that no redundancy selection would have been necessary at all because the company would then have had with its employees the required number of French polishers even without going into the great detail of the marking process it is clear that the two contractors were

advantaged by being included. There are other aspects of the process which I have considered as to whether they also effect the fairness of the selection and the dismissal again reminding myself that it is not for the Tribunal to substitute its own decisions or engage in rescoring. However, it is necessary to consider these aspects because evidence has been given about them and submissions have been made. I have announced my finding with regard to the inclusion of the two independent contactors. With regard to the question of consultation this should be a meaningful dialogue with employees so that they are aware of the method of selection and the matrix which is to be used in order to operate the scoring. There is no evidence that there was any suitable consultation with the claimant as to the matrix which was to be used. Whilst he was notified of the scores awarded the fact that he was one of the lowest two there appears to be no adequate opportunity for him to comment on the scores to advance any arguments which he could have put forward as to whether the scores given to him where appropriate in the various categories. In addition he was given no right to appeal against his decision which is implicit in employment law. I do not find the entire matrix objectionable but there are some aspects which appear not to be such as would be operated by a reasonable employer. These were put to the respondents witnesses and in some areas they were unable to explain the reason for the marking and why the marks were attributed as they were for example the section headed training appeared to have been of benefit only to the worker described as an apprentice and this appeared unfair even if the same process was used when considering the joinery shop. The section with regard to absence had negative scoring which appeared illogical and ill defined, the section on team player/communication gave the claimant a mark as being popular with fellow workmates although this conflicted the evidence given by the three witnesses for the respondent. The category of giving a negative mark as to the cost of redundancy was illogical and could not be explained by the respondent, the suggestion was that the claimants mark was because he would cost £4,000.00 to be made redundant but no evidence was produced as to how that figure was reached. The whole premise of that section was entirely flawed and it appeared to invert the whole idea of redundancy protection and prejudiced those who had longer service by making them more likely to be selected to be made redundant whereas the principal of protection against redundancy should favour those with longer service the law then would awarding them or protecting them giving them larger redundancy payments based upon their length of service.

8) For all the above reasons I find that Mr Suttrock was unfairly dismissed I appreciate that the company did make endeavours to set up a scoring process and that there was some good will on the part of those participating in it however this was not a fair procedure there was lack of consultation, it was inappropriate to include contractors, there was no right of appeal and various aspects of the scoring matrix were objectionable and could not be regarded as a fair method of achieving a fair outcome. I have considered the Polkey argument, however in view of my finding that it was unfair to include the two sub contractors in the pool for selection and to retain them in preference to employees, I cannot find any basis for suggesting that if this exercise had been carried out in a fair way the

outcome would have been the same. This is because if the two sub contractors had not been included in the process their service would have been discontinued and there would have been no need to make any of the other employed polishers redundant.

9) Compensation of Remedies

The claimant was seeking only compensation. He remains out of work and this is despite significant efforts made for him to find suitable alternative employment. Mr Howson confirmed on behalf of the respondent that no issue was taken with regard to any suggestion of failure to mitigate.

10) The claimant has received his statutory redundancy payment and therefore in respect of his claim for unfair dismissal there is only a compensatory award to calculate.

Average net weekly wage £328.38. This sum was agreed on both sides. The last payment received by the claimant was to 26 January 2018.

Past loss of earnings 23 weeks from 26 January 2018 to 4 July 2018 – 23 x £328.38 = £7,552.74

11) Future loss of earnings

I find that there is no reasonable prospect of the claimant finding alternative employment. He will be 65 on 19 November 2018. I find that it is reasonable, fair and equitable to award him of future loss of earnings from the date of the Hearing 4 July 2018 to his retirement date 19 November 2018 when he will receive his pension.

Future loss claim 19 x £328.38 = £6,239.92

12) Loss of statutory rights

A conventional figure of £500.00 will be awarded. Mr Howson did not argue against it.

13) Total compensation

Loss of earning	£7,552.74
Future loss of earnings	£6,239.92
Loss of statutory rights	£ 500.00
Total compensatory award	£14, 292.66

Mr Sturrock is not receiving any benefits and therefore there is no requirement for a recoupment notice. There is no other income at the present time and therefore there are no deductions from the above figures.

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Employment Judge Speker

Date14 August 2018

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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