



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Jackson

**Respondent:** Berkeley Catering Ltd

**Heard at:** Croydon

**On:** 22 August 2019

**Before:** Employment Judge Nash

## Representation

Claimant: Ms Anderson of counsel

Respondent: Mr Robson of counsel

Judgment having been sent to the parties on 21 September 2019 and written reasons having been requested on 24 September 2019 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. Following an ACAS early conciliation period from 2 July 2018 to 3 July 2018 the Claimant presented her claim to the Tribunal on 31 July 2018. Notice of claim and hearing was sent on 6 September 2018 and the ET3 was presented on 5 October 2018.
2. At the hearing the Tribunal heard from the Claimant as her only witness. It also heard from the Respondent, Mr Patel, its owner and director.
3. The Tribunal had sight of an agreed bundle amounting to 593 pages. One document was added on the day of the hearing by consent.

## Claims

4. The only claim before the Tribunal was for unfair dismissal under section 98 Employment Rights Act 1996.

## Issues

5. With the parties, the issues were agreed as follows:-
- (i) Was there a genuine redundancy situation in respect of the Claimant's position as Managing Director?
  - (ii) If so, was the decision to dismiss by reason of redundancy reasonable? In particular, was there consultation, including an appeal, and consideration of suitable alternative work?
  - (iii) If there were any procedural flaws, should there be any Polkey deduction?
  - (iv) If there was no genuine redundancy situation, was there some other substantial reason for justifying dismissal? The Respondent relied upon a business re-organisation.
  - (v) If so, was the dismissal procedurally unfair?
  - (vi) If there was any procedural unfairness, should there be any Polkey deduction.
  - (vii) Sanction, did the decision to dismiss the Claimant come within a range of reasonable responses to the substantial reason for dismissal?
6. For the avoidance of doubt, the Respondent did not contend that the Claimant had contributed to her own dismissal.

### **The Facts**

7. The Respondent is a high-end catering service and event management company. It is a small family company.
8. The Claimant started work for the Respondent on 28 May 2013 as Commercial Director for Sales. At this time, Mr Patel, the son of the original founders, was Managing Director. Mr Patel contended that his formal title (before the Claimant's subsequent promotion) was not Managing Director (MD). However, the Tribunal did not accept this because of the evidence to the contrary in the bundle.
9. At the Claimant's appraisal in 2014, it was recorded that Mr Patel told her that she could listen more to staff. However, there was no other reference to this as an issue.
10. On 4 January 2016 the Claimant was promoted to Managing Director in Mr Patel's place. He sent out an email saying that he was stepping down from day-to-day management and the Claimant was becoming Managing Director in his place. All queries would go to him and any queries to him would be re-directed to her.
11. The Tribunal had sight of a diagram of the Respondent's business structure dated January 2018 showing the Claimant as Managing Director with Mr Patel, in effect, off

to one side on the same level - as owner of the business. There were nine managers below the Managing Director reporting to her.

12. In practice, Mr Patel still had a role in deciding on the direction of the company; for instance, he made significant capex decisions and had a final say in recruitment. As the Claimant succinctly put it, it was “his business”.
13. In April 2017 the Claimant produced a lengthy and detailed business plan, at page 520. This did not include any reference to restructuring, beyond some staff being moved to the events arm. This was then actioned.
14. According to the Respondent, the company undertook a restructuring in May 2017 in that it was divided into two arms – delivery and events. However, this division to some extent dated back to 2013 when Mr Patel had made reference to maintaining two businesses. In contrast, according to the Claimant, the only effective restructuring in 2017 was a change to the website.
15. There was no other evidence before the Tribunal of any effective business restructure at that time. The Tribunal did not find there were any significant restructure in respect of the two parts of the business in 2017 due to the lack of evidence and particularly lack of any reference in the April 2017 business plan.
16. Mr Patel and the Claimant then became involved in discussions over the Claimant’s remuneration. It was a matter of record that there were discussions between Mr Patel and the Claimant in respect of her compensation package. The Claimant’s view was that her remuneration was going down – for instance, from about £59,500 to £53,500 p.a from 2016 to 2017. She made suggestions as to how to increase her remuneration.
17. Mr Patel and the Claimant got into a polite but unmistakable dispute about why the Claimant’s remuneration had reduced. According, to the Claimant, the business was doing well. The Respondent had made a net profit of £1.7m during her employment. Mr Patel thought that this figure sounded about right. He agreed that the last quarter in 2017 and the first quarter in 2018 were best quarters in the history of the business. In general Mr Patel agreed that at this time the business was performing well.
18. The Claimant contended for a higher salary. Her basic salary was £54,000 p.a for a four-day week. This would have been equivalent to a full-time basic salary of £67,000. She also was entitled to a bonus. On 12 March 2018 she referred to the market rate for her position being £80-100,000 p.a plus bonus. This would have been very significant increase.
19. The Respondent’s case was that the Claimant was poor at relating to staff. Her failings forced Mr Patel to take over some duties from the Claimant. However, there was little detail about this. There was a refence to an issue between the Claimant and an employee who was exited. However, there was nothing in writing, as would have been expected in a termination (or resignation) and the Tribunal was unable to draw any conclusions from this.

- 20.** Mr Patel got married and his new wife started to work full-time for the Respondent. Mr Patel himself started to spend more time in the business. The Claimant alleged that from December 2017 onwards she started to be excluded by Mr Patel from matters within her role and responsibilities.
- 21.** The Claimant contended that Mr Patel undermined and disparaged her before her reports and within the business. She gave a list of examples in her witness statement which corresponded to emails in the bundle. For instance, Mr Patel sent an email on 30 November 2017 to senior managers (her reports) stating, 'guess we need to consider how committed the MD is to the business'. He was publicly critical of her at being unable to attend a work event at short notice. In another example, on 6 December 2017 the Claimant informed Mr Patel of a delivery problem (which had required an apology to a client) and asked how the business could improve. Mr Patel consequently emailed the senior staff stating, 'what a silly question'.
- 22.** Mr Patel took over responsibility for appraisals of senior staff from the Claimant. He missed the Claimant out of email exchanges with the senior management team. Mr Patel agreed frankly in oral evidence that he had undermined the Claimant and disparaged her to her reports.
- 23.** Since 2017 the Respondent had been advertising – without success - for an Event Sales Manager. In January 2018 the Respondent found a possible external candidate. The Claimant led on the interviews with the candidate. On 24 February the candidate showed Mr Patel around his current employer's premises. The Claimant advised against recruiting the candidate on the grounds that he was sharing his current employer's confidential business information with a competitor (the respondent). This made him an unsuitable employee.
- 24.** On March 2018 the Claimant provided Mr Patel with a second detailed business plan.
- 25.** Mr Patel and the Claimant had a meeting on 8 March 2018 with the stated purpose of discussing her compensation package. The Claimant made minutes, which were agreed. About half-way through the meeting Mr Patel without warning told the Claimant that he intended to take over as Managing Director and she would no longer be in the role. The Claimant told Mr Patel that she was not willing to have her salary reduced.
- 26.** In cross-examination, Mr Patel accepted that he had not mentioned any restructuring to the Claimant prior to the meeting.
- 27.** The Tribunal had sight of an email exchange between Mr Patel and the Respondent's external HR function in which he stated that he would come in as CEO five days per week on a lower salary and the role would not be attractive to the Claimant.
- 28.** On 12 March 2017 Mr Patel stated that he would be taking full control of management decision-making and operation but not as MD. His title would be CEO and the MD role would be redundant. Mr Patel said that he had changed his mind as to his role because he had taken legal advice.

29. During this time Mr Patel said several times to the Claimant that a new alternative role would be forthcoming. There was a discussion of a creative role.
30. On 15 March 2018 the Respondent sent the Claimant an at risk of redundancy letter. The Claimant was then absent sick for an eye operation from 19 March to 3 April.
31. There was then a meeting on 10 April 2018 between the Claimant and Mr Patel. Mr Patel told her there was no suitable alternative work. He confirmed that all team leaders would now report to him and he would be responsible for appraisals. All senior responsibilities would be carried out by Mr Patel, but not as MD.
32. When the Claimant asked, he could not explain the difference between his new role - described as CEO - and the current MD role. Mr Patel said that the Respondent did not need an MD because it needed two people for its two brands. This was the only reference to the two brands rationale.
33. Mr Patel, when asked, said that he intended to cut costs, although no evidence was led as to this. The Claimant told Mr Patel that she might accept a lesser pay and role in effect to save her job.
34. On 12 April 2018 the Respondent offered the external candidate the role of Events Director, which was a new role.
35. A final redundancy meeting was arranged for 19 April 2018 to consider suitable alternative work, including a new creative role. Before this meeting the Claimant wrote asking the Respondent to supply its redundancy procedures and job descriptions. These were not supplied.
36. The Claimant asked to work from home on 19 April and the Respondent agreed. The Respondent's HR consequently asked Mr Patel to reschedule the final redundancy meeting. Mr Patel then stated that the Claimant, 'never showed up to work today (19 April)'.
37. The Respondent wrote to the Claimant confirming that she was made redundant because this was unavoidable and there was no suitable alternative work. The Claimant was given notice.
38. The Claimant requested that the Respondent consider her appeal against dismissal. Mr Patel attempted to get someone from outside the business to carry out an appeal but did not offer the Claimant an appeal.
39. The Respondent said that post-termination Mr Patel was an employee and paid under PAYE.

**The Applicable Law**

40. The applicable law is found at sections 98 and 139 of the Employment Rights Act 1998.

**98.— General.**

(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 subsection (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 subsection if it—

...

- (c) is that the employee was redundant, or

...

(4) Where the employer has fulfilled the requirements of subsection (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 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.

**139 Redundancy.**

(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) 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 was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

**Submissions**

41. Both parties provided written submissions and spoke to these briefly.

**Applying the Law to the Facts**

42. The Tribunal firstly considered the reason for dismissal.

43. The Court of Appeal stated in *Abernethy v Mott Hayy and anor 1974 ICR 323* that a reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee. The burden at this stage is upon the Respondent but it is not a heavy one.

44. This is modified in respect of redundancy. A Tribunal must be satisfied objectively that at least one limb of the definition of redundancy at section 139 Employment Rights Act 1996 is satisfied for an employer to have dismissed for the potentially fair reason of redundancy. As the Respondent submitted, a tribunal cannot look behind the reasons for any reduced need for employees. To put it another way, the question for the Tribunal is not whether a redundancy is wise, only whether it is genuine.

45. The Tribunal in this case found that the employer had ceased there was no genuine redundancy situation as defined in section 139 in respect of the Managing Director position for the following reasons.
46. The Tribunal applied the test set out by the Employment Appeal Tribunal in *Safeway Stores plc v Burrell [1997] ICR 523*. The Respondent's case was not that it had ceased or intended to cease carrying on the business for the purposes of which the Claimant was employed. The Respondent's in effect was that the need for employees of a particular kind (in this case, Managing Director) had ceased or diminished, or were expected to do so. Mr Patel said in terms that it was the MD position that was redundant. The Tribunal accepted the Respondent's submission that, for the statutory test to be made out, it is only necessary that an employer needs fewer workers, irrespective of whether the amount of work which needs to done has diminished.
47. The difficulty for the Respondent was that, according to his witness statement, Mr Patel had decided that "the business would operate more effectively if I was to take on the MD role". Mr Patel was, in effect, putting more time into his business. Having previously reduced his role, following his marriage he increased his role in the business. There was no diminishing need for an MD role. The role of MD continued with Mr Patel fulfilling it. He had started to do some of the role before he informed the Claimant of the stated redundancy. He did more of the role during the stated consultation process.
48. The need for what might be described as a Managing Director function was not diminishing. An external HR Consultant suggested that, such was the burden on the MD role including nine reports, that it would be advantageous to recruit an Operations Director in addition. This indicated that the MD role was overloaded rather than there being a diminishing need for it.
49. The Respondent's case was that Mr Patel took over only part of the Claimant's role thus, it is understood by the Tribunal, indicating that there was a diminishing need for the MD role, because other staff were taking over various functions.
50. However, the evidence showed that Mr Patel, as he frankly told the Tribunal, was deliberately cutting the Claimant out of the business and undermining her as MD. He also frankly admitted that this was happening without her being informed.
51. This was not, accordingly, a situation where there was a diminishing need for an MD, or an MD function, because the duties were being filled by other staff. In contrast, this was a deliberate and undenied attempt to undermine the person who was fulfilling the role of MD at the material time by the person who was about to take over.
52. In addition, there was no evidence that there was a general diminishing need for senior staff in the Respondent's business. Mr Patel became MD, and the respondent took on an Events Director at this time resulting in additional senior management capacity in the business.

- 53.** In addition, there was no good evidence of a financial need to cut costs in the business. There had been £1.2m increase in sales during the Claimant's employment. Mr Patel accepted that there had been no reduction in head count or business outgoings at the time of the redundancy. Although, there was a suggestion in an email that this was going to happen, the Tribunal had no sight of a business structure post-dismissal to show any reduction in head count or any documents showing a reduction in outgoings. As such evidence would have been within the respondent's control, the Tribunal drew an adverse inference from the lack of such evidence. The Tribunal found on the balance of probabilities on the evidence before it that there was no material reduction in outgoings or head count at the time of the dismissal.
- 54.** Having found that there was no genuine redundancy situation, the Tribunal went on to consider whether the Respondent could demonstrate the other potentially fair reason on which it relied, some other substantial reason justifying the dismissal of an employee holding the role held by the claimant – that of Managing Director. In effect, the Respondent relied upon a business reorganization.
- 55.** According to the Court of Appeal in *Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA*: 'The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness.'
- 56.** In *Hollister v National Farmers' Union 1979 ICR 542, CA*, the Court of Appeal said that a 'sound, good business reason' for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. It is not for the tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns. In fact, the employer need only show that there were 'clear advantages' in introducing a particular change, to pass the low hurdle of showing SOSR for dismissal. The employer does not need to show any particular 'quantum of improvement' achieved — *Kerry Foods Ltd v Lynch 2005 IRLR 680, EAT*. Whilst the circumstances of this dismissal were not the same, the Tribunal found the analogy of assistance.
- 57.** Further, in *Scott and Co v Richardson EAT 0074/04*, the EAT warned against Tribunals substituting their own opinion of whether the employer's business decision gave them a discernible advantage and also stated that the advantage to the employer did not have to be so substantial that it mitigated the consequences of the dismissal.
- 58.** The Tribunal sought to identify the re-organisation. The Tribunal had not accepted the Respondent's case that there was a restructuring in May 2017, for the reasons set out above. This left the re-organisation, such as it was, of Mr Patel taking over the Claimant's role as MD. The MD role remained – filled by Mr Patel. There was no wider re-organisation, save for the appointment of an Events Manager and there was no suggestion that this position would take over some of the MD's duties. In the view of



the Tribunal, this was the difficulty for the Respondent in arguing that there was a re-organisation.

- 59.** The Tribunal was bolstered in this finding by the lack of evidence of business reasons for any re-organisation. The Respondent asserted that it had business reasons for removing the Claimant and Mr Patel's taking over her role. However, his explanation of these business reasons in response to specific questions from the Tribunal were notably vague. He said that he wanted the business to be more efficient overall and he wanted to improve profitability. He also said that he felt happier taking decisions himself and that it was a family decision.
- 60.** The Tribunal was taken to no evidence or details or rationale as to any such business reasons. There was, for instance, no explanation about reducing costs or head count. There was no suggestion that the business was not performing well.
- 61.** Although the Tribunal bore in mind that the Respondent is a small family company, it was notable that there were no documents going to the re-organisation on which the Respondent relied. This was in circumstances where the Claimant had provided two detailed business plans which did not refer to any such restructure. In contrast to the position before the stated re-organisation, the Tribunal did not have sight of a business structure post-termination. Therefore, it was very difficult for the Tribunal to discern the structure after the stated re-organisation, let alone any clear advantages to any new structure.
- 62.** Mr Patel also said in reply to a question by the Tribunal, that there was no need for "the two of us", that is himself and the Claimant. However, the Tribunal found that Mr Patel's role prior to the supposed restructure was limited. He was in charge of strategy rather than operations; for instance, apart from the Claimant, he did not have staff reporting to him.
- 63.** Mr Patel said that he reduced head count on 18 April but there was no evidence and accordingly, the Tribunal could not place any reliance upon this assertion. There was no explanation as to why an MD was no longer required. The Tribunal found that there was no explanation because an MD was still required, as demonstrated by Mr Patel taking over the role.
- 64.** The Tribunal considered if the Respondent's claims that the Claimant was performing badly, for instance that her interactions with most of the management team were disruptive, might constitute clear advantages to removing her. The Respondent did not rely on poor performance or misconduct as a reason for dismissal. The Tribunal therefore viewed these allegations as also going to the Respondent's credibility.
- 65.** Save for a brief reference in 2014 - several years prior to the termination - there was no reference to any such performance issues in the Claimant's appraisals. There was no other documentary evidence of this in a bundle going to nearly 600 pages. Mr Patel said in cross-examination that he had written to the Claimant several times about her disruptive behaviour. However, there was no documentary evidence of this, and it was not put to the Claimant. Accordingly, the Tribunal did not accept that this had

happened.

66. Further, the Respondent's allegations of poor performance were inconsistent with its stating in open correspondence in July 2018 that the Claimant's performance and loyalty were not in issue or dispute.
67. Accordingly, on the balance of probabilities the Tribunal found that these allegations were created because the Respondent was in effect seeking to undermine the Claimant in order to make it easier to terminate her employment and subsequently justify that termination. These allegations damaged the Respondent's credibility.
68. When considering if a business re-organisation was the real reason for dismissal, the Tribunal noted evidence that suggested that the Respondent had other reasons for dismissal which related to the Claimant personally, rather than the structure of the business. The Claimant prior to termination was raising issues about her shrinking compensation at a time when the business was doing well. She was advocating that her compensation should stop reducing and, further, for a significantly increase in compensation. Whilst the discussion remained polite, the Tribunal found that the Respondent saw the Claimant as persistently demanding a pay rise. Accordingly, the Claimant as an individual was becoming a problem for Mr Patel. When asked if the compensation discussions had impacted on the decision to dismiss, Mr Patel firstly said, no, and secondly that it was one reason in his thought process and thirdly that it was not entirely the reason for the dismissal.
69. In light of this inconsistency, the Tribunal found that the Claimant's seeking to stop her compensation reducing and wanting to be paid more were factors in the decision to dismiss. This link is corroborated by Mr Patel informing the Claimant of redundancy during what was stated to be a meeting about compensation.
70. The appointment of an external candidate as an Events Manager happened at much the same time as the Claimant's redundancy process. The candidate was offered the job very close to when the Claimant was dismissed.
71. Accordingly, the Tribunal found that this appointment was very much live in Mr Patel's mind when making the decision to dismiss. The Claimant had objected to employing this candidate. Further her objections were on ethical grounds. This was distinct from  
  
an objection that might be hoped to change once the two started to work together, for instance, whether the external candidate was properly qualified,
72. Accordingly, there was good reason for Mr Patel to fear that the Events Manager and the Claimant might not work well together. This is corroborated by Mr Patel's not informing the Claimant that candidate had accepted the job offer. This concern was another reason to exit the Claimant from the business which did not relate to any restructure and which was personal to the Claimant.
73. This was further corroborated by the evidence of Mr Patel's animus towards the Claimant as set out above, including his undermining her to her reports and publicly

criticizing her.

- 74.** The Tribunal concluded that the reasons for dismissal related to the Claimant as an individual, rather than to the role she held. It was not a business restructure. The Respondent decided that it wanted to exit the Claimant from the business and changed around personnel to effect this. The reason for dismissal in Mr Patel's mind when making his decision was a wish to exit the Claimant personally.
- 75.** The reason for dismissal was accordingly not any business re-organisation.
- 76.** As the Respondent had not discharged the burden upon it of showing that it had one of the two potentially fair reasons for dismissal, the Tribunal found that there was no potentially fair reason.
- 77.** On these facts the Tribunal found that the reasons for dismissal related to the Claimant personally. There was no need to investigate this further. According to the EAT in *Hertz (UK) Ltd v Ferrao EAT 0570/05*, where an employer fails to show a potentially fair reason for dismissal, Tribunals are not obliged to ascertain the real reason for the dismissal if there was insufficient evidence to do so. In these circumstances the dismissal will be unfair.
- 78.** Accordingly, the Claimant was unfairly dismissed.

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Employment Judge Nash  
Dated: 17 October 2019