EMPLOYMENT TRIBUNALS

Claimant: **Mr W McVicker**

Respondent: **Cineworld Cinemas**

Heard at: **Croydon** **On:** **Tuesday 26 November 2019**

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

Representatives

Claimant: **In person**
Respondent: **Mr Spence of Counsel**

RESERVED REASONS

1. Mr McVicker ably represented himself and gave evidence on his own behalf. Mr Spence of counsel represented the Respondents and he called Mr L Foster-Hill, Head of HR Business Partners, Mr D Spence the General Manager of the O2 cinema, Mr I Fathi, Regional Manager and Ms K J Drew the Operations Director of the southern division. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues and the law

2. Mr McVicker brings a claim of unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996 (the 1996 Act).

3. It is for the employer Cineworld to prove a potentially fair reason for dismissal in accordance with sections 98(1) and (2) of the Employment Rights Act. In this case Cineworld's case is that Mr McVicker was dismissed for "some other substantial reason" as a result of a business restructuring. It is common ground that Mr McVicker was given notice of termination on 24 November 2017, such notice expiring on 24 February 2018. Again it is common ground that Mr McVicker was offered reemployment on different terms with no break in continuous service and he declined to take up that offer of reemployment.

4. If such potentially fair reason is not made out then the dismissal is at that point unfair. If however the potentially fair reason of some other substantial reason is made out then the fairness of the dismissal is to be determined in accordance with subsection 4 of section 98:-

> "(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."

Case law

5. It has been long recognised by the Courts that a dismissal consequent upon a business reorganisation that does not meet the statutory definition of redundancy can be identified as some other substantial reason on the basis that employers should have the ability to reorganise their workforce and their terms and conditions of work so as to improve efficiency.

6. In **Hollister v The National Farmers Union** [1979] ICR 542 the Court of Appeal established that "a sound good business reason" for reorganisation was sufficient to establish some other substantial reason for dismissing an employee who refused to accept a change in his or her terms and conditions. Further it is not for this Tribunal to make its own assessment of the employer's business decision to reorganise or to change terms and conditions.

7. If such reason ie some other substantial reason is proved then it is for the Tribunal to apply the well-known test of the band of reasonable responses as set out in the **Iceland** case:

> "**Range of 5 Reasonable Responses - Iceland Judgment:**
>
> The law for this band of reasonable responses was laid out in the judgment and is as follows:-
>
> 1. The starting point should always be the words of section 98(4) themselves;

2. In applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

3. In judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

4. In many (though not all) cases there is a band of reasonable responses to the employee conduct within which one employer might reasonably take one view, another quite reasonably take another;

5. The function of the Industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

8. As to the band of reasonable responses the burden of proof is neutral and the test also applies to the process which led to the decision to dismiss.

Findings of fact

1. Mr McVicker at the time of his dismissal was the Deputy General Manager of Cineworld's O2 Cinema at Greenwich. He had been employed in various roles from 15 March 2007 to his effective date of termination which was 24 February 2018. Mr McVicker was a successful Deputy General Manager of the O2 Cinema. He together with Mr Spence had over the years brought about a number of improvements which led to that cinema being awarded the prestigious title of Cinema of the Year.

2. Mr McVicker was happy in his role and in particular with his life/work balance in that he lived within a short walking distance of the cinema and quite plainly he loved the job that he was doing and felt fulfilled by it.

3. A process of management restructuring began towards the end of 2016. Mr Foster-Hill became the HR lead on the project with effect from February 2017.

4. In June 2017 began the process which led to Mr McVicker's dismissal. The restructuring was announced via a document which begins at page 76 and its overall aims were set out as follows:-

- "Introducing efficiencies in to the operation
- Streamlining procedures
- Increased consistency across the circuit
- Clearer role definition
- Empowerment and trust
- Mobile workforce
- Quicker progression"

5. The announcement went on:-

> "It is proposed that the number of Deputy General Manager positions will be reduced; (specifically those working in our complexity 3 cinemas x16), that we will remove the role of Operations Manager and replace this with a more flexible and reduced quantity of "Cinema Managers". In addition, we propose the role of a Supervisor will be replaced with a more flexible and reduced quantity of "Team Leaders", who will be developed as our future leaders. We also propose to review our terms and conditions of the affected roles."

6. In regard to Deputy General Managers on page 78 the document goes on:-

- "Removal in Complexity 3 cinemas
  - Redundancy situation
  - 4 Designate DGM roles to be created (selection via GM assessment centre)
- Consultation to amend T's and C's in Complexity 1 & 2 cinemas
  - Include mobility clause
  - Standardise holiday entitlement (post 2011)
    - Will not apply until 2018 (to be held back for collective consultation)
    - Buy-out for affected employees to (to be held back for collective consultation)
  - 40 hour week
  - NOT a redundancy situation"

7. The chronology of the process was set out at page 82 and included the proposal that there would be collective consultation with employee representatives that would be elected by the categories of employees affected by the proposals including the Deputy General Managers (DGM's).

8. Mr McVicker did not put himself forward for election as an employee representative for understandable reasons in that at the time he was effectively the General Manager of the O2 cinema because Mr Spence had been seconded to another task for some months.

9. At page 86 are a series of frequently asked questions. One reads as follows:-

> "**What is collective consultation?**
>
> We have decided to consult with you collectively to ensure that we are able to take your views into account as part of this process.

We will consult with employee representatives to discuss:-

- The ways to mitigate redundancy dismissals
- Reducing the numbers affected
- Mitigating the consequences of any dismissals
- The proposed business case
- The terms and conditions of employment."

10. A further paragraph dealt with individual consultation as follows:

"As part of the process we are also required to hold individual meetings with you to discuss the impact of the proposals and alternative job roles. Subject to agreement in the collective consultation, the first individual consultation meeting will take place once selection has been completed. This is expected to be at the end of August."

11. It can be seen that that paragraph together with the material published about the duties of employee representatives are both aimed mainly at that part of the reorganisation which would lead to dismissals by way of redundancy.

12. On 20 July 2017 was the first collective consultation, the notes of which begin at page 88.

13. Under the heading of "Individual Consultation" at page 90 appears the following quotation attributed to Mr Stone, the Operations Director, North:

- "For unaffected roles where there is to be a consultation on T;s and C;s, this will commence as soon as those are agreed through the collective consultation. This is not a redundancy situation and we will seek agreement to the new contract. If agreement cannot be reached we will issue formal notice of the change. Any questions?"

14. At page 111 there was a discussion about a buyout for the loss of holidays and further Mr Foster-Hill made it plain that the pay ceiling for DGM's was to be £30,000 and that was not going to be changed.

15. The second collective consultation took place on 27 July and the notes begin at page 114. There was detailed discussion concerning the proposal to decrease the number of holidays that DGM's and others were entitled to and there was also further detailed discussion about the redundancy process for those at Complexity 3 cinemas.

16. The third collective consultation took place on 2 August. The notes beginning at page 118. At page 120 there is a lengthy note concerning changes to terms and conditions and in particular the mobility clause. A mobility policy was to be put in place and indeed was published before the end of the collective consultation and it is set out at pages 63 to 64. There was a discussion about the proposal to have different travel times in respect of relocation as between London and elsewhere.

17. At page 121 it was agreed that the implementation of the change to the holiday terms and conditions would not be implemented until 1 January 2018.

18. In relation to Deputy General Managers it is recorded as follows at page 122:

- "7 DGM's will lose money
- 18 DGM's will have their salary increased
- In total 21 DGM's will receive location pay which they did not receive before (or an increased amount)"

19. In fact Cineworld accept that 9 DGM's were affected and these are set out in anonymised form at page 42. This is not to say that the figure of 7 given at that point in the discussion was wrong. There may well have been reasons why it changed.

20. On 9 August the fourth collective meeting was held and notes begin at page 132. At page 133 there is further discussion about the changes in terms and conditions for DGM's and a one off good will payment to affected DGM's equivalent to 8 days' pay was proposed. It was also asked whether the buyout offer could be paid in November which was subsequently agreed.

21. On 16 August the fifth meeting was held with the notes beginning at page 139. At page 141 Mr Foster-Hill again makes it plain that the package of terms and conditions relating to DGM's is the company's final offer. In response an employee representative is recorded as saying:

> "We aren't happy coz people are losing money but it is what it is."

22. There was a further very brief meeting on 24 August and the final ie the seventh collective consultation took place on 31 August and the notes thereof begin at page 150. It is clear from the notes that by and large the employee representatives understood Cineworld's position and thus ended the collective consultation.

Individual consultation

23. In relation to Mr McVicker he was sent a letter of 30 June at page 84.

24. On 6 October the first individual consultation took place with Mr Spence who was Mr McVicker's direct Line Manager with whom he had worked for a number of years and it was clear from the hearing that they held each other in high regard.

25. The notes begin at page 153 and it is abundantly plain that Mr Spence's position was that negotiations on the changes to the terms and conditions had been concluded but that he would take back to higher management any concerns raised. Understandably Mr McVicker believed that the company were acting unfairly both generally and in particular as to the changes in his terms and conditions.

26. It is perhaps appropriate at this stage to spell out what those changes were:-

a) Mr McVicker would be subject to a salary cap at £30,000 and as a consequence he would lose a gross annual sum of £289.12.

b) The introduction of the mobility clause which we see at page 171 and which reads:

"Place of Work: Your normal place of work is at Cineworld Greenwich, The O2 Peninsula Square, Greenwich, London SE10 0DX.

> We reserve the right to amend your normal place of work to another cinema, within a reasonable commuting distance of your home, whether on a permanent or temporary basis, as we may from time to time require. Where practical, we will give at least 4 weeks' prior notice to you of such a change."
>
> That clause is to be read in conjunction with the policy referred to above at pages 63 and 64.
>
> c) A reduction in holiday entitlement of 8 days per annum, subject to a buyout of one year's worth ie 8 days' pay.

27. After a considerable delay the second consultation meeting took place on 14 November. Again Mr McVicker asked whether he can negotiate changes and questions the purpose of the individual consultation. He also questions the truth of the paragraph in the business case at page 85 which reads as follow:

> "We believe the benefits will include the creation of a clearer role definition for those involved. As a result of these changes we will have a leaner, more efficient and empowered mobile workforce. We will also be able to increase the rewards for our leadership teams."

28. Mr McVicker believes that statement to have been untrue and not made in good faith. Again understandably Mr McVicker asked to see his new contract and we see set out at pages 171 to 173 the proposed new contract of employment bearing a date of 15 November 2017.

29. On 20 November another consultation meeting takes place with Mr Spence's notes at 174 to 176. Mr McVicker complains that he is acting under duress. He quotes from a number of collective meetings, such quotations having the meaning that individual consultations could renegotiate the company's proposals (see page 175). He complains of a massive breakdown in trust and that he is being forced to be a General Manager when he has no wish to do so. Mr Spence accepts that he was in error for calling that particular meeting without giving notice and seeks to rectify this by inviting Mr McVicker to another meeting which was held on 24 November, the notes of which begin at 179. Mr McVicker asked to speak to HR and to the Regional Manager, Mr Fathi but Mr Spence confirms that he cannot speak to those individuals before deciding whether to sign the new contract of employment.

30. Mr Spence had reached the conclusion, and in my view it was a reasonable conclusion that he could take the matter no further and accordingly a letter was written to Mr McVicker of 24 November at page 184, the effect of which was to terminate his current contract on 24 February 2018 with an offer of reemployment on the terms and conditions set out in the offer of 15 November at pages 171 to 173. Mr McVicker did not sign the new terms and conditions and therefore his notice would expire on 24 February 2018 bringing an end to his employment.

31. As he was entitled to do on 20 December 2017 Mr McVicker appealed to Mr Fathi, the Regional Manager in a lengthy letter beginning at page 185, twelve grounds of appeal. At page 192, Ms Windsor of HR e-mails Mr Foster-Hill questioning whether Mr Fathi is the appropriate person to hear the appeal. On the same page Mr Fathi had written to Ms Windsor questioning whether there should be an appeal at all and asking for a consultation with Ms Windsor.

32. The appeal was arranged for 16 January 2018 and the notes begin at page 199.

33. Having read the notes of the appeal meeting and having listened to Mr McVicker's cross examination of Mr Fathi, it is plain that Mr Fathi's approach both to the appeal and his evidence to this Tribunal was characterised by a failure to prepare and understand the process. Both in the appeal hearing and in cross examination Mr Fathi was as Mr Spence put it "tied in knots".

34. In my view it is worse than that. Mr Fathi's approach was lazy. He insisted on many occasions on Mr McVicker setting out the questions he said had been unanswered or inadequately dealt with. As Ms Drew later showed it was not difficult by reference to reading the consultation minutes to determine what Mr McVicker regarded as being either unanswered or inadequately answered. That should surely have been one of Mr Fathi's duties in preparation for the appeal. The process would not have taken long and it would have meant that he could have dealt with that issue if he felt that it needed to be dealt with. A further example is that Mr McVicker invited Mr Fathi go through the grounds of appeal and discuss them, see page 204. Mr Fathi eventually does read the grounds of appeal but on most of them gives the answer "I would like the opportunity to look into this".

35. Another point on which Mr McVicker complains is that Ms Windsor goes beyond her role of notetaker and intervenes in the meeting. I can fully understand why she had to do so but as Ms Drew accepted that was a breach of the company's own appeal process.

36. Mr Fathi responded on 31 January 2018 in a letter which begins at page 2013. In fairness to Mr Fathi he does then deal with the grounds of appeal. I suspect that the letter was drafted for him by Ms Windsor. In conclusion Mr Fathi decides that he cannot find sufficient grounds to overturn the decision to dismiss and the appeal therefore failed.

37. Mr McVicker then, as he was entitled to do, pursued a grievance process which began with Ms Drew. There was an appeal against Ms Drew's conclusion but it seems to me that given that I am concerned only with a claim of unfair dismissal it is unnecessary to reach any conclusion about that process since it is common ground that of itself it could not have overturned the decision to dismiss.

Conclusions

<u>Have Cineworld proved a potentially fair reason for dismissal</u>?

38. The context in which all of the issues have to be determined is Mr McVicker's belief, which I accept is genuinely held, that he has been treated unfairly and unreasonably and that in particular the mobility clause was aimed specifically at him to force him to move from his perfect job with its ideal life/work balance. However I have to determine matters on an objective basis insofar as Mr McVicker is suggesting that the restructuring and in particular the mobility provision were aimed with the purpose of forcing him to move. Such a belief cannot be sustained when objectively examined. I have set out above the rationale for the restructuring as advanced by Cineworld.

<u>Does the restructuring judged on an objective basis, add up to a "sound, good business reason</u>?

39. I remind myself that it is not for me to substitute my judgment in that regard.

There were clearly a number of issues which the restrictions addressed including as Mr Foster-Hill accepted in cross examination and indeed referred to during the consultation meetings the difficulty of getting Deputy Managers to apply for manager roles in smaller and less important cinemas. I bear in mind that Cineworld operate many cinemas of varying size across the UK. Mr McVicker did not attack other parts of the restructuring including the requirement to make a number of Deputy Managers at smaller cinemas redundant.

40. In my view the Respondents have proved some other substantial reason namely a business reorganisation which had a number of objectives, one of which was the changing of the terms and conditions of Deputy General Managers such as Mr McVicker. I am satisfied that overall they have shown there were sound good business reasons for the reorganisation overall and indeed in respect of the changes in terms and conditions which affected Mr McVicker.

Was the dismissal fair?

41. As I have said above the heart of the matter is Mr McVicker's objection to the mobility clause. I accept as Mr Foster-Hill put it that there would be a possibility that Mr McVicker might be forced to move. I accept also that the policy has teeth, see the last paragraph at page 64:

> "Refusal to move to another cinema which is in a reasonable travel distance of your home address would be considered a breach of your contract which may result in disciplinary action being taken against you. This disciplinary action may lead to your dismissal."

42. I also take Mr McVicker's point that the policy differentiates between London and elsewhere in terms of travel time. Again he considers that to be unfair. Cineworld's answer was that this is in line with similar policies by other employers across the country. However reading both the clause and the policy as a whole, whilst I accept that it is a significant change to Mr McVicker's then contract of employment which simply described his place of work as the O2 cinema, nonetheless taken overall and given the policy objectives of improving mobility and encouraging Deputy Managers to apply for managerial roles, it does not seem to be an unreasonable or unfair provision taken on its own.

43. The next significant change is the salary cap and gross loss of earnings of £289.12.

44. In that regard this reduction has to be looked at in context and in particular the context of the nine DGM's who suffered in monetary terms which is set out at page 42. Six of the nine DGM's suffered considerably diminutions in salary but all accepted the proposed new contract.

45. The loss of 8 days paid holiday subject to the buyback of one year's worth was again something that was applied across the board to all DGM's as a part of the restructuring process.

46. Again, as I am entitled to do I can take into account the number of employees who accepted the changes, see **St John of God (Care Services) Limited against Brooks** [1992] ICR 715 the factor taken into account in that case was that of 170 employees offered less favourable new terms and conditions, 140 accepted and 30 were dismissed because they did not accept.

Here Mr McVicker is the only one of nine who did not accept the new terms and conditions. At page 722 of that decision the EAT took that factor into account and also took into account that the approach taken by the Employment Tribunal in that case, namely whether the terms offered were those which a reasonable employer could offer as the crucial question is difficult to reconcile with the statutory provision which is now subsection [4] of section 98. It went on to say:

> "The situation may very well be one in which the employer's legitimate interests and the employee's equally legitimate interests are irreconcilable. If there is a sound good business reason for the particular reorganisation (see **Hollister against the NFU** [1979] ICR 542 the unreasonableness of the employer's conduct has to be looked at in the context of that reorganisation. To look at the offer as the crucial question is act to blur that aspect of the matter."

47. Mr McVicker also raised two matters which he alleged showed that Cineworld had lied. The first related to the statement at page 85:

> "We will also be able to increase the rewards for our leadership teams."

I accept that in relation to Mr McVicker and a small number of other DGM's that was not true but generally I accept the statement was fair. Secondly he says correctly that Cineworld had already decided which concessions to make before entering into the Collective Consultations. In my view Mr McVicker's approach is naïve. In any event neither factor seems to me to effect the question of fairness. The position might have been different had this been a case of constructive dismissal.

48. Another matter raised by Mr McVicker in addition to his general complaint that the imposition of the new terms was both unfair and unreasonable is what he says about a Mr O'Connor who was a Marketing and Investments Manager. He says about Mr O'Connor that he did not have an individual consultation and was never asked to agree to the new terms and conditions. Mr O'Connor was allowed to continue on existing terms until the end of May 2018 when he was made redundant. This appears to be an argument of inequality of treatment. It seems to me that the facts such as they are and which are hearsay in that Mr O'Connor did not give evidence cannot amount to unfairness.

49. In conclusion and reminding myself once again of the statutory test of fairness and the band of reasonable responses test I am of the view that the dismissal in substance was fair.

50. I am however concerned in a number of ways as to the process carried out by the Respondent. I accept that I am examining the process with hindsight and that taken overall Cineworld will regard both the process and the outcome as successful.

51. My first concern is the ambiguity surrounding the individual consultation process and its purpose. Both Mr Foster-Hill and Mr Spence were clearly of the view that the collective consultation effectively ended the process of finalising the new terms and conditions for DGM's. I am satisfied that that was Cineworld's objective and there is a good deal of evidence supporting that view, including the answers to the FAQ's set out at page 86.

52. However when push came to shove management gave the clear impression that there could be changes to terms and conditions as a consequence of individual consultation meetings, see for example Mr Stone's comments on pay band feedback at page 148. See also in the individual consultation meeting with Mr McVicker at page 155 and 156 Mr Spence does give the impression that concerns which amount to a rejection of the new terms and conditions can be discussed and taken to higher levels of management.

53. In fact as Mr Foster-Hill post clearly set out in his cross examination, the purpose of the individual consultation meetings was simply to ensure that the effected employee understood what the changes would be and to discuss those very rare circumstances which he described as 'can't do' eg where a disabled manager was asked to relocate to a cinema which he could not physically access. In my view these ambiguities are a flaw in the process. The second matter which gives me considerable concern as to procedural fairness is the conduct of the appeal by Mr Fathi as set out in paragraphs 34 to 36 above. In my view Mr Fathi's approach to the appeal was indefensible. He was not prepared and he simply went through the motions. I trust that before Mr Fathi is involved in a disciplinary process again he is given further training. The inadequacy of the appeal is in my view of itself enough to render the dismissal procedurally unfair.

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54. Given that I have found that the dismissal was procedurally unfair I am required to consider whether a reduction should be made on the ground that a lack of a fair procedure made no practical difference to the decision to dismiss.

55. In this case that consideration is straightforward. Mr McVicker made it clear both during his individual consultation and in cross examination that he would not, under any circumstances, accept a new contract of employment which included the mobility clause. Thus, short of the withdrawal of that provision, a dismissal was inevitable.

Remedy

56. It follows therefore that it would not be just and equitable to make any compensatory award pursuant to section 123 of the 1996 Act. However Mr McVicker is entitled to a basic award calculated in accordance with section 119. I heard no evidence about his earnings at the time of his dismissal and I cannot therefore make the simple arithmetical calculation required by section 119. I would trust therefore that the parties can come to terms given that the matter is so simple. If agreement cannot be reached then Mr McVicker will need to apply to the Tribunal for a remedy hearing not later than 28 days from the date that this decision is sent to the parties.

57. One final matter though it is not within my power to require Cineworld to do so, I would hope that they would be in a position to give a reference accurately setting out Mr McVicker's contribution to the business over his years of employment.

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Employment Judge Blackwell

Dated: 18 December 2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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