



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE HILDEBRAND (sitting alone)
AT: ASHFORD

BETWEEN:

Claimant

MR JOHN TWYCROSS

AND

Respondent

PACALIS CONSTRUCTION LTD

ON: 9 October and 26 November 2019

APPEARANCES:

For the Claimant: In Person and Mr Jonathan Twycross, Son

For the Respondent: Mr P Doughty, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The Claimant's claim of unfair dismissal fails and it is dismissed
2. The Claimant's claims of failure to pay expenses and failure to pay holiday pay due on termination fail and are therefore dismissed.

REASONS

The Claim

1. By a claim presented on 20 December 2018 the Claimant made claims of unfair dismissal, for payment of expenses and for payment of holiday pay due on termination of employment. He had been employed by the Respondent and its predecessor since 26 October 2015. His employment was terminated by reason of redundancy on 7 September 2018. In an extensive document setting out his particulars of claim he contended that there had been sham discussions regarding GDPR after which he had taken a grievance and appeal both of which had been unsuccessful. The Respondent then undertook a redundancy exercise which the Claimant also contended was a sham. The Respondent had then made his employment role redundant. He unsuccessfully appealed this process. He claimed the dismissal was unfair, being not for redundancy but because he had brought a grievance. He further claimed that on termination of employment the Respondent had used a holiday calculation based on a year from April to March while his holiday year ran from January to December. He also claimed expenses related to a company telephone which he had maintained until the outcome of his appeal against dismissal was known. No claim of discrimination was made.

The Response

2. In its response the Respondent denied that the redundancy exercise was a sham and also denied that it was connected to the Claimant's grievance or the matters which had led to that grievance. The Respondent also disputed the Claimant's monetary claims. The Respondent helpfully produced a list of issues which the claimant agreed. I deal with these in the conclusion.

The Evidence

3. I heard evidence from the Claimant in the form of a written statement and oral cross examination. On the Respondent's side I heard from Mrs Dawn Morgan who dealt with the Claimant's grievance hearing at first instance and took the decision to dismiss. I also heard from Mrs Jessica Bull who dealt with the Claimant's appeal against dismissal. Both witnesses produced written statements and gave oral testimony. I also considered a bundle of documents which runs through some 615 pages. The hearing began on 9 October 2019. The parties had indicated that the case might take three days. In the event the oral process was completed on 26 November 2019 but thereafter a full day was engaged in consideration of the bundle and further time was taken in producing this reserved judgement

Findings of Fact

4. As is clear from the size of the bundle, a massive amount of material was produced to the tribunal in this case, principally from the Claimant. The Claimant attempted to establish some ulterior purpose for his dismissal, said by the Respondent to be by way of redundancy. I do not propose to deal in great detail with the material prior to the redundancy exercise. It is in the redundancy exercise that the appropriate consideration of the background is undertaken. I therefore give a brief summary of the background to the redundancy dismissal as follows.

Job Descriptions

5. The Claimant was offered a post with Environ Communities Ltd by letter dated 5 October 2015. He was to start on 23 October 2015 as Technical Manager and Coordinator incorporating Clerk of Works, Quality Manager, CDM, overall project planning and specification in liaison with the project teams. He

was to report to David Boden the MD and owner. In January 2017 the Claimant transferred, it is common ground, under TUPE to Pacalis Construction Ltd, the Respondent, with the role of Technical Director. The Respondent had both a CEO, Mr Boden, and an MD, Ms Robinson. It does not appear that structure led to clear lines of communication.

6. In April to June 2017 there was discussion about a draft job description which had been circulated to the Claimant. The discussions between Mr Boden and the Claimant were inconclusive.

7. By an email on 14 February 2018, attaching a letter dated 6 February 2018, the Respondent sent to the Claimant a "Statement of Employment", which provided that his line manager was Julia Robinson, the Managing Director. The accompanying job description comprised 27 key responsibilities. An earlier version of the document contained 26 key responsibilities. The additional one is the responsibility number 13 to review coordinate and issue all specification information. The Claimant was asked to let Dawn Morgan know if he had any queries. He was asked to confirm his acceptance by email. The Claimant responded the same day: "Acknowledged. " He did not raise any queries and it is a reasonable inference for the Respondent that he accepted the terms.

GDPR Meeting

8. The Respondent was at this time engaged in preparation for the introduction of GDPR, the new data protection provisions. Dawn Morgan was assigned the task and she arranged to meet the senior managers of the Respondent, a company which employed only 7 people directly. She met the Claimant on 9 March 2019. She wished to understand his daily tasks so that she could map the data implications. When he was unable to tell her what his day to day activities involved she suggested looking at his job description. He responded by

saying that Julia Robinson was doing most of the tasks on his job description and he had not agreed it anyway. He felt he was not qualified to do some aspects of the job description and others required clarification. He felt he was excluded from some of the areas he should be involved in. Dawn Morgan said she would ask the Claimant and Julia Robinson to put together by 21 March 2018 a document recording what they thought the Claimant's role should be.

9. Julia Robinson produced some thoughts. She pointed out that the Respondent was the main contractor on some sites and the client on others. This involved very different input from the Technical Director. The Claimant also made comments.

10. A further meeting took place on 29 March 2018. At this meeting Dawn Morgan sought to talk further about job descriptions. She had also decided to offer the Claimant some assistance in the form of personality profiling such as MBTI tests and SWOT analysis. In the course of these discussions the Claimant emphasised his good working relationships with the Respondent's external professional consultants. The Respondent indicated that some consultants viewed him as pedantic and sought to avoid working with him. Whatever the rights and wrongs, it appears there are some grounds for the viewpoint of the Respondent and some acceptance by the Claimant that he could be viewed as pedantic on occasion. What is important is that the Claimant found this perceived slight unacceptable and harboured from that time a sense of grievance that appears have clouded all further relations between the parties.

11. After this disclosure the Claimant would not discuss the job description further and wished to explore the way forward. Dawn Morgan identified the possible avenues were resignation by the Claimant, an HR process or a settlement agreement. Notwithstanding any possible issues of "Without Prejudice" privilege or statutory inadmissibility, both parties wished the tribunal to accept evidence about this discussion and what followed. The Claimant is adamant that Dawn Morgan told him one of the three options discussed was that

he would be sacked and not, as the Respondent contends, that there would be an HR process. I find that suggestion improbable on what I have heard. Dawn Morgan was professional and restrained in these meetings and made clear in her evidence that the issue of poor relations with external consultants would have to be investigated further to resolve the difficulty which had arisen.

12. A further meeting took place on 9 April 2018. Dawn Morgan wished to explain that she would need to look further into the issue of the external consultants. The Claimant sought to explore only the possibility of a settlement agreement. Dawn Morgan at his request provided him with a draft agreement on a “without prejudice” basis. The Claimant was given 3 weeks paid leave to consider the proposed agreement and to take advice at the expense of the Respondent.

The Grievance

13. Attempts were made to contact the Claimant buying this period of absence but his solicitors indicated in response that he should not be contacted. The next contact received from the Claimant was an extensive written grievance and supporting documents dated 24 April 2018. The grievance raised a number of matters including historical material. The grievance meeting before Dawn Morgan took place on 1 May 2018 from 1100 to 1539. During the meeting the Claimant produced more supporting documentation. It was not clear to Ms Morgan which material related to which grievance. Dawn Morgan asked for further information as it was clear not all supporting material had been supplied. A schedule was produced cross referencing material to grievances. A focus of the grievance was the job description and the fact that Julia Robinson was doing tasks on the Claimant’s job description.

14. Dawn Morgan communicated the outcome of the grievance in her letter of 11 May 2018. She did not uphold the grievance. She cannot be criticised for

failing to give time to the meeting which was lengthy. She devoted significant efforts to the consideration of the documents produced and dealing with her ruling.

15. In the meantime Dawn Morgan had addressed the practical problem arising from the contentious issue of the Claimant's job description. The Claimant had not accepted the job description produced. He was therefore directed that he should work to Julia Robinson's instructions and he was to report weekly to her by email giving details of tasks completed, tasks outstanding and priorities.

The Grievance Appeal

16. The Claimant appealed against the grievance outcome to David Boden on 17 May 2018 and this was heard on 23 May 2018. Again this was a long meeting from 1100 to 1730. The outcome was given in writing on 31 May 2018. The appeal was not upheld. After setting out his comments in detail in an extensive decision letter Mr Boden concluded there was no evidence to support the grievances.

The Redundancy Process

17. In her witness statement Dawn Morgan sets out clearly the considerations she undertook about the work of the Respondent and the roles of Technical Director, Construction Director and Commercial Director. The Claimant was doing some things which she considered the external professional consultants should be doing. The Claimant was also checking their work which the Respondent considered unnecessary. She concluded there was overlap between the roles of Technical and Construction Director. She considered the Commercial Director did not have overlap. She informed the other members of the board that they needed to consider whether there was a redundancy

situation. She produced manuscript notes dated 7 June 2018 which confirmed that she was considering the role of the Claimant in this context at that time.. After board approval was given for the redundancy exercise Julia Robinson stood back from personal involvement in the redundancy process because she was under consideration herself.

18. Dawn Morgan met the Claimant and Julia Robinson separately on 11 July 2018. She explained they were at risk of redundancy. She wrote following the meeting to confirm what had been discussed. She provided a copy of the proposed scoring matrix, the job specification for the proposed role, a copy of the briefing note and an invitation to the first consultation meeting. She had further individual meetings on 24 July 2018 The Claimant's meeting lasted 3 hours. The Claimant handed over a copy of the scoring matrix he had completed. He scored himself 22 out of 48. The Claimant did not at that time require adjustments to the matrix.

19. Dawn Morgan scored the Claimant 16 and Julia Robinson 42. She met the Claimant on 9 August 2018. She explained at his request that disciplinary and attendance criteria were not included in the scoring as both candidates had no issues in these contexts. She provided a written response to the document he had produced at the previous meeting. She explained that she had scored the Claimant a little differently to his own score. This did not affect the outcome. Julia Robinson had scored much higher than him. She asked the Claimant if he was happy to proceed straight to the final meeting and he confirmed he was. She provided notice of termination. She had prepared a letter for this purpose but would not have used it if it had been appropriate to continue with the consultation. She explained the right of appeal. The following day she provided written confirmation of the right of appeal, explanatory notes of the scoring assessment, evaluation of the points raised during the meetings with the Claimant and Julia Robinson and her response to the document the Claimant had produced. She confirmed the employment would end on 7 September 2019. Other possible roles had been considered by way of redeployment but

were not suitable either as alternatives or in relation to location. She explained that there was a genuine reduction in the requirement for employees to carry out work of a particular kind.

The Appeal

20. The Claimant submitted an appeal. The Respondent appointed an external HR professional, Jessica Bull, to undertake this role. In the course of the appeal Dawn Morgan was asked to take a statement from Hayden Meates said to have heard that the Claimant would be made redundant before the process had run its course. On investigation Mr Meates confirmed that he had jumped to a conclusion but had not received advance notice of a decision.

21. Jessica Bull heard the appeal. She is an independent HR Consultant, having formerly practised as a solicitor. She is an experienced consultant. She provided authoritative testimony. She had authority from the Respondent to determine the appeal as she saw fit. She identified some specific points she wished to clarify with Dawn Morgan. These were: the timings of meetings 3 and 4 on 9 August 2018; the pre-preparation of the dismissal letter; whether there were any disciplinary or attendance issues among the candidates; Dawn Morgan's understanding of the Claimant's role and workload; the rationale for the redundancy process and the significance of the consultants in this regard; who created the briefing note and for what purpose; the company response to the issue that meeting dates had not been adhered to; the Board decision to embark on the exercise; the knowledge Julia Robinson had of the process; the HR process referenced in the appeal; the ages of the candidates and more information about the Claimant's shareholding. She also asked for further information and a statement from Hayden Meates.

22. Jessica Bull considered the grounds of the appeal were that the rationale for the redundancy was flawed and that a fair procedure had not been carried

out. The Claimant also complained about the way he had been treated by Dawn Morgan. The appeal was heard on 7 September 2018 from 1030 am to 1430 pm.

23. The appeal outcome was sent to the Claimant on 17 September 2018. Jessica Bull found there was a genuine redundancy situation because the Respondent had a reduced requirement for employees to carry out work of a particular kind. She was satisfied there was a clear and credible business rationale and that this had been clearly communicated to the Claimant. In the appeal letter the Claimant had said he was required to work his notice and conduct a handover. The handover had only taken 5 minutes which suggested the workload was not as great as the Claimant thought it was. There was awareness of the Claimant's workload and not all the tasks he was engaged in were necessary to the Respondent. External consultants were already being paid for some of the work undertaken by the Claimant. Julia Robinson was at risk herself and had been excluded from the process after the decision in principle had been taken at board level. Jessica Bull did not consider the challenge to the scoring matrix was valid. She did not find Dawn Morgan's behaviour was intimidatory or bullying to the Claimant. She considered if the Claimant had not raised his grievance the outcome of the process would have been the same. She considered the GDPR meeting had brought to light lack of clarity about the Claimant's tasks. She discounted the evidence of prejudgment said to have come from Hayden Meates. She dismissed the appeal against dismissal.

24. In relation to the monetary claims, the Claimant contends his holiday year runs from January to December. The Respondent gave evidence it runs from April to March. The Claimant should have corroboration from earlier years if he is correct. He has not produced any. I do not accept what he says. I prefer to accept that the Respondent has correctly calculated his entitlement based on their normal practice and the holiday year they operate, which allows for untaken holiday to be taken in the quiet part of the year from January to March.

25. Finally on the expenditure for telephone rental, the Claimant claims he is entitled to be paid his expenses until determination of his appeal. I do not find the appeal extended his employment. I find his entitlement came to an end when he left the Respondent's employment. On being given notice he should have given notice to his telephone provider.

Submissions of the Parties

The Claimant

26. The Claimant's submissions focussed on the hardship he had undergone fighting for his job and to avoid redundancy. There were no notes to support the decision making of the Respondent. He had been threatened with sacking. No evidence had been produced to support the allegations made in the settlement agreement.

The Respondent

27. The Respondent produced written submissions dealing with specific points raised by the Claim. It would not be appropriate to reproduce those here. I asked Counsel for the Respondent, as I had asked the Claimant, to deal with the issue of Section 111A Employment Rights Act 1996 ("the 1996 Act") This provides that evidence of pre-termination negotiations is inadmissible in any proceedings under Section 111. The Respondent said they had taken a pragmatic view. The Respondent had tried to keep without prejudice discussions out of the grievance but in reality the whole case was shot through with references to it made by the Claimant. If discussions had come to nothing the parties had to continue with the employment relationship. The Respondent waived any right to object to the material but the Claimant had been unable to move

on from that discussion. The settlement agreement forms the basis for his grievance. It was therefore impossible to exclude it from the case.

28. The Respondent submitted the holiday year was April to March and the claimant was not entitled to any further holiday pay. He was not entitled to reimbursement of telephone rental payments in respect of periods after termination of employment.

29. In relation to the unfair dismissal issue the Respondent submitted that the Claimant had not been clear about his day to day activities or his job description. The requirements of the company were changing and the need for technical input was not clear. There was nothing to say that the Respondent had improper motives and motivation for the redundancy. The evidential burden lies on the Claimant to show there is an reason for dismissal outside the redundancy. He seeks to establish that if things had gone differently on 29 March 2018 he would not have been dismissed.

30. No statutory provisions or authorities were cited by the parties.

A concise statement of the law

31. Section 98 of the 1996 Act provides that it is for the employer to show a potentially fair reason for dismissal. The relevant reason here is redundancy. It is then for the tribunal, with a neutral burden of proof, to consider whether the reason shown is sufficient to justify dismissal taking into account equity and the substantial merits of the case, including the size and administrative resources of the employer. In redundancy dismissals the tribunals looks for a fair procedure. This will include a fair selection process avoiding as much as practicable subjective criteria as a basis for decisions. Reasonable efforts to

redeploy should be undertaken. Redundancy includes the fact that the requirements of the business for employees of a particular kind have ceased or diminished or are expected to cease or diminish.

32. The tribunal may find that the Respondent has failed to establish the reason for dismissal on which it relies. That would also follow if the Claimant has established a reason which played a part in the dismissal which was not a potentially fair reason for dismissal.

Conclusion

33. Dealing with the monetary claims at the outset, I do not see a basis for the Claimant waiting until determination of the appeal to give notice to terminate his telephone rental agreement. This is not a case where there are contractual arrangements which provide that the appeal had the effect of prolonging the engagement until the determination of the appeal. The Claimant was given notice and when the notice expired the employer ceased to be obliged to the employee. There is no valid claim for expenses after the termination.

34. In the context of the holiday pay claim, the Claimant contends for a holiday year ending in December. The Respondent contends for a holiday year ending in March. The Claimant makes the claim and it is for him to prove it. One would anticipate corroboration from earlier years. There is none offered. It may be there is none, I anticipate that is more likely than that there is such corroboration and the Claimant has failed to produce it. Accordingly I do not accept this claim as well made.

35. Finally I turn to the unfair dismissal claim. The Claimant seeks to establish that the reason for his dismissal was the fact that he raised a grievance. I do not consider that the Claimant has established this to be the case. It may be that the redundancy process followed closely on the grievance but that does

not establish a causal link. There is a causal link between the GDPR discussion and the lack of clarity over the Claimant's job description and that led to the redundancy process. There is a connection in the Claimant's mind between the GDPR issue and his grievance. The Respondent has a plausible explanation for the process it followed. I did not find that the Claimant's grievance played any part in the causation of his dismissal.

36. In relation to the individuals chairing meetings, particularly Dawn Morgan, the Respondent has dealt with matters as best it can given the size of the organisation. The Claimant was in senior management. The Respondent had a limited pool of senior managers to deal with grievance and appeal. They appear to have conducted lengthy and careful meetings. The Claimant challenged a note of one meeting and said while giving evidence he had notes which he had not disclosed. The case was adjourned but the material eventually supplied did not provide the missing note.

37. I have found nothing unfair in the outcome of the Claimant's grievance or appeal.

38. The redundancy exercise had been established on good grounds. The criteria are objective and the Claimant cannot challenge the scoring. There is nothing to be said regarding any failure of redeployment. There was no opportunity for alternative employment denied to the Claimant which would have supplied a practicable way forward. There was no basis for citing the grievance as the cause of the redundancy process.

39. Given its limited resources in terms of individuals to hold the appeal the Respondent instructed Jessica Bull. She is unconnected with the Respondent. She brought a clear and independent eye to the process. She was astute to understand the timing in relation to the grievance. The issues she identified at the outset of the appeal demonstrate a good grasp of the salient issues. She found the process to be fair.

40. I therefore conclude in relation to the list of issues as follows. The reason for the dismissal was redundancy. There was a genuine redundancy situation. The Claimant was fairly selected and there was adequate consultation. Adequate steps were taken to provide suitable alternative work. I did not find any other reason for dismissal established by the Claimant.

41. The Claimant's claims therefore fail.

Employment Judge Hildebrand

Dated: 2 December 2019

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