



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T J Boyle

**Respondent:** Dunn (Canadian UK) Limited

**Heard at:** Liverpool

**On:** 18 October 2019

**Before:** Employment Judge Aspinall

## REPRESENTATION:

**Claimant:** Miss Hughes (Counsel)

**Respondent:** Mr Harthan (Counsel)

# REASONS JUDGMENT

**Judgment was given on 18 October 2019 and sent to the parties on 8 November 2019.**

1. By a claim form dated 7 June 2019 the claimant claimed unfair dismissal. The claimant was employed as a Fabricator Welder from 16 May 2016. He was dismissed from his employment on 11 February 2019. The claimant had the requisite two years' continuous employment to entitle him to bring a claim for unfair dismissal and to claim to be entitled to a redundancy payment.

2. The claimant says that his dismissal was unfair for the purposes of sections 94 and 98 of the Employment Rights Act 1996. The respondent says that it fairly dismissed the claimant by reason of redundancy or, in the alternative, that its failure to consult on redundancy would have made no difference in this case. The claimant seeks compensation.

3. Mr Boyle gave evidence. He did not think he should have been selected for redundancy. He was willing to work in administration or even to consider working on site or undertaking training if necessary for the respondent but was not asked to do

so. He says the way in which he was selected was not fair. He felt very badly let down by the way in which his employment came to an end.

4. Mr Dunn gave evidence. Business pressures had affected his health in recent years. Mr Dunn said that this was not something that he did lightly nor took any pleasure in. He said this is only the second time he has had to finish people and that he has hated it on both occasions. For him this was not personal but a difficult business decision. He admitted that he did not inform or consult the claimant at all. He thought the redundancy was unavoidable and didn't ask the claimant's view at all.

### **The witness statement issue**

5. At the start of the hearing Miss Hughes was unable to provide a claimant's witness statement. The respondent had seen the claimant's witness statement, albeit only late the day before the hearing. There was no copy before the Tribunal. The respondent said that the claimant should not be allowed to adduce evidence in chief.

6. There was an adjournment for reading time and to allow Miss Hughes time to obtain a copy of the witness statement. The statement was obtained.

7. The Tribunal heard from both counsel as whether or not the statement should be admitted in evidence. The claimant was clearly in breach of Case Management Orders and had not complied with the late extension it sought and was granted, nor the additional extension it says it agreed with the respondent.

8. Having regard to the overriding objective and seeking flexibility and informality in these proceedings, given that both Mr Boyle and Mr Dunn were present here today, and in order to deal fairly and justly with the parties, both of whom started out in these proceedings as litigants in person, the statement was allowed in.

### **The Issues**

9. There was a list of issues provided by the respondent in the following terms:

11.1 Whether the reason for the claimant's dismissal was redundancy.

11.2 If the reason for the claimant's dismissal was redundancy whether a fair process was followed.

11.3 Whether the claimant's dismissal was fair and reasonable in all the circumstances.

10. Discussion at the outset of the hearing lead to the claimant agreeing the respondent's list and lead to an agreed expansion of the list to include consideration of whether or not the respondent informed and consulted the claimant about a proposed redundancy as part of the consideration on fair process and, if it had done, whether or not it would have made any difference.

## The Facts

11. The claimant started work for the respondent on 16 May 2016. The respondent is a small business fabricating steel, erecting steel buildings and cladding steel buildings mainly in the agricultural sector. Before Christmas 2018 in response to a question from the claimant as to whether his job was safe the respondent's Mr Dunn replied that the claimant's job was as safe as everyone else's but that the business had gone quiet and was struggling to get work in.

12. In 2018 the business was under financial pressure and had gone from a profit of around £ XX 000 per year to a loss of around £ XX 000 in its 2018 accounts. (If either party wishes to be provided with the figures they may apply in writing to the Tribunal within 14 days of the date upon which these reasons are sent out to the parties for a version of this paragraph containing the amounts given in evidence). The respondent had made savings and the directors had taken a cut in their salaries. There had been a cash flow crisis from May 2018 which was continuing. The respondent had taken steps from early 2018 to ease the financial pressures including changing accountants and getting a consultant to reduce the rates bill for the business.

13. During 2018 the nature of the work coming in was changing. There was a dramatic decrease in the orders and enquiries coming in for fabrication work. Farmers were not commissioning new buildings. The work coming in was refurbishment work which did not require as much fabrication.

14. The respondent is a small business with no designated administration function. There is one part time employee who does some payroll and record keeping for the respondent for legal compliance purposes but the paperwork and administration falls on Mr Dunn's shoulders. He does not keep an order book as such. The orders come in by telephone or word of mouth. Mr Dunn keeps a working pad, and writes orders down as they come in. The majority of the business is repeat business and orders are made not on paper but on a handshake.

15. In 2018 the employee headcount dropped from 14 workers to 11 workers in February 2019 when the claimant was dismissed. It has continued to drop and there are 8 workers employed at the time of the hearing.

16. In February 2019 there was still work on pre existing orders for the claimant to do. On occasions in February the respondent's business was busy and occasionally overtime was worked so as to meet deadlines for orders. Sometimes Sundays were worked as an alternate to Saturdays so that Mr Dunn could have time with his wife on Saturdays.

17. Mr Dunn knew that the respondent only had enough orders to continue needing fabricator welders to do fabricating work until the end of March 2019. The respondent decided to make employees redundant. It decided it had to act quickly to cut the wages bill because soon there would not be enough fabricator welding work. The work would run out in a matter of 4 – 5 weeks. Mr Dunn decided, in early February 2019 that he would not reengage two subcontractors and he decided to terminate the employment of DB (who had less than two years service) and to make the claimant redundant.

18. Mr Dunn chose the claimant for redundancy because he was a fabricator welder and had not worked on site work. He was not a steel erector and not a cladder. He did not have qualifications which the other workers had in using site equipment or driving the fork lift truck.

19. On Sunday 10 February 2019, having decided to make the claimant redundant, the respondent Mr Dunn looked online to calculate the payment due to the claimant.

20. On Monday 11 February 2019 the claimant came to work to be handed a letter by Mr Dunn dated 10 February terminating his employment by reason of redundancy. This was the first the claimant had heard of his job being at risk. He was not informed or consulted about redundancy. Mr Dunn also terminated the employment of DB that day.

21. The claimant worked most closely with three other Fabricator Welders TW, CR and IL. IL was working at the respondent's business but was an employee of Mr Dunn's father's business based nearby and was sub-contracted to work with the respondent on a temporary basis. There was some animosity between the claimant and IL. The animosity arose out of the claimant (who did not have a fork lift truck driving licence) having to rely on others in the workplace, usually IL, to bring the steel to him so that he could work on it. IL had, on one occasion at least, taken his time to bring the steel to the claimant, and had said later that he did not like the claimant's attitude. Mr Dunn spoke to each of them at that time about the need to work more cooperatively together.

22. The claimant was a qualified and experienced Fabricator Welder. He was C E Accredited like all of the fabricators. He worked in the workshop. He did not work on site because he was not asked to do so. He had worked on site previously in his career, about twenty years ago, and would have worked on site for the respondent if he had been asked. On site work is steel erecting work and steel cladding work.

23. The claimant did not have the additional qualifications that other workers had. He could not drive the forklift truck. TW and CR had worked recently as steel erectors as well as fabricator welders, the claimant had not. TW, CR and IL had qualifications to operate on site equipment which the claimant did not have. TW drove the lorry, he had a heavy goods vehicle licence.

24. The respondent arranged for IL's sub contract to end and IL went back to work for the respondent's father's business from April 2019. The claimant did not return to work after 11 February 2019.

## **The Law**

25. The unfair dismissal claim was brought under the Employment Rights Act 1996.

26. The primary provision is section 98 which, so far as relevant, provides as follows:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
- (a) the reason (or, if more than one, the principal reason) for the dismissal and
  - (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this sub-section if it ... is that the employee was redundant ...
- (3) ...
- (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonable 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”.

27. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

- “(1) 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) ...
  - (b) the fact that the requirements of that business –
    - (i) for employees to carry out work of a particular kind ... have ceased or diminished or are expected to cease or diminish”.

28. The proper application of the general test of fairness in section 98(4) has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer’s conduct fell within the “band of reasonable responses”: **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley; HSBC Bank PLC v Madden [2000] IRLR 827**.

29. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result

can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

30. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

**“It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant ... when he said:**

**‘Fair consultation means:**

- (a) consultation when the proposals are still at a formative stage;**
- (b) adequate information on which to respond;**
- (c) adequate time in which to respond;**
- (d) conscientious consideration by an authority of the response to consultation”.**

### **Applying the law to the facts**

31. *Submissions:* The claimant says that the reason for his dismissal was not redundancy but suggests that the respondent was motivated to dismiss him by the animosity that existed between him and IL, and by the stress that this was causing to Mr Dunn. It is the claimant’s submission that there is no genuine redundancy situation and that this is clear from the absence in this case of corroborating documentation to prove the tailing off in work. The claimant says that the respondent should have produced copies of order books, estimates and invoices to prove that downturn. Those submissions are not accepted.

32. *Genuine redundancy:* A redundancy situation existed in the respondent’s business in February 2019 in that there was a reduction in the need for employees to perform fabricator welding work. The Tribunal accepts the oral evidence of Mr Dunn, corroborated by the falling headcount, that orders from farmers for fabricator welder work were diminishing.

33. *Reason for dismissal:* The claimant's dismissal is attributable to the downturn in work at the respondent’s business. He was dismissed by reason of redundancy.

34. *Fairness of dismissal:* The law provides that if the respondent does establish that there was a redundancy situation and it did dismiss the claimant for that reason the dismissal is then only potentially fair. To complete the enquiry, the Tribunal must

go on to consider the general reasonableness of the dismissal under section 98(4) of the Employment Rights Act 1996.

35. *Reasonableness*: Did the respondent act reasonably in this case? No, it did not. The claimant was dismissed on the spot, at what the respondent described as a meeting but the claimant quite rightly says was not a meeting, he was merely informed. There was no prior warning and no fair consultation in this case. The respondent acted prematurely.

36. *Fair consultation*: Mr Dunn ought to have informed and consulted the workforce. He could have done this as soon as he saw that orders were dropping off. Mr Dunn had orders running until the end of March and could have taken time to inform and consult.

37. *The selection pool and alternate subordinate employment*. The claimant says he would have worked on site work, he would have done steel erecting or taken on some office or administrative duties. He ought to have been given the time at least to respond to the proposal. There may have been suitable alternative offers. If Mr Boyle had been consulted he may have suggested a temporary lay-off or some reduced hours or different way of working to avoid redundancy altogether. He may, they may, have come up with some job sharing arrangements to preserve employment for as many staff as possible. Those conversations ought to have been had. It was unreasonable of the respondent to proceed unilaterally to make the decision to dismiss in the way that it did.

38. *The Polkey point*: Whilst the respondent ought to have properly informed and consulted the claimant, to have done so would probably not have made any difference in this case. The claimant conceded that the savings that the respondent had been trying to make were trivial in the face of the financial pressures it was under. Mr Dunn produced the accounts and, persuasively, the employee headcount document which shows that the employee headcount was and is dropping. It may have taken the respondent time to properly inform and consult the claimant but the outcome would have been the same, ultimately, the claimant would have been selected for redundancy.

## Conclusions

39. The claimant said under cross examination that he would not have been here today in Tribunal but for the way in which the respondent handled the dismissal.

40. A genuine redundancy situation existed. The claimant was dismissed for the potentially fair reason of redundancy but the dismissal was not fair. The respondent failed to inform or consult and failed to consider any mitigation or suitable alternate employment for the claimant. Sadly, the claimant would have been made redundant in any event.

41. For the reasons given above, the conclusion of the Tribunal is that the claimant was unfairly dismissed. A remedy hearing will be listed and case management orders made to prepare the case for that hearing.

Employment Judge Aspinall

Date: 18 November 2019

REASONS SENT TO THE PARTIES ON

21 November 2019  
FOR THE TRIBUNAL OFFICE

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42. Mr Dunn knew this from the drop in orders and enquiries coming in. The absence of corroborating documentation does not negate the oral evidence of Mr Dunn. Mr Dunn was able to point to a decreasing employee headcount and the other measures he had taken to make financial savings including changing accountants and achieving a rates reduction. Mr Dunn terminated the employment of DB on the same day as the claimant was made redundant and did not reengage two sub contractors.