Case Number: 3202313/2012

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr K Cordwell**

Respondent: **Bennett Gould & Partners Ltd**

Heard at: **East London Hearing Centre**

On: **Tuesday 7-9 May 2019**

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

Representation
Claimant: In person
Respondent: Mr J Gifford Head (Counsel)

JUDGMENT having been sent to the parties on 17 May 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

The Judgment

Full reasons being given at the conclusion of the hearing, it is the determination of Employment Tribunal that:-

(1) The Claimant was unfairly dismissed in breach of section 94 Employment Rights Act 1996.

(2) The Claimant shall be awarded compensation as follows:

(i)	Basic award (which is not taxable) -	£645.00
(ii)	Compensation for loss of earnings and employment related benefits (gross) -	£6,420.35
	Total	**£7,065.35**

The law

1. The claimant claimed that he was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").

2. Section 98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

3. The s98(4) test can be broken down to two key questions:

   a. Did the employer utilise a fair procedure?

   b. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

4. The respondent said that it dismissed the claimant for a redundancy (pursuant to s98(2)(b) ERA) or for some other substantial reason ("SOSR") related to the redundancy that could justify the dismissal of an employee holding the position that the employee i.e. held (pursuant to s98(1)(b) ERA).

5. The definition of redundancy is contained in s139(1) ERA:

> 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–
>
> (a) the fact that his employer has ceased or 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 the employee was so employed, or
>
> (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 he was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.

6. The emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to the purported redundancy situation.

7. Where a dismissal is for redundancy, the Tribunal must be satisfied that it was reasonable to dismiss *that* employee by reason of redundancy: it is not enough to

show that it was reasonable to dismiss *an* employee: *Williams V Compare Maxam Limited [1982] IRLR 83*. In *Polkey v AE Dayton Services Limited [1988] ICR 142* the House of Lords determined that, in the case of redundancy, the employer will not normally act reasonably unless it:

a. warns and consults any employees affected (or their representatives);

b. adopt a fair basis on which to select for redundancy, i.e. identifies an appropriate pool from which to select, and uses objective criteria and applies those criteria fairly (see *British Aerospace plc v Green [1995] IRLR 33 CA*); and

c. take such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organisation.

See also *Buchanan v Tilcon Ltd [1983 IRLR 417, FDR Ltd v Holloway [1995] IRLR 400, John Brown Engineering Ltd v Brown and Others [1997] IRLR 90* and *King v Eaton Limited [1996] IRLR 199*.

8. As with unfair dismissal for misconduct, for example, the issue of fairness and reasonableness will still need to be judged by reference to the *range of reasonable responses* test: *Beddell v West Ferry Printers [2000] ICR 1263*. In *Drake International Systems Ltd v O'Hara UKEAT/0384/03* the Employment Appeals Tribunal emphasised that tribunal's should not impose their own view as to the reasonableness of the selection criteria or the implementation of the criteria: the correct question was whether the selection was one that the reasonable employer acted reasonably could have made.

9. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeals procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can properly reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

10. For SOSR dismissals the dismissal must also be within the range of reasonable responses. In applying this test an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

11. An important qualification to the band of reasonable responses test was made by *Newbound v Thames Water Utilities Ltd [2015] IRLR 734 CA*. The Court of Appeal determined that the band of reasonable responses is "*not infinitely wide*" and that Tribunals should focus on the statutory language and the words "*in accordance with equity and the substantial merits of the case*" in s98(4)(b) ERA.

The Tribunal's findings of facts

12. I (i.e. the Tribunal) have not determined the whole dispute between the parties merely the facts which I determine is necessary to determine whether or not the claimant was unfairly dismissed and how much, if any, compensation is payable.

13. Mr Charles O'Sullivan brought a substantial amount of insurance work and effectively his team from Besso to the respondent on 4 January 2011. The Besso team with its work amounted to the Bennett Gould & Partners International Limited ("BGP(I)") business entity, which formed part of Bennett Gould & Partners Limited group ("BGP").

14. The claimant commenced working with BGP(I) on 4 January 2011. I shall refer to BGP(I) and BGP as the respondent throughout this determination, save as to where I deal with the TUPE issue. the claimant was employed as a Director Non-Marine division, a job title or description that he retained until his employment was terminated.

15. The respondent lost a significant amount of business in last quarter of 2011 and first quarter of 2012. By April 2012 the respondent did not have sufficient income to meets its salary obligations to its staff.

16. In particular the respondent lost work from:

    a. Cool Petroleum on 22 February 2012; and

    b. SuperClubs on 1 April 2012; and

    c. A proportion of work from TOPA/Ironshore Protection.

    So far as the claimant's workload was concerned, he was directly involved with (a) and (b) above and he had undertaken a large amount of work for (c) in the past, however, recently that work had been undertaken largely by a colleague, Mr Paul Galvin.

17. On 27 March 2012 Mr O'Sullivan and Ms Karen Shelley propose saving options to Mr Adrian Glyde and Mr Paul Vincent (of BPG). These were the so-called *Armageddon options*. There were 3 options in total canvassed that day: *A2 to A4*.

    - A2 proposed a general salaries reduction.

    - A3 proposed a salary saving in respect of the claimant (and 1 other).

    - A4 proposed saving salaries for the claimant and 4 others.

18. None of the Armageddon or A options were shared with the claimant – either by way of redundancy consultations by Mr O'Sullivan, Ms Shelley, Mr Glyde or Mr Vincent. I also accept the claimant evidence that he did not know about these options on an informal basis. So at this stage, and throughout the duration of the claimant's employment, I accept that the claimant was in the dark about these proposed savings.

19. On 28 March 2012 Mr O'Sullivan and Ms Shelley proposed A5 which entailed salary savings to Mr Glyde and Mr Vincent in respect of Mr O'Sullivan and Ms Shelley only.

20. The situation had moved on by early April 2012. On 5 April 2012, Mr Glyde wrote to Mr O'Sullivan and Ms Shelley (and copied Mr Vincent) [Hearing Bundle p447].

> Having yesterday gone through the BGPI forecast sent by Charles', it's clear the problems we face have escalated quite considerably to the point at which I do not believe the existing structure is viable. The cost base (mainly salaries) is way too high for the income. We need to urgently consider how this is addressed but in my view it's a 'start again' scenario. By this I mean effectively closing BGPI, negotiating severance with the staff and reduction of all other costs including Besso etc. We then start again by re-employing a much reduced number of suitable staff paid on a significantly lower basic plus bonus so that we avoid the problem of being stuck with fixed costs if the business does not come in. There are obvious issues with this including marketing message, staff and so on but unless existing shareholders are willing to inject significant working capital I see no alternative. We are scheduled to talk this afternoon but wanted you to have time to consider my views beforehand.

21. On 10 April 2012 discussion continued between the 4 senior employees (and directors) [HB449]. This included potential salary savings of all of the claimant's salary (and 2 others, who were not in fact made redundant) and salary cuts for others. Again, the claimant not part of these discussion. Indeed, as stated above, I accept the claimant's evidence that he did not know of these discussion or options.

<u>The claimant's dismissal</u>

22. The claimant's 3 witness statements describe a meeting of 25 April 2012 (first statement 23 September 2012; second 7 January 2014; and third statement 25 April 2019). These statements are consistent. They report a meeting as follows: HB258.

23. There is a slight variation on HB261 which, if anything, makes a concession to the respondent's position. These statements are entirely consistent with the claimant's case. It is entirely consistent with claimant's contemporaneous note. Also consistent with Mr O'Sullivan's signed statement of 9 January 2014. He said (at HB269):

> 14. There were four individuals who were not retained by the Respondent following the transfer. These were Keith Cordwell, Lida Van der Ploeg, Lucinda Andrews and Corneille Bulambwe. It was decided that as the accounts which Mr Cordwell was responsible for on a day to day basis were the ones which BGPi had lost, his role would be made redundant and because of the cash flow issues this would take immediate effect… Ms Van der Ploeg had resigned in February and was working out her notice period… Ms Andrews was a new member of staff still in her probationary period, so her employment was terminated… Mr Bulambwe was on an internship which was not renewed.
>
> 15. During the afternoon of 25 April 2012, Mr Gyde, Karen and I met with Mr Cordwell in order to inform him that there were insufficient funds to pay him and that he should leave the office and wait to hear from us further; he did so. Mr Gyde advised, for "employment law" reasons we were not to tell Mr Cordwell he had been made redundant. I made a file not of this conversation.
>
> 16. on 27 April 2012, I sent a letter to Keith, drafted by Mr Gyde, informing him that due to operating losses and the resultant necessity to re-organise the business, his position was redundant with immediate effect. Keith was advised that BGPi did not have the financial resources to make payment to him, but that he would be advised of progress in this respect…

24. This account is consistent with Mr O'Sullivan's contemporaneous file notes at HB565, HB567 and HB568.

25. I approached Mr O'Sullivan's written evidence with caution. He has not given evidence at the hearing so the weight I attach to his evidence will be less. I am

aware that Mr O'Sullivan may not be a reliable source of information because of his alleged misconduct in respect of financial irregularities. That said, his contemporaneous notes and the letter of 27 April 2012 are entirely consistent with his previous account – and it corroborated the claimant's evidence.

26. I find the claimant to be an entirely credible witness – gave evidence against his financial interests, in that he had offered to work without pay, which is corroborated, and, which is not corroborated, if this did not prove fruitful he would have agreed not to pursue the non-payment of his wages should employment opportunities not materialise at the end of the 3-month's trial period.

27. This evidence contrasted with the evidence of Mr Gyde at HB226.

> On 24 April 2012, Mr Cordwell was advised that his contract was being terminated consequent upon the loss of business which had placed the company in a perilous financial state and it did not have the funds to pay staff that month. It was acknowledged that the company and its directors would do everything possible to honour its liabilities but because of the financial problems immediate action was required.

28. I quizzed Mr Gyde on events at this meeting. He did not make a contemporaneous or near contemporaneous note. He said in evidence that he believed or felt sure that the claimant was specifically told that he was dismissed at this meeting. In addition:

    a. There was some equivocation in his oral evidence.

    b. In his statement of 2 October 2012, Mr Glyde identified the date of meeting wrongly – said it was day before. This is a significant inaccuracy because he recognized the importance of this meeting and that also undermines his account of the meeting where this is disputed.

    c. Mr Glyde did not say he dismissed the claimant. He said that it was Mr O'Sullivan who dismissed him – and it directly contradicted Mr O'Sullivan's record (i.e. the record of the dismissing officer) of what was said. Indeed, Mr O'Sullivan's record was the only record kept by the respondent's key protagonist.

    d. Mr Glyde proffered a very candid explanation, which contrasts markedly from the respondent's refusal to explain and/or disclose or inform the claimant of this relevant information at every possible stage before. So Mr Glyde's account it is entirely inconsistent with the established stance of 3 senior directors, Mr O'Sullivan, Ms Shelley and Mr Glyde prior to meeting.

    e. Furthermore, and perhaps most importantly, it is not consistent with the dismissal letter of 27 April 2019.

29. For reasons above, I prefer evidence of the claimant over evidence of Mr Glyde.

30. I also find that the claimant was the only member of BGFI and BGP staff dismissed by reason of redundancy.

31. The claimant was not dismissed by BGPI or BGP on 25 April 2012.

32. The dismissal letter is dated 27 April 2012 [HB572].

> Further to our meeting of 25th April 2012 we are extremely sorry to have to tell you that following significant losses and the resultant necessity to re-organise the business, Bennett Gould & Partners (International) Ltd has decided to make the post of Director, Non-Marine Division redundant with immediate effect…

33. This is a clear and unequivocal notification of dismissal. Dismissal by reason of redundancy. It was a summary dismissal (i.e. with immediate effect as notice was not given and the claimant's notice period was not provided for). The letter is marked "received 28.4.12" and initialed by the claimant. I am satisfied that this notice of immediate and summary dismissal was received by the claimant on 28 April 2014 and that is the date of the termination of his employment.

34. The claimant was not offered any appeal in circumstances where no consultation had taken place. The claimant's dismissal was procedurally unfair.

35. There is no reason why the respondent could not have put the claimant on formal notice that he was at risk of redundancy. There was not notice of redundancy and no consultation. This is particularly surprising since Mr O'Sullivan, Ms Shelley, Mr Glyde and Mr Vincent had been discussing options since the Armageddon or A proposals 1 month before the claimant's dismissal and particularly in light of the very clear dismissal options 17 days before the claimant's actual dismissal letter. The absence of offering the claimant an appeal is indicative that the respondent's senior officers in this case had no intention of following a fair dismissal process.

36. Mr O'Sullivan left the respondent on 24 July 2012 and took substantial amount of work with him.

Determination

<u>TUPE</u>

37. Employment Judge Brown looked at the TUPE issue at a 3-day hearing and she gave Judgment on 26 November 2013.

38. She did not make any determination as to when the claimant was dismissed. She made determination in respect of the events of 25 April 2012 at para 13 [HB57]:

> On the same day [i.e. 25 April 2012] Mr Gyde, Charles O'Sullivan and Karen Shelley met with Keith Cordwell. Keith Cordwell made a note of the conversation soon afterwards. The others told Mr Cordwell that BGPi was insolvent and that there was no money to pay his salary. They asked him to go home. Later, at 7pm that day, Charles O'Sullivan spoke on the telephone with Mr Cordwell. Mr Cordwell again made a note. Mr O'Sullivan told Mr Cordwell that only Mr Cordwell, Lida van der Ploeg and Lucinda (a copy typist under probation) had been asked to leave. The rest of the staff were being transferred to BGP, at two-thirds of their previous salary…

39. EJ Brown determined that BGPI was an undertaking (which was accepted by the other respondent). BGPI was the claimant's employer at that stage – at least until the claimant employment was terminated. It was an organised grouping of workers and assets performing an identified function of providing insurance broking services to clients. EJ Brown went thru through the relevant law and determined:

- "I find that BGP did assume control of the BGPi business from 25 April 2012": paragraph 64 [HB66].

- "I address the *Cheesman* criteria as follows. The major assets of BGPi were its staff, client base and contracts. The employees were offered

employment by BGP on 25 April 2012 and accepted the offers of employment that day. BDP assumed control of the client base and contracts on that date. There were fourteen staff members at the date of transfer: only Keith Cordwell, Ms van der Ploeg and a probationary copy typist did not continue working as before. Paragraph 72 [HB67]. NB – I find above that the claimant was still an employee of BPGI on *25 April 2012*.

- "BGP took control of the clients and incurred the obligation of employer with regard to the employees on 25 April…" Paragraph 77 [HB68]. EJ Brown rejected Mr Vincent & Mr Gyde's attempt to avoid liability for transferred employee's in clear terms.

- "On the balance of all the facts, I find that there was a Transfer of Undertaking from BGPi to BGP on 25 April 2012": paragraph 79 [HB68]

Dismissal

40. A notice of termination must be clear and unequivocal. the claimant was sent home at meeting of 25 April 2012. His possessions were put in bin bags. He asked the question as to whether he was made redundant and was not given any answer.

41. So in accordance with my finding of fact I determine that the claimant's employment was terminated 28 April 2012 (when notice of dismissal was received).

42. Mr O'Sullivan's letter of 27 April 2012 set out redundancy as the reason for dismissal. Redundancy is a potentially fair reason pursuant to s98(2)(c) ERA. I am satisfied that the claimant's employment was terminated because of the precarious financial position of the respondent and that the dismissal occurred after the TUPE transfer.

43. The lack of conferring a right of appeal also amounts to an unfair dismissal in itself in these circumstances as there was no notification of a redundancy situation nor any consultation whatsoever. This is a fundament features of any fair dismissal and the absence of these steps or stages render any dismissal unfair, i.e. no formal notification, no consultation and no appeal.

44. Appropriate test for the procedure or process adopted is whether the reason for dismissal or the procedure adopted was within the range or band of reasonable response available to an employer of this type, size and administrative resources available. There was ample opportunity for the respondent's 4 senior directors to notify, consult and follow a fair dismissal process. They did not. No adequate explanation was proffered. The claimant was unfairly dismissed.

Possible *Polkey* reduction

45. In this case, the respondent asserted that, if the claimant succeeded in his complaint of unfair dismissal, then he should be subject to a possible reduction of any compensation payable (to nil) under the principles set out in the leading case of *Polkey v A E Dayton Services [1988] ICR 142*. Where a Tribunal finds that the dismissal was unfair it still may reduce the award payable by any amount if it is convinced that, had the employer followed the correct procedures then, it was

likely that the employee's dismissal would have been fair. This is one of the factors I should consider when assessing compensation. This can have effect of limiting compensation to a specific period of time or could reduce the actual amount of compensation as a percentage reduction (up to 100%) that may be made by the Tribunal if I determine that the dismissal would still have occurred. What the Tribunal should do is to "*construct, from evidence not speculation, a framework which is a working hypothesis about what would have happened had the [employer] behaved differently and fairly*": see *Gover and Others v Property Care Limited [2006] EWCA Civ 286*. So whilst this issue inevitably involves speculation, there needs to be some evidential basis.

46. I was mindful of the claimant's evidence that such was precarious nature of his employment that he may have been prepared to work for up to 3 months without pay and, if so, that he was prepared to confirm that he would not pursue this salary sacrifice if his employment was terminated at the end of this period. I was also mindful that Mr O'Sullivan left the respondent and that the Brusso/BGPI work moved with him on 24 July 2012. The claimant said that Mr O'Sullivan offered him a job (which he understandably rejected) but this indicates that Mr O'Sullivan must have taken sufficient work that the claimant was familiar with to justify this job offer. So, if the claimant was to avoid redundancy it was short-lived as any role was not viable beyond 24 July 2012 (i.e. less than 3 months).

47. The respondent has invited me to find that the claimant would have been dismissed in any event after 28 April 2012. This is supported by evidence I have heard. The claimant spoke to Mr O'Sullivan by telephone after he was instructed to leave the office, the claimant offered the salary sacrifice arrangement. This was rejected before Mr O'Sullivan proceeded to dismiss him so as Mr O'Sullivan was the driving for in the claimant's dismissal I conclude that the claimant's overture or suggestion or offer was not going to be accepted as the claimant's eventual dismissal was inevitable.

48. It is usual to allow 2 weeks for consultation. The respondent's failure to follow a fair process is indicative that Mr O'Sullivan, Ms Shelley, Mr Glyde and Mr Vincent had made up their mind in any event and these closed minds were not to be changed. The claimant's argument at this hearing was not accepted by Mr Glyde and not accepted in Mr Vincent's statement, tendered for the case.

<u>Just and equitable deduction from the award</u>

49. S123(6) ERA states that "*[W]here the Tribunal finds that the dismissal was to an extent caused or contributed to by the action of the complainant, it shall reduce the… compensatory award by such proportion as it considers just and equitable having regard to that finding*". This ground for making a reduction is commonly referred to as "contributory conduct" or "contributory fault". There is a wide discretion under s122(2) ERA to possibly reduce the basic award on the grounds of *any* kind of conduct on the employee's part that occurred prior to his dismissal. Therefore, the capacity to make reductions to the compensatory award is more restrictive than in respect to the basic award. Three factors must be satisfied if the Tribunal is to find contributory conduct: (a) the relevant action must be culpable or blameworthy; (b) it must have actually caused or contributed to the dismissal; and (c) it must be just and equitable to reduce the award by the proportion specified.

50. The respondent invited me to exercise my discretion to reduce any compensation payable to the claimant. I was invited to make findings of the claimant's alleged wrong-doing, although this was not part of the respondent's pleaded case. I am not prepared to, in effect, allow satellite litigation to be run on this basis. The respondent pursued a High Court case against Mr O'Sullivan and had the option to pursue its allegations against the claimant in these proceedings. However, it chose not to. There was no finding in the High Court litigation of the claimant's wrongdoing. So I am not satisfied that he engaged in culpable or blameworthy conduct. I cannot see how the claimant's behavior caused or contributed to his dismissal. Under the circumstances, I refuse to exercise my discretion to make any deduction from the claimant's award. In refusing to exercise my discretion. I am particularly persuaded by the claimant's argument that the Financial Conduct Authority (or predecessor body) was appropriate body to determine financial misconduct. The respondent have complained about the claimant's conduct to the professional regulator and following referral, the regulator did not proceed with this complaint.

Remedy

51. There was no breach of contract claim so there is no wrongful dismissal award. The claimant is entitled to a basic award for his unfair dismissal. I limit the claimant's compensatory award to loss of earnings and loss of benefits for two weeks. There are known figures available for me and any award in respect of wages may be prime facie taxable in any event. I award loss of earnings and loss of benefits on the basis that the respondent can account to HM Revenue & Customs for any tax payable (if appropriate).

Employment Judge Tobin

Date: 15 August 2019