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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Freindorf**

Respondent: **Mulalley & Company Limited**

Heard at: **East London Hearing Centre**

On: **Tuesday 23 July 2019**

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

Representation

Claimant: In person
Respondent: Mr R Cifonelli (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:

1. **The complaint of unfair dismissal is well-founded.**

2. **If a fair selection had been followed there was 100% chance that the Claimant would have been selected for redundancy fairly within the same period. I therefore make no award of compensation.**

REASONS

Findings of Fact

1 Having heard the evidence of the Claimant, Ms A Bowen, Mr C Watson and Mr G Piscatelli and having read the statements of Mr O'Malley and Mr Gibson and the documents referred to me during the evidence, I make the following findings of fact.

2 The Claimant was employed by the Respondent, a construction company, from 14 July 1997. He was promoted 4 times and became Operations Manager in its Planned

Maintenance Division from September 2011. The Claimant received just over £82,000 per year.

3 The Respondent employs about 450 people. It has a number of divisions including the Construction Division and the Planned Maintenance Division. In Planned Maintenance, it employed two Operations Managers, the Claimant and Mr Kilby. Mr Kilby had had two years' service by the time of the redundancy. Both earned a similar amount of money.

Verbal Warning

4 On 28 June 2018 the Claimant's manager, Mr Watson, gave him a verbal warning about two matters. The first concerned not instructing that a skip left overnight should be protected by a fence, as health and safety required. The second concerned not implementing some NEC requirements into a programme relating to a particular construction project leading to problems in relation to relying on an extension of time.

5 I find that Mr Watson gave that warning in good faith. In cross-examination he explained why he was concerned about those two matters. He stated that the Claimant had accepted part responsibility for the lack of the fencing. While I understand, to an extent, the Claimant's predicament in relation to the skip (that it was the end of the day and the labourer had left), he accepted in an email that he was partly responsible for the failure in that case. He had ultimate responsibility. It was reasonable therefore for Mr Watson verbally to warn him about that.

6 I am less clear about the alleged failures in connection with the requirements of the programme that the Claimant had implemented. It seems to me on the evidence that I have heard that the Claimant may have been insufficiently trained for what he was being required to do by Mr Watson. Be that as it may, I find that Mr Watson genuinely reached the view that the Claimant was at fault for not following the NEC requirements in the programme. I note that, for example, the Claimant's job description required him to have responsibility for checking contract programmes (37).

7 The reason I have reached the view that Mr Watson made his verbal warning in good faith is that I accept he did not know of the likely redundancies on the date he gave the warning and that he only knew this on 4 July when the board met and first discussed it.

8 As something of an aside, I am unhappy with the procedure that Mr Watson adopted before he made the verbal warning. He does not appear to have put matters that he was concerned about to the Claimant beforehand. A fair procedure would have been to have done so in order to give the employee a chance to respond before the decision is made. Mr Watson should take care in the future to give staff an opportunity to be heard before any disciplinary decision even an informal one such as this. Nevertheless, that is a procedural matter and does not undermine my view that the warning was given in good faith.

Redundancy Situation

9 I also accept that a genuine redundancy situation arose because of a downturn in work in Planned Maintenance. While the Claimant may not as yet have seen such a downturn, I accept Mr Watsons' evidence that the division was to lose about £10 million less in contracts. I am supported in that conclusion because no Operations Manager has been subsequently employed in the division.

Selection Criteria

10 The company had selection criteria for redundancy. It had decided it in about 2013. It was available on the staff intranet for them to see. It was a very simple criteria, which counted spells of absence in the last 12 months of employment and disciplinaries. Length of service was counted in the event of a tie-break. The weighting of the criteria is set out at page 74: number of years' service beyond 11 were not counted.

11 The weighting of the criteria was also determined back in 2013 and not for the purposes of the redundancy selection in this case.

Pool

12 The company decided a pool for selection within the planned maintenance division, in other words as between the two Operations Managers, the Claimant and Mr Kilby. This was the division where the downturn was expected.

Procedure

13 On the 11 July 2018, both Operations Managers were given a warning that they were at risk of redundancy and invited to a meeting at which the company would listen to their alternative proposals.

14 The meeting for the Claimant took place on the 27 July where he said he was prepared to do other roles at the same salary.

15 After that meeting the Claimant raised two additional points: first that he had only had two sick days in 21 years; and second that he had been loyal and worked hard including the evenings, at weekends and had shown a great deal of commitment.

16 A further meeting took place on 13 August at which the Claimant was told the Respondent would be looking to reduce the number of Operations Managers by one. The Claimant confirmed that he had seen the criteria. He was told to send his appeal about that criteria to Ms Taylor, the Finance Director. The Claimant later did so.

17 The Claimant raised a number of points at this meeting. First, a person in the Construction Division had been promoted to Operations Manager and that he or Mr Kilby could have filled that role. No response was given to the Claimant about that point. Second, the pool for selection ought to have included the Construction Division. No response was given to that point.

18 The Claimant also asked about voluntary redundancies. I find that he heard Mr Watson say 'we are not at that stage'. I prefer the Claimant's evidence on this because he raised his objection quickly at the time and he remembered that a remark had been made because he found it curious because, of course, voluntary redundancies should be offered first if they are to be offered at all. I find Mr Watson may well have meant it should have been raised earlier but that is not what the Claimant heard him say. The Respondent rejected voluntary redundancies as an option.

Selection Criteria

19 In relation to the selection criteria, the Claimant sent his letter of appeal. He made two points: that loyalty should be added and that the period of attendance should be all of the employee's service. Ms Taylor, the Finance Director, responded to these points that loyalty was included in the length of service criteria and that using the last 12 months in relation to attendance was fairer to staff as it was an equal measurement.

Appeal

20 The Claimant was provided with formal notification of his redundancy on 31 August 2018 and invited to appeal if he so wished. He was provided with the proper period of notice and statutory redundancy payment.

21 The Claimant's appeal grounds were heard by Mr Piscatelli at a meeting in September. Initially at the meeting, he told the Claimant that he was going to gather all the relevant information and that Mr O'Malley would make the decision. As it turned out, Mr Piscatelli made a report to Mr O'Malley recommending that the appeal be rejected, which Mr O'Malley approved. In reality, therefore, it was Mr Piscatelli who made the decision on the appeal. He did not inform the Claimant about that.

22 I find that Mr Piscatelli looked carefully at each appeal ground that the Claimant put forward and gave him a considered response to each in the report attached to the outcome.

22.1 he found that the warning was genuinely made for performance issues;

22.2 he decided that to discount the sickness absence because it was two days when it should have been four weeks would not have been able to apply the criteria objectively;

22.3 as to the dispute about the minutes, he found that as both recollections had been set out in the final minutes there was transparency;

22.4 he considered the member of staff promoted in the Construction Division but decided that that did not achieve a head count reduction because it was not a promotion to a vacancy but to recognise high performance;

22.5 he considered the position in relation to the senior contracts manager that had been filled on 19 March and decided that was before the redundancy process had commenced. And, in any event, since that post had been vacated it had not been filled.

22.6 he regarded the redundancy package to be provided in line with the company procedure.

23 The appeal was rejected.

Law

24 A redundancy situation exists where an employer's requirements for employees to do work of a particular kind cease or diminish. It is not therefore a question of whether the work ceases but whether the need for so many employees to do that work reduces, for example where costs are squeezed.

25 Where a disciplinary sanction is objected to in the course of an unfair dismissal, the law states that I can only go behind this disciplinary sanction if manifestly unreasonable or made in bad faith.

26 A fair redundancy process requires that a reasonable pool is selected, that selection criteria are reasonable and that they are applied reasonably. There is a range of what is reasonable in these circumstances by reference to the standards of a reasonable employer. If I would have made different decision, I cannot interfere unless what the employer did was outside that range.

27 A fair procedure in a redundancy situation requires warning the employee that he is at risk of redundancy, that a genuine consultation is entered into. This does not mean simply informing an employee but making proposals and giving an employee an opportunity to respond to those proposals and considering that response.

28 I consider whether a fair procedure has occurred by looking at the procedure overall. Thus an early failure to consult might be overcome by a full consideration later on.

29 In relation to remedy, I have to consider whether the employee has reasonably mitigate his loss. And I also apply the *Polkey* question, which means that I consider, if a fair procedure had been followed, what chance or percentage of chance that the dismissal would have occurred in any event.

Application of Facts and Law to Claim

30 First there was a genuine redundancy situation. This follows from my findings of fact because there was a reduction in the order book of 10 million. As a result the Respondent decided as part of its response to reduce the head count, the number of Operations Managers in the relevant division. As I have indicated, whether or not the Claimant found himself to be busy at work or not, is not the point. It is whether or not there was a need to reduce employees and I find genuinely that there was here.

31 I found that the recruitment of the Senior Contracts Manager was filled before the redundancy situation became apparent and in any event, when that Senior Contracts Manager left his vacancy was not filled which supports there was a genuine need to reduce head count.

32 Likewise, the promotion internally did not undermine the need to reduce head count. That was a promotion to recognise performance rather than a promotion into a vacancy.

Disciplinary

33 In relation to the verbal warning that the Claimant was given, I do not consider that the verbal warning in respect of the skip issue to be manifestly unreasonable. I may not have given it. But, given that the Claimant accepted that he was partly at fault in that respect, I cannot find that it was unreasonable on that matter. I have also found that the warning was given in good faith. I found that Mr Watson did not know at the time he gave the warning that the redundancy situation was going to be identified the following week. Therefore, I find that the warning was not given in order to ensure the Claimant was selected in that redundancy process.

34 As to the contracts programme warning, I found that a little more difficult to determine. I found that it was not given in bad faith for the same reasons. Whether it was manifestly unreasonable, in my judgment the warning does not reach that threshold. There were NEC requirements to be included in the programme and the Claimant had responsibility for that. There was plainly some mitigation in that he had not received the appropriate training to do that and I therefore would not have given the warning, but that is not the same thing in deciding it is manifestly unreasonable.

35 I understand why the Claimant suspects the warning to have been connected to the redundancy coming as it did so soon afterwards but I have heard of clear evidence that the board first made its decision on 4 July. And there is no reason for me to go behind that clear evidence.

Pool for Selection

36 I find that the pool for selection was a reasonable one. A wider pool would have been equally reasonable. But, in my judgment, it was not unreasonable to narrow the pool to the division affected by the downturn in orders.

Selection Criteria

37 I accept it was reasonable to include the number of disciplinaries in the selection criteria. And to include verbal warnings in that. It is an objective measure.

38 As to the weighting of the selection criteria, I had a greater pause for thought. Weighting in connection to disciplinaries is only just within the band of reasonable approaches. The score for a verbal warnings is minus 3 and a final written warning is minus 5. I have to ask myself carefully: does a verbal warning weigh 60% of a final warning? A final written warning is for repeated, serious and sometimes gross misconduct: it is a great deal more serious than a verbal warning. This relative valuation would therefore seem to me to be at the very edge of reasonableness. I suggest the Respondent reconsider this weighting for future exercises.

Absence

39 With regard to the selection criteria for absences, it was reasonable, it seems to me, to look only at the absences for the last 12 months. That would not penalise long-servers. The Respondent would assess periods of absence for everybody equally. It seems to me an entirely reasonable approach.

40 Ms Bowen explained that absences were counted at all because they could be objectively measured. This, up to a point, is reasonable because an objective measure reduces the chance of subjective judgments creeping in. However, the reason that absences are looked at in selection for redundancy must be presumably that absences are a problem (a 'black mark' so to speak) that says something about the Claimant's commitment to work. It cannot simply be that they are countable. (Many aspects of an employee are countable – their height for example, but this would not be a sensible criteria upon which to select them for redundancy. There must be something about the criteria that makes it a meaningful thing to use in a redundancy selection). This is where I am concerned about the absence criteria. I accept the Claimant's submission that if absences are counted at all, it is unreasonable to mark an unavoidable one-off absence the same as persistent minor absences.

41 The Respondent has attempted to do this in its weighting by giving more marks for the greater number of absence spells. If someone had a large number of individual spells of absence for coughs and colds or a number of absences conveniently on a Friday or Monday, that that would count against them more than somebody who had no absences.

42 What is more difficult to understand is the weighting for one entirely unavoidable absence. This is weighted more harshly than no absence and it seems to me that this is unreasonable. Somebody who had an unavoidable need for one absence in that 12-month period, for example for an operation or broken leg or some other kind of unavoidable injury puts themselves at higher risk of redundancy for having one spell of absence. That does not seem to me reasonable. Putting it another way, a weighting which distinguishes between one unavoidable absence in a year was and no absence was, in my judgment, outside the weighting that a reasonable employer would apply reasonable selection criteria because it did not distinguish in any meaningful way in the commitment that each of those members of staff had shown.

Length of Service

43 It was reasonable to treat length of service as a criteria only where there was a tie. That was a matter entirely for the Respondent to determine. It is odd, in a way, if the Respondent is looking for things that could be measured not to include it in the criteria overall but I cannot say it was unreasonable to do so

44 Was it then unreasonable not to weigh service beyond 11 years as the Claimant suggests? I can see force in both arguments. On the one hand, the length of service shows loyalty, commitment as the Claimant argues. On the other hand, to count over a certain period of time of length of service might be fairly arbitrary. Length of service beyond a certain period of time depends on the life's choices of a particular individual. It is therefore arguably to give too much weight to length of service to do so. For this reason, I have decided that it was within the reasonable band of responses to stop weighing length of service at 11 years.

Process

45 As far as the redundancy process is concerned I have two criticisms of it:

45.1 The failure to respond during the consultation meeting or after it to the two points raised; and

45.2 the rejection of the Claimant's point about voluntary redundancies because it was too late.

46 It seems to me a genuine consultation is only reasonable if there is a response to points raised by the employee and there was not any here, except on appeal. Mr Watson should be under no illusion that the process is supposed to one in whereby an employee is listened to and genuine consideration given to those points and a response made to them.

47 I find however, that in this case the approach to the appeal was a very careful one and Mr Piscatelli looked afresh at each of the concerns that the Claimant raised about the process and therefore the failure to respond initially was cured on appeal.

48 Rejecting the idea of voluntary redundancies because the point was raised too late was illogical. This was a consultation meeting. The Claimant was entitled to raise any point he wished to do so. Mr Watson gave a peremptory response and should not have done so. Nevertheless, it is up to an employer whether it chooses to decide whether to offer voluntary redundancies and it was reasonable not to do so in this case given that cost was the issue creating the redundancy in the first place. Mr Piscatelli did consider that matter as part of his appeal but considered that the redundancy package was sufficient. Therefore, again, looking at the matter overall as I am required to do, seems to me overall there was no unfairness in relation to voluntary redundancies.

49 Looking at the procedure overall, as I must, I have therefore found that the failure properly to respond to the Claimant's points during the consultation period was cured on appeal by Mr Piscatelli's very careful fresh look.

50 Finally, I have decided that what Mr Piscatelli said at the outset of the appeal was not unfair. He did, as a matter of fact, take on all the information and make a report to Mr O'Malley but because Mr O'Malley approved of his decision it was effectively Mr Piscatelli's decision. I find that what he said made no difference because, of course, the information the Claimant would have given would have been the same in either event.

51 Overall therefore, I have decided that this dismissal was unfair because of the unreasonable and unfair weighting of the spells of absence and application of them to the Claimant.

Polkey

52 I then go on to look at the *Polkey* question: what is likely to have happened if a fair redundancy selection criteria was applied. It seems to me if that had happened, the Claimant would still have been made redundant in this case. He and his counterpart

would have both received 4 points in respect of absence but, because he would have received minus 3 points in respect of the verbal warning, he still would have been selected for redundancy. Therefore, I find that if a fair procedure had been followed there was no chance that he would have retained in employment.

53 There is no doubt that the Claimant gave long and loyal service to the Respondent. Redundancy decisions are difficult ones to make and this one bears no reflection on that service.

54 Therefore, the dismissal was unfair but there is a 100% chance that the Claimant would have been selected had a fair criteria for redundancy been adopted. I therefore make no order for compensation.

Employment Judge Moor

21 August 2019