Case Number: 2300232/2018

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Miss Giedre Dian		**Sussex Community Development Association Limited**

Held at London South **On 3 and 4 September 2019**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: **In person**

For the Respondent: **Mr L Godfrey**

JUDGMENT

The decision of the tribunal is that:

1. The correct title of the Respondent is Sussex Community Development Association Limited and the tribunal file shall be amended accordingly.

2. The claim for unfair dismissal is not well founded and it does not succeed.

REASONS

1. The Claimant claims unfair dismissal in relation to her dismissal by reason of redundancy on 25 September 2017. I heard evidence from the Claimant herself, from her trade union representative Mr Jed Murray and from Mrs Amber Upton, Mr Ruairi McCourt and Mr John Cornish on behalf of the Respondent.

2. The Claimant's position is that her redundancy was a 'sham' and that she had been targeted because she was just about to pass a work anniversary and become entitled to a pay rise. She alleges that the process was unfair, and that the Respondent made a number of serious errors that disadvantaged her. She asserts that she should have been treated as part of a 'pool' and that she was treated differently as she was not offered the chance to reduce her hours although others were. She also says that she should have been redeployed into another role. The Respondent's position is that a genuine redundancy had arisen, that the process followed was fair and that reasonable efforts were made to find the Claimant alternative employment.

3. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.

4. The Respondent operated three day-care centres for vulnerable elderly adults under a contract with East Sussex County Council ('ESCC') and the Claimant started employment on 7 October 2013. At the time of her dismissal she was employed as an Activities Development Worker at the Phoenix Centre. It is not in dispute that she performed well in her role and was passionate about her work.

5. By early 2017 the Respondent had accumulated a deficit in relation to the three centres of around £240,000 of which £60,000 related to the Phoenix Centre. The position of the Respondent is that for the Phoenix Centre to break even, they needed an average of 18.5 bookings and attendance per day. On their

figures, average attendance was just 12. The Claimant says that they were using out of date information and the average was in fact 14.5.

6. Discussions with ESCC took place and they were prepared to underwrite some of the deficit, but also required costs savings from the Respondent.

7. The senior management team discussed how costs savings could be achieved. The Centre Manager was not part of these discussions. A plan was drawn up which is set out in a Staff Briefing at page 81 of the Bundle. It was proposed to delete the role of Activities Development Worker at the Phoenix Centre, and that of Trainee Activities Development Worker at one of the other centres. The rationale for the removal of these posts was that they were not part of the core provision of care which was the function of the centres and which could not be reduced. The post of Activities Development Worker had been introduced after the award of the contract by ESCC and was viewed as an enhancement to the service offered, but was an activity that could be dispensed with due to the financial constraints.

8. The Respondent's evidence which I accept is that the senior management team made a report to their board setting out the cost savings proposals, as would be expected, but that the board was not otherwise involved in the implementation of the redundancy process until the appeal stage.

9. The Respondent has a Redundancy Policy. Two versions of the policy were in the bundle. The first, dated 2013, set out selection criteria that would be applied. The second, dated 2014, contains an additional paragraph relating to the deletion of specific posts. The appellant says that this second version was not on the Respondent's share drive when she searched for it, and that it was only disclosed by the Respondent just before the date for exchange of witness statements. I accept this evidence.

10. The Claimant attended a consultation meeting on 20 June 2017 which was conducted by Mr McCourt, Care and Support Programme Manager and attended by an HR representative. She was told that she could be accompanied by a colleague or trade union representative but she came on her

own. The proposal to remove her role was put to the Claimant and confirmed in writing, and a copy of the Staff Briefing was sent to her. She was invited to put forward any proposals for alternatives to redundancy, and was told that the Respondent would consider redeploying her into another role.

11. A second consultation meeting took place on 27 June 2017. On this day the Claimant put forward her own cost saving proposals. She suggested that her role be retained as numbers were increasing. She proposed the closure of Phoenix Centre on bank holidays, the complete closure of one of the other centres and the removal of the role of Care and Support Programme Manager. She also offered to reduce her own hours.

12. It is worth noting here that the Centre Manager, AJ, also submitted alternative proposals to senior management and these were at page 92 to 94 of the Bundle. AJ suggested that rather than remove the Activities Development role it should be reduced by 25% alongside a reduction of 25% to one of the care roles, and that the kitchen assistant post should be removed instead.

13. The Respondent's practice is to guarantee an interview to staff who are at risk of redundancy if they apply for alternative roles.

14. The Claimant applied for the vacancy of Advice and Information Services Team Leader. This would have been a promotion as it was at a higher level than her existing post, but she was not successful. Mrs Upton who was on the panel stated that the Claimant had not demonstrated that she had a track record in supervising others or in advice provision, which were key requirements of the role. The Claimant did not challenge this during her cross-examination of Mrs Upton.

15. A role of volunteer co-ordinator was also available at the same level but the Claimant decided not to apply for it and notified the Respondent on 28 June 2017.

16. A third consultation meeting took place on 11 July 2017. At this meeting the Claimant indicated that she did not intend to apply for any other roles.

Feedback on the alternative proposals that she had made was not available at this meeting as the senior management team were still considering it.

17. A meeting (described as a 'final consultation meeting') was arranged for 25 July 2017. By this time the Claimant had joined Unison. She asked for a postponement to allow her trade union representative to attend. It took place on 3 August 2017 and Mr Murray who is a Unison Convenor attended with her. During the meeting Mr Murray asked about the Respondent's policy around alternative employment. Mr McCourt replied that the Claimant had been made aware of all vacancies. He stated that they were under a contractual obligation to advertise some positions. The Claimant stated that there had been another role but that it was below her current salary so she did not apply. Mr Murray asked if she would still receive her redundancy payment in light of this and Mr McCourt confirmed that she would. I have noted that at the end of this meeting Mr Murray commented that '..if the funds aren't there [to carry on the activities] you can't run it on thin air'.

18. Mr Murray and the Claimant say that at the end of this meeting there was an informal discussion between Mr McCourt and Mr Murray where they noted that they were both away in August so would meet again in September. I find that it is more likely than not that this conversation took place.

19. On 8 August the Respondent emailed the Claimant to make it clear that if she applied for the Volunteer Co-ordinator role and was successful, her salary would remain the same. HR offered to re-send her details of vacancies and notified her that although the closing date for the Volunteer Co-ordinator role had passed, they would be able to accept an application up until 11 August 2017. The Claimant replied by email to say that she would not apply.

20. During this period it seems that the senior management team were still considering the various alternative proposals that had been received from staff, including the Claimant and AJ. At pages 148 to 152 there is a detailed document setting out all the proposals received, the rationale, cost saving and response. The Claimant's proposals were rejected on the grounds that they would not result in the necessary cost savings.

21. On 9 August the Claimant was invited to an outcome meeting on 18 August. She stated that she could not attend as Mr Murray was not available. An exchange of emails took place in which the Claimant said that Mr Murray was on leave and would not be back until 4 September 2017. The Respondent took the view that consultation had been in process since June and that the matter needed to be brought to a conclusion. They offered alternative dates and the meeting took place on 22 August 2017, without the Claimant being accompanied.

22. Mr Murray explained that the Claimant had joined the union fairly recently and that the level of support provided was at the discretion of individual officers. As a result at the time of her dismissal, the Claimant was not entitled to regional support and an alternative representative could not be supplied for the outcome meeting.

23. At this meeting it was confirmed that the Claimant would be made redundant. She was given feedback on the proposals that she had made about ways of avoiding her redundancy. She was permitted to work out her notice in order to carry out a handover as some activities would be continuing. Her last day of employment would be 25 September 2017.

24. The Claimant appealed on the basis that there had been communication issues and errors in the process; evidence was not up to date; grounds for selection were unfair; the need for the continuation of her role; and a claim that she had been unfairly dismissed.

25. On 11 September HR sent an email to all staff notifying them of a vacancy for Project Assistant and Receptionist for fifteen hours per week. This vacancy was due to a member of staff called EE changing her working pattern resulting in one day a week when reception would not be covered. The Claimant did not express an interest in this role which would have been at a lower salary, but she said in evidence that if offered she would have accepted it. On 6 October, after the Claimant had left, EE resigned. Eventually the Respondent recruited

two receptionists at six hours per week each and a Project Assistant on thirty-three hours per week.

26. The Claimant also asserts that the Trainee Activities Development Worker at another centre was offered the option to reduce her hours and avoid redundancy. In the event the Trainee did not accept this, and she was made redundant too. The Claimant alleges that this amounts to differential treatment. She has also pointed out that Mr McCourt's hours were reduced at another centre by agreement with the union there. His evidence was that his hours at this centre were reduced by just one hour and this was not challenged.

27. An appeal hearing took place on 9 October 2017 at which the Claimant was accompanied by Mr Murray and was provided with an opportunity to present all her grounds for appeal. Mr Cornish, chair of trustees, chaired the panel. Contrary to the Claimant's assertion I do not accept that Mr Cornish was conflicted in carrying out this role on the grounds that the Board had previously been made aware of and had approved the costs savings proposals put forward by the senior management team. This would be normal practice in any organisation.

28. The appeal was unsuccessful. In relation to the receptionist and project assistant roles, the appeal panel found that the roles were very different to that of Activities Development worker and that the salary was much lower. In any event, the Claimant had been given the opportunity to apply for the roles. It was not accepted that the Trainee Activities Co-ordinator had been offered reduced hours. The reduction in hours proposed by the Claimant would not have achieved the required cost saving. The attendance figures were still below the break-even point, even if the Claimant's figures were correct.

29. Regarding representation at the outcome meeting the appeal panel expressed the view that Unison could have supplied another representative.

Decision

30. I find that the Claimant was dismissed because of redundancy. I have noted her argument that this was a 'sham' and that she was specifically targeted because she was due a pay rise. However, it is not in dispute that the three centres had accrued a major financial deficit and that cost reductions were necessary. The matter had been properly considered by the senior management team and the board, and a range of measures looked at. Ultimately the decision reached was that as care services could not be cut, cost savings would have to be sought from services that were seen as an enhancement to the activities of the centres as opposed to services that were part of the 'core' function. Sadly the Claimant's work, although admirable, fell into this category and so her post was targeted for removal. I accept that some of the activities that the Claimant had put in place may have continued, but I have not been shown evidence to suggest that one or more people continued to carry out the role after the redundancy had taken place. It is also relevant that it was not only the Claimant who was made redundant as the Trainee Activities Development Worker at another centre also lost her job, which further contradicts the assertion that the Claimant was 'singled out'.

31. The decision to remove the Activities Development roles amounts to a redundancy situation on the grounds that the work the two employees were engaged to do was due to cease. Redundancy is potentially a fair reason for dismissal. However it is next necessary to apply section 98(4) of the Employment Rights Act 1996 and decide if dismissal on this ground was reasonable in all the circumstances.

32. The first complaint made by the Claimant is that she should not have been treated as being in a pool of one; that a wider pool should have been drawn up and selection criteria applied in terms of the redundancy policy.

33. I find that the Claimant and her trainee colleague each held unique roles within their respective centres. It is true that there were other 'stand alone' roles such as those in the kitchen but it is a matter for the Respondent as to which area of their operation they decided to cut back. The Claimant was not in a similar role

to the care workers and the Respondent had identified that the two Activities Development Workers held a specific post which could be removed from the centres without affecting their contractual obligation to run the service for ESCC. Therefore no selection issue arose.

34. I am surprised that a revised version of the redundancy policy including a reference to role 'deletion' was produced late into these proceedings. I accept the evidence of the Claimant that it was not on the share drive when she searched for it. The 2013 policy may well have been reviewed by the Respondent the following year, but this is of little effect if the revised policy had not been communicated to staff. Nevertheless whatever the redundancy policy says there are situations where it may be reasonable for an employer to determine a 'pool of one' as part of a redundancy process where the role of a post-holder is unique within an organisation. The failure to mention this in the 2013 policy does not necessarily make the Respondent's actions unreasonable or unlawful.

35. The case of *Williams v Compair Maxim Ltd [1982] IRLR 83 EAT* suggests that in a redundancy situation it is necessary for an employer to warn the member of staff that their post is at risk; consult with them over ways of avoiding redundancy; and consider if alternative employment can be offered.

36. I am satisfied that there was full and careful consultation with the Claimant over the proposed removal of her role. This possibility was clearly put to her at the meeting on 20 June and confirmed in writing. There were four separate consultation meetings with her before the final outcome meeting. All of her queries were addressed and replied to. The Claimant was given a full opportunity to suggest alternatives to dismissal. It is true that the Respondent took some time to come back to the Claimant with its response to the proposals that she and other members of staff had made. I have noted that she put these forward on 27 June but there was no reply until the outcome meeting on 22 August 2017. Nevertheless I am satisfied that having seen the document prepared by the SMT with its response to each and every suggestion made that

the proposals were properly considered. Ultimately the Respondent concluded that none of the proposals would achieve the required saving.

37. The Claimant asserts that the Respondent was using attendance figures that were out of date in support of its decision to remove her role. I find that there may be a difference here between the figures for bookings which the Claimant was quoting and the figures for attendance used by the Respondent. However even if the Claimant's figures are preferred, it is not in dispute that the average attendance figures were not hitting 18.5 per day which is the number identified by the Respondent as the 'break-even' point.

38. I have noted the Claimant's view that she was treated most unfairly in that the Respondent accepted offers from some members of staff to reduce their hours, but did not accept her offer to reduce by a day a week. In fact, the evidence suggests that any reductions in staff hours were minimal. I am satisfied that the offer to reduce hours was properly considered and rejected on the grounds that it would not achieve the necessary costs saving. I do not find that this amounted to some form of discrimination. The Respondent's evidence which I accept is that their ability to reduce the core care provision was very limited. I do not find their conduct to be unreasonable. I am also not satisfied on the evidence that it is more likely than not that the Trainee Activities Development Worker was offered the opportunity to avoid redundancy by reducing her hours. This was rejected at the appeal stage and is denied by the Respondent and there is no other evidence to support that statement.

39. It is a matter of some concern that as the Respondent was not prepared to delay a final decision until September 2017 the Claimant had to attend the outcome meeting unaccompanied. There may well have been a discussion between Mr McCourt and Mr Murray on 3 August indicating that he would not be available until September. I have noted the extent of the support that Unison was able to offer which was due to the fact that the Claimant had only recently joined. It is understandable that they were not able to supply an alternative representative as a result. Nevertheless I note that the Claimant did have the benefit of Mr Murray's support at the fourth consultation meeting and

that he had the opportunity to make any points to the Respondent that the Claimant might not have addressed in the first three meetings. The purpose of the final outcome meeting was to deliver the decision. Whilst the Respondent could have delayed for another couple of weeks, in all the circumstances and in view of the significant consultation that had already taken place, I do not find that their refusal to prolong the matter further was unreasonable. There was no breach of the statutory provision relating to the right to be accompanied as the Claimant was asking for a postponement for more than five days. In any event, the Claimant was able to obtain Mr Murray's support in challenging the outcome decision by lodging an appeal and by him representing her at the appeal hearing.

40. I turn to the question of alternative employment. I note that the Claimant applied for one role unsuccessfully, and she had the opportunity to apply for at least two other roles: that of Volunteer Co-Ordinator and of Receptionist and Project Assistant.

41. The Claimant suggested in her closing submission that she could have done the Team Leader role which she unsuccessfully applied for and that she had been unfairly treated. That does not seem to have been part of her case to date. In any event I accept the Respondent's evidence that the Claimant had not demonstrated at interview that she had the skills and experience needed for the job which was at a higher level than her previous role.

42. The Claimant was invited by the Respondent to apply for the Volunteer Co-ordinator role on at least two occasions, including an offer to extend the closing date to allow her to apply. She made it clear that she did not wish to do so. It is difficult to understand her reasons for not applying. She had a concern that it would be at a lower salary, but that matter was addressed by the Respondent in the email dated 8 August.

43. The Claimant suggested that going through an interview and selection process had been stressful. She considered that the Respondent should have offered

her the role without interview if it was suitable alternative employment – she asserted that this is what 'redeployment' means. Mr Murray suggested that if a person is at risk of redundancy it is best practice to 'ring fence' available roles for those affected.

44. I have considered that argument carefully. The test which I must apply is whether the Respondent's practice (which was to allow staff who were at risk to apply for any vacancies and guarantee them an interview if they did so) was within the range of reasonable options open to them. I have decided that it was. I have not seen evidence to suggest that the respective roles of Activities Development Worker or Volunteer Co-ordinator were particularly similar. Had they been a very close match, my view might have been different. In any event I do not accept that an employer necessarily has an obligation to offer a suitable alternative vacancy to a member of staff without asking them to go through a selection process. There is some support for this in the EAT decision of *Morgan v Welsh Rugby Union [2011] IRLR 376.* After commenting on the obligations around redundancy selection, the headnote goes on: *'where however an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role'.* In the circumstances of this case I find that it was not unreasonable to ask members of staff to apply for available vacancies on the basis that they were guaranteed an interview. I am also not satisfied that the Claimant would have taken the role if offered. If she was keen to do it, why not apply for it? Or at the very least enquire about whether they would consider offering it without interview, if she was concerned about going through another assessment process? This was not suggested by the Claimant during any of the consultation meetings nor when she emailed to say she would not apply for the job, and nor was it suggested by Mr Murray at the meeting he attended.

45. In relation to the receptionist/project assistant roles, the Claimant was unfortunately affected by the timing of events around her termination date. The combined role, at fifteen hours per week, was advertised to her just before her

employment ended. She could have applied but she did not. As it happened the Respondent later recruited a Project Assistant for thirty-three hours per week. It may well be that the Claimant would have been interested in that role after EE resigned, but it did not arise until after her employment had ended. She is adamant that if she had been offered a receptionist/project assistant role for one day a week, on a much lower salary, she would have accepted it. Again this raises the question as to why she did not apply for it when she saw the advert on 17 September and was facing imminent redundancy. Her position is that the Respondent should have approached her and offered the role to her. I do not find that the Respondent acted unreasonably here. First, they advertised the part time combined role to her. Second, they are likely to have assumed that she would not want a very part time role at a much reduced salary and there was nothing to indicate to the contrary. Third, the possibility of a more substantial role did not arise until EE resigned on 6 October and so it was not in the mind of the Respondent at the time the Claimant's redundancy took effect.

46. For all the reasons set out above I find that the process followed by the Respondent prior to making the Claimant redundant was reasonable. In light of that the claim for unfair dismissal cannot succeed.

_____

Employment Judge Siddall
Date: 4 September 2019