EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Miss Lisa-Marie O'Brien **Hampstead Gymnastics Limited**

v

Heard at: Watford **On:** 16 May 2019

Before: Employment Judge Alliott

Appearances:
For the Claimant: In person
For the Respondent: Theodore Lake

JUDGMENT having been sent to the parties on 18 July 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by the respondent on the 30 April 2014 as a gymnastics coach. Although both forms ET1 and ET3 state that her employment ceased on the 9 June 2017, in actual fact she was dismissed on the 11 May 2017 and paid a month's pay in lieu of notice. She presents claims for unfair dismissal and breach of contract, based on an alleged shortfall in her notice pay.

The issues

2. The issues were as set out in the case management summary of Employment Judge Manley dated the 23 October 2018. They are as follows:-

Unfair dismissal

2.1 Did the respondent dismiss the claimant for a potentially fair reason pursuant to section 98 Employment Rights Act 1996 ("ERA")? The respondent contends that the claimant was dismissed for the potentially fair reason of redundancy.

2.2 If so, pursuant to section 98(4) ERA, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee?

2.3 Was the dismissal fair in all the circumstances?

Breach of contract

2.4 Is the claimant entitled to any further sums for notice pay? The claimant's case is that she was "promised" two month's notice pay.

Remedies

2.5 If the claimant succeeds in whole or in part, what remedy is she entitled to? The claimant seeks compensation.

2.6 Did the claimant make reasonable efforts to mitigate her loss?

2.7 If the respondent is found to have failed to follow a fair procedure in relation to the claimant's dismissal, should any compensatory award be reduced pursuant to *Polkey v Dayton Services Ltd [1988] ICR 142* to reflect the possibility that following a fair procedure would have made no difference to the decision to dismiss the claimant?

The Law – Unfair Dismissal

3. It is for the respondent to show the reason for the dismissal.

4. It is for the respondent to show that he had a genuine belief based on reasonable grounds following a reasonable investigation.

5. The respondent says that the reason for the dismissal was redundancy.

6. For a dismissal to be by reason of redundancy, a redundancy situation must exist. Section 139(1) of the Employment Rights Act provides a definition of redundancy and the relevant one in this case relates to the fact that the requirements of the business for employees to carry out work of a particular kind in the place where the employee was employed by the employer had…diminished.

7. It is well established that it is not for Tribunals to investigate the reasons behind the redundancy situation.

8. In *Williams & Others v Compair Maxam Limited [1982] ICR 156 EAT* the Appeal Tribunal laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed however, that in determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted."

9. The factors suggested by the EAT in the *Compair Maxam* case that a reasonable employer might be expected to consider were:

- Whether, the selection criteria were objectively chosen and fairly applied.

- Whether employees were warned and consulted about the redundancy.

- Whether, if there was a union, the union's view was sought.

- Whether any alternative work was available.

10. In the IDS Employment Law Handbook on redundancy at paragraph 8.155 the following is set out:

> "The importance of following proper procedures was made resoundingly clear by the House of Lords in *Polkey v Dayton Services Ltd.* In that case Lord Bridge stated that "In the case of redundancy…the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

11. Further at 8.162:

> "**Subject matter of consultation.**
>
> … best practice suggests that it should normally include:
>
> - An indication (i.e. warning) that the individual has been provisionally selected for redundancy.
> - Confirmation of the basis for selection.
> - An opportunity for the employee to comment on his or her redundancy selection.
> - Consideration to what, if any, alternative positions of employment may exist, and
> - An opportunity for the employee to address any other matters he or she may have.
>
> The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided. It also helps employees to protect themselves against the consequences of being made redundant."

12. In dealing with fairness, pursuant to section 98 of the Employment Rights Act, the determination of the question of whether the dismissal is fair or unfair having regard to the reason shown by the employer depends on whether in the circumstances, including the size and the administrative resources of the employers undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

Breach of contract

13. It falls to me to determine what the claimant's normal working hours were at the time of the redundancy and her rate of pay and calculate whether there has been a shortfall in the notice pay actually paid.

Evidence

14. I heard evidence from Mr Theodore Lake for the respondent and from the

claimant. The claimant, in the face of an Unless Order, has only served a partial witness statement that does not address the main issues in the case. On the 12 May 2019 Employment Judge Manley directed as follows:

> "The witness statement sent by the claimant will stand as her evidence. She will only be able to add any evidence with the permission of the Employment Judge. The claim is not dismissed. It will proceed on the 16 May 2019."

15. Nevertheless, she has given evidence and answered questions from myself. She has also not served documents relating to her compensation claim in accordance with the case management orders of the 25 October 2018.

The facts

16. The respondent is a small business. It runs after school clubs for children teaching them gymnastics. The respondent business operates from two premises. The relevant premises for the purposes of this case was at Jacksons Lane Community Centre where the respondent moved in April 2016. The other premises had four employees. At the Jacksons Lane Community Centre premises, along with Mr Lake, there were four other individuals working in 2017.

17. From April 2016 the claimant worked on Wednesdays and Fridays for three hours each day at an hourly rate of £20. In 2017 two of the other coaches worked three days for three hours each day and one other coach worked for three days but for nine hours each day.

18. In July 2016 the claimant received a written warning following a disciplinary process. She was also advised that she would no longer be teaching the most able gymnasts. She was informed that if she wished to contest the written warning then she should do so in writing. She told me that she did not do so and, indeed, only opened the attached formal written warning one year after it was administered. In short, she was disciplined for teaching a gymnastic manoeuvre that she had been told not to do due to it being dangerous both to the child and herself. Although the claimant disputed the justification for administering that warning, the fact of the matter is that it was administered.

19. In January 2017 one staff member left. She had been working two days for three hours. A new member of staff was recruited to replace her to work three days for three hours.

20. All five coaches (including Mr Lake) worked on a Friday. Unfortunately, the hoped for increase in children attending did not take place. At the end of January 2017 an exchange took place between the claimant and Mr Lake. There is a dispute of fact as to what in actual fact took place. The claimant's case is that the respondent removed her Wednesday working from her. The respondent's case is that the claimant requested that she go down to one day a week on Fridays as academic commitments meant that she could not continue doing the Wednesday shift. The claimant later told me that in actual fact she did not want to do the Wednesday shift but was seeking to replace it by working on a Tuesday. In determining this issue, I have taken into account text exchanges between the parties which went as follows. On or about the 28 January 2017:

From the claimant: "Hi Theo, can you give me a quick call please?"

From Mr Lake: "Hi Lisa, thanks for keeping me informed about your change of schedule from half-term. I tried to be optimistic and was hoping that the class numbers would have improved much better this term. For this reason, I brought Rebecca on as part of the team. We are however now over staffed and the change that you are bringing about does in fact help to alleviate the financial problem as Jacksons Lane is still losing money in its third term of operation.

It is possible that I may have to keep you on Fridays only until the situation improves.

I know this is not good news for you but at the end of the term I may need to put my money into the company to pay coaches and rent. This situation can't continue.

Regards

Theo"

From the claimant: "Hi Theo, I totally understand. I just don't want to break ties altogether. I love working with you guys and really adore the kids. Even some of the small ones and this won't be forever so don't stress, it's fine."

21. I prefer the evidence of Mr Lake on this issue. I find that it did suit the claimant to cease working on Wednesdays due to her academic commitments. She told me that she had already arranged with her supervisor for her supervision to take place on Wednesdays. Consequently, I find that at the claimant's request her normal working hours were reduced from six to three per week.

22. In actual fact, for the next 12 weeks until her dismissal the claimant did only work three hours a week. (Save for public holidays over Easter).

23. Mr Lake told me that financially the club was loss making in 2017. By April 2017 he had had to put in £39,000 from his pension savings. He told me that this situation was not sustainable. I note that in the text exchange from January 2017 there is contemporaneous reference to financial difficulties, over-staffing and the fact that the situation can't continue. Mr Lake told me that by May 2017 he had concluded that there would have to be redundancies. He had too many coaches and not enough children paying.

24. I accept Mr Lake's evidence that there was a genuine redundancy situation. I reject the claimant's assertion that this was a sham redundancy designed to orchestrate her removal from her employment. It is not for me to second guess a management decision to reduce the workforce in the face of reduced demand by children for gymnastic training.

25. Mr Lake in his evidence accepted that he did not warn or consult the workforce or tell them about the selection criteria.

26. Mr Lake informed me that he did consider the other three potential candidates for redundancy. One was not directly comparable in that she worked three days but for nine hours on each day. The two others worked for three days on three hour shifts. Mr Lake told me that the selection criteria he applied were related to attendance, punctuality and disciplinary record. As far as the claimant's attendance record is concerned I have

been shown some instances, probably not more than two, that the claimant, at short notice, did not come into work. However, in my judgment those instances were probably related to the lack of need for her to attend due to the poor attendance of children. Perhaps only one related to a last minute decision not to attend. As far as punctuality is concerned the claimant accepted that she was, for reasons relating to childcare, quite often 10/15 minutes late. The claimant could only accept that she had received a written warning in July 2016. As regard to the application of those selection criteria Mr Lake told me that the three other employees' attendance was very good. As far as punctuality is concerned two of the others were punctual. Mr Lake accepted that one of the other coaches was occasionally late but less frequently than the claimant. Mr Lake told me that all three other coaches had no disciplinary matters recorded against them. Consequently, it was for that reason Mr Lake selected the claimant for redundancy.

27. On the 11 May 2017 the following email was sent to the claimant:

> "Hi Lisa, as you may be aware the club at Jacksons Lane has been making losses in each term. We have now ran out of the money that we had in reserve and I am in the position of having to put money from my savings in to keeping the club afloat.
>
> I have to reduce our costs and this can only be done by cutting staffing hours.
>
> Unfortunately, Friday has the lowest attendance by children and highest attendance by staff so it is the prime area in which to make a cut.
>
> As per our conversation I will be terminating your employment as a regularly attending coach with one months notice from today. If you are amenable I would be happy to come to some arrangement if you would like to provide cover in the case of staff absences.
>
> I also have to cut staff in the other club as well as looking at raising the price of the classes. I have had to give these mattes a lot of thought – in particular whether it is worthwhile continuing at Jacksons Lane or whether to cut our losses and close the club.
>
> I am really sorry to have to let you go but I am now jeopardising my savings and need to take action.
>
> I hope this is not the end of our time together.
>
> Kind regards
>
> Theodore Lake"

28. Obviously before someone loses their job because of redundancy potential alternative arrangements need to be considered. The claimant told me that she went with one of the other coaches to Mr Lake and suggested that the other coach work one less shift a week to allow the claimant to carry on with her one shift on a Friday.

29. Mr Lake told me in evidence that he spoke to this other employee privately and she told him she was made to feel very uncomfortable by the claimant and effectively coerced into volunteering to reduce her hours. I accept Mr Lake's evidence on this point and find that the offer by the other employee to reduce her shifts was not genuinely and freely made but made because

she found herself in an awkward position with a fellow worker.

30. Nevertheless, it is clear to me that Mr Lake did consider this as an option and he replied to the claimant on the 14 May as follows:

> "Hello Lisa
>
> Having taken time to consider your proposal for Rebecca to give up her Friday hours in favour of you I have concluded that I cannot accept this.
>
> I have previously explained to you that the company is losing money and that my personal savings are being used to keep afloat. This cannot go on indefinitely and I have to make changes. My savings are in jeopardy of being lost and I have to act on this.
>
> It is my responsibility to look at the overall picture. I am working to make the club a stronger organisation and to this end I am moving towards employing fewer coaches that will work longer/more shifts, rather than lots of coaches working a few shifts. The reasoning behind this is that there will be a greater commitment from the coaches to the club. I do not feel that Rebecca giving up some of her hours is in the interests of helping the club to survive."

31. I accept Mr Lake's evidence as to his reasoning why he could not transfer a shift from one of the other coaches to the claimant. He told me in evidence that he feared that if he reduced the other coach's hours then he might lose that employee entirely which would not be to the benefit of the business. I do not consider that Mr Lake's reasoning was unreasonable and consequently I do not find that there was a failure to look for alternative options. The dismissal letter has already alluded to the fact that at the alternative premises there had been staff reductions in any event so a transfer elsewhere was again not a feasible option to avoid the redundancy.

32. As far as the claimant's notice pay, the claimant was paid £300 lieu of notice. She received £270 redundancy payment.

Conclusion

33. I find that the reason for the dismissal was redundancy.

34. Redundancy is a potentially fair reason for the dismissal.

35. I find that the respondent did act reasonably in treating that reason as a sufficient reason for dismissing the employee. I find that Mr Lake genuinely believed in the redundancy.

36. I find that the lack of warning and consultation rendered the procedure unfair. Consequently, the claimant is entitled to a declaration that her claim for unfair dismissal is well-founded.

37. I find that even if correct warning and consultation had taken place, then the claimant would have been made redundant and lost her job in any event. Failure to warn was only a failure expressly to warn and I find that the claimant probably well knew that the club was in some financial difficulties and that, with falling numbers of children attending, the club was over-staffed. It cannot have come as a major surprise that the respondent reduced the number of coaching hours that it was employing.

Nevertheless, there was a lack of formal warning and consultation on selection criteria and consultation on what alternatives might be available. However, I find that even if that had taken place it would have made no difference whatsoever.

38. The claimant cannot recover a redundancy payment and a basic award. The claimant has already been paid a redundancy payment (£30 above what she was actually entitled to) and consequently she cannot receive a basic award.

39. As regards a compensation payment I have found that the claimant would have been made redundant in any event and consequently the compensatory reward should be reduced to nil to take account of that fact. By the same reasoning the claim for loss of statutory rights is reduced to nil.

40. As regard to breach of contract I find that at the time of the dismissal the claimant's normal working hours were three hours per week at £20 per hour and had been for three months. As such, with three complete years of service she would have been entitled to three weeks notice or £180. In actual fact she received £300 so there has been no underpayment of notice pay.

41. For the sake of completeness, I record that the ACAS code of practice does not apply to redundancies.

42. Finally, in so far as it may be relevant, the claimant would have been in great difficulty in proving her loss as there is no evidence or documents before me upon which I could determine that issue.

_____

Employment Judge Alliott

Date: 07/04/2020

Judgment sent to the parties on

30/06/2020

Jon Marlowe
For the Tribunal office

Note:

I heard the case and dictated my reasons on 16 May 2019. When the judgment came for my signature in June 2019 I reconsidered it as a 'Polkey' reduction would not deprive a claimant of a basic award. I appear to have forgotten that the claimant had received a redundancy payment.

Having been reminded by these reasons that the claimant received a redundancy payment it would appear that my reconsideration to award the claimant a basic award of £270 was wrong. If it has been paid then she has been overpaid.