EMPLOYMENT TRIBUNALS

Claimant: Ms A Swift

Respondent: National Business College Ltd

Heard at: Leeds
(by CVP video link)

On: 7 August 2020

Before: Employment Judge Shepherd

Appearances:

For the Claimant: Mr Johnston

For the Respondent: Mr Whitfield

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claim of unfair dismissal well founded and the respondent is ordered to pay the following sums to the claimant:

Total unfair dismissal award – £2,559.38

2. The Employment Protection (Recoupment of Income Support and Jobseekers Allowance) Regulations 1996 apply and their effect is set out in the Annex to this Judgment. The prescribed period is from 20 January 2020 to 23 March 2020 The prescribed element is £862.65 and the balance of the unfair dismissal award is £1,696.73.

REASONS

1. This Hearing took place in the Leeds Employment Tribunal. I was physically present in the Tribunal room and the parties, their representatives and their witnesses took part in the Hearing by CVP video link.

2 The claimant was represented by Mr Johnston and the respondent was represented by Mr. Whitfield.

3. I heard evidence from:

Andrew Stringer, Director of the respondent company;
Keely Carleton, Manager of the respondent company;
Amanda Swift, the claimant.

4. I had sight of a bundle of documents which was numbered up to page 199. I considered the documents to which I was referred by the parties.

5. The issues that I had to determine were whether the claimant was dismissed for the potentially fair reason of redundancy and, if so, whether the dismissal was fair in all the circumstances. If the dismissal was unfair, should a "Polkey" reduction be made to any award to reflect the chance that the claimant would have been dismissed if a fair procedure had been followed.

Findings of fact

6. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that I made from which I drew my conclusions:

6.1. The claimant was employed by the respondent from 22 February 2016. She was initially employed as a Business Development Officer.

6.2. On 12 July 2018 the claimant's job was redefined to that of Recruitment and Sales Officer.

6.3. The respondent is an independent training provider that provides apprenticeship training. In 2017 apprenticeship training reforms were introduced which meant a significant reduction in the number of apprentices which could be provided by the respondent.

6.4. Part of the claimant's role included approaching companies, which could be new or existing customers or providers of apprenticeships. The claimant would ascertain whether those companies wanted any new apprentices or training for their existing workforce. She would match apprentices to roles, conduct interviews and would follow up the position with employers and apprentices after the companies had taken on apprentices.

6.5. The claimant initially reported to Jenny Stringer, Director of the respondent.

6.6. In February 2019 in an exchange of emails with Ms Stringer the claimant was criticised for failing to meet her targets and it was stated:

> "Numbers have never been this low and this is causing big problems for the company which can't continue…

> I really hope I don't have to issue any warnings and that you succeed in hitting your targets."

6.7. On 15 April 2019 Jenny Stringer wrote to the claimant and included in the letter was the following:

> "I would like to remind you that failure to meet these targets, will result in disciplinary action being taken."

6.8. In May 2019 Keely Carleton started working for the respondent as a manager and took over the management of the claimant.

6.9. At a monthly meeting on 10 July 2019 Keely Carleton raised concerns with regard to the number of apprentices, she told the Tribunal that the claimant was not bringing in any new business.

6.10. In the claimant's annual appraisal on 5 August 2019 it was indicated that the claimant had a crucial role and needed to start attracting new business. It was provided that the claimant needed a plan to achieve targets.

6.11. On 30 September 2019 the claimant had a week off sick for a surgical procedure.

6.12. On 21 October 2019 the claimant informed Keely Carleton that she would be undergoing complete hip replacement surgery on 20 January 2020 and that she would not be able to return to work for approximately 8 to 12 weeks following the operation.

6.13. In the morning of 21 November 2019 the claimant attended a funeral and arrived at work at lunchtime. She was told that Andrew Stringer, Director, wanted to have a chat with her. At that meeting she was told that she was to be made redundant. The claimant was upset and indicated that she would take it further. The claimant was asked to leave her job immediately.

6.14. On 25 November 2019 Keely Carleton wrote to the claimant indicating that her role with the respondent was now redundant. It was stated that the decision was due to changes in funding and:

> "The company can no longer justify having this role within the business for economic reasons and bears no reflection on your individual ability or performance.
>
> As discussed, we have fully considered with you whether other vacancies exist within the Company, but currently the only position we need is a Full Time Levy sales person which you agreed you would be unable to do with your skill set so unfortunately at the moment we do not have any other vacancies that you would be able to do at this time."

6.15. It was indicated that the claimant would not be required to work out her notice period. She would be paid until 30 November 2019 plus one month's notice from that time. It was also stated:

> "If you do wish to appeal, you must inform the Company in writing within five working days of receiving this decision."

6.16. On 26 November 2019 the claimant sent an email to Keely Carleton indicating that she had not been told about being able to appeal and that she had only received the letter that morning. Keely Carleton indicated that the claimant had been made redundant on 22 November 2019 and this had been confirmed on 25 November 2019. It was stated that the response procedure states five days in which to appeal and this meant by close of business on Friday, 29 November 2019.

6.17. The claimant sent her appeal by email on 2 December 2019. This was within five working days of the claimant receiving the letter informing her that she was redundant and providing her with the right of appeal.

6.18. In the letter of appeal the claimant said that she did not believe that redundancy was the true reason for the dismissal. She referred to informing Kelly Carleton, on 22 October 2019, of the operation whichwas scheduled for 20 January 2020 and that she would be likely to need a long time off work. She also said that Keely Carleton had stated that the claimant ought to consider claiming constructive dismissal. It was said that she said this is a friend, not the claimant's boss. The claimant said that she had informed Keely Carleton that she intended to make a subject access request for the personal information the respondent held about her. On 20 November 2019 Keely Carleton sent an email to all employees requesting they cleanse their data.

6.19. In the letter of appeal the claimant said:

> "In the meeting, Andrew said that I was being made redundant due to not meeting targets. Andrew stated that the Company intended to advertise a new role which would undertake the sales aspect of my job and that recruitment would be dealt with by others.
>
> I note that the letter dated 25 November 2019 makes reference to the Company requiring a full-time Levy sales person which I allegedly agreed I would be unable to do. The Company has not provided any reason as to why I would not be able to undertake a full-time sales position, which I do not agree. I can therefore not agree that I would not be suitable for the position. In any event, in the meeting with Andrew, I suggested that I could undertake any necessary training for a full-time sales role, which suggestion appears to have been dismissed without consideration. I'm aware other employees have received training in the past in order to effectively transfer into alternative roles."

6.20. On 5 December 2019 Keely Carleton wrote to the claimant indicating that her appeal letter was received:

> "Outside of the time specified in our company terms, therefore no appeal is to be heard"

6.21. The respondent's contention was that there was no substance in the claimant's appeal and that it would have made no difference in any event. However, the letter clearly raised issues with regard to whether redundancy was the true reason for dismissal, the new role and that this would undertake the sales aspect of the claimant's job and issues with regard to training and suitable alternative employment. These were issues of substance that should have been discussed with the claimant.

6.22. On 25 March 2020, after following the ACAS Early Conciliation procedure the claimant presented a claim of unfair dismissal to the Employment Tribunal.

6.23. The claimant indicated that, in December 2019 prior to her hip operation, she managed to obtain new employment. She was offered a position to start on 24 March 2020. The Tribunal was provided with evidence showing that the claimant had been provided with confirmation of a new permanent position which was on the same salary as she received at the respondent and this was to commence on 23 March 2020. The claimant said that her new employer completely understood her circumstances and were willing to allow the claimant time to recover after her hip operation before commencing her new role. The claimant indicated that, unfortunately, due to the Covid – 19 pandemic she was unable to start the role. She had managed to gain part-time employment working in Tesco. She had also been able to work overtime and, in the week before the Tribunal hearing she had worked 59 hours.

6.24. The position with regard to the claimant's new employment was not entirely clear. In the schedule of loss it was indicated that her new role was to start on 23 March 2020, however the start has been delayed due to the Covid -19 pandemic. The claimant was unable to provide any further information with regard to taking up her new employment.

The Law

Unfair dismissal

7. Where an employee brings an unfair dismissal claim before an Employment Tribunal and the dismissal is established or conceded it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons set out in Section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason, the Employment Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with Section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Redundancy is a potentially fair reason for dismissal under Section 98(2).

8. The definition of redundancy is contained in Section 139(1) of the Employment Rights Act 1996. This states:

> "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 the 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"

9. If it is accepted that the reason for dismissal was redundancy then it is necessary to decide if that dismissal was reasonable under Section 98(4) of the Employment Rights Act 1996. In judging the reasonableness of an employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses within which one employer might reasonably take one view and a different employer might reasonably take another view and the function of the Tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which an employer might have adopted.

10. The factors of which a reasonable employer might be expected to consider are whether the selection criteria, including the pool for selection were objectively chosen and fairly applied, whether the employee was warned and consulted about the redundancy, whether any alternative work was available.

11. In **Williams & Others v Compare Maxam Limited [1982] ICR 156**, the Employment Appeals Tribunal laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The factors suggested which 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 and whether any alternative work was available.

12. In carrying out a redundancy exercise, an employer should begin by identifying the pool of employees from whom those who are to be made redundant will be drawn. The Tribunal will consider whether an employer acted reasonably in identifying the pool for selection and may consider whether other groups of employees are doing similar work to the group from which the selections were made, whether employees' jobs are interchangeable and whether the employees' inclusion in this unit is consistent with his

or her previous positions. A fair pool of selection is not necessarily limited to those employees doing the same or similar work. Employers may be expected to include in the pool those employees whose work is interchangeable.

13. In **Polkey v AE Dayton [1987] ICR 301** Lord Bridge of Harwich said :

> *"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:*
>
> *(c) that he was redundant.*
>
> But an employer having prima facie grounds to dismiss. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus … 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 redundancy and take such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference …. "

14. In the case of **R v British Coal Corporation and Secretary of State for Trade and Industry Ex parte Price [1994] IRLR 72** Glidewell LJ stated:

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

15. I had the benefit of oral submissions from Mr Johnston and Mr Whitfield These are not set out in detail but both parties can be assured that I have considered all the points made and authorities referred to, even where no specific reference is made to them.

Conclusions

16. The respondent has not established that the reason for the claimant's dismissal was that of redundancy. At the time of the dismissal the respondent was of the view that there was a full-time vacancy in a Sales Levy role. The duties involved in this were part of the duties included in the claimant's role. The fact that this role was not filled is not relevant to the reason for the dismissal at the time. The respondent was of the view that it was work that needed to be carried out. In fact, it was said that the work was vital to re-establishing the respondent's position. The respondent had financial

difficulties which were largely as a result of the reform in respect of apprenticeships in 2017. It was not established that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish.

17. The need for a full time Levy Sales Person was not discussed with the claimant despite the letter of 25 November 2019 indicating that she had agreed that she would be unable to do the role with her skill set. The claimant denied that it had been discussed. She confirmed this in her letter of appeal in which she stated that she had not agreed that she would be unable to do the sales role and she did not agree that she would not be suitable for the position. This was a sales role and was a substantial part of the claimant's duties. Andrew Stringer agreed that this had not been discussed with the claimant at the meeting but that it had been discussed on other occasions by Jenny Stringer, the other director of the respondent, but he was unable to provide any specific details of those discussions.

18. The claimant had been subject to criticisms with regard to her performance and meeting targets. Her role was vital to the respondent re-establishing its financial position. The claimant was given a warning that failure to meet targets would result in disciplinary action being taken. There was a clear concern about the claimant's performance, particularly with regard to cold calling large employers. Andrew Stringer indicated that he was of the view that Keely Carleton did the job far better than the claimant**.**

19**.** In addition, the claimant had informed the respondent on 21 October 2019 that she was to undergo complete hip replacement surgery on 20 January 2020 and that she would not be able to return to work for 8 – 12 weeks following the operation.

20. I am satisfied that the reason for dismissal was not redundancy, it was by reason of the respondent's concerns about the claimant's performance and her imminent lengthy time off work.

21. It was conceded by Mr Whitfield on behalf of the respondent that the dismissal was procedurally unfair. He contended that there should be a large reduction in accordance with the principle of **Polkey** on the basis that it was likely that there would have been a fair dismissal in any event. He argued for a 100% reduction.

22. I have found that the respondent has not established that the reason for dismissal was redundancy. However, had I accepted that redundancy was the reason then I do not accept that it was merely procedure unfairness as conceded on behalf of the respondent. There were a large number of procedural failures. There was no warning or fair consultation. The claimant was presented with a fait accompli, the decision to make her redundant was made before the meeting.

23. The claimant was denied the right of appeal. The respondent referred to a time limit for the appeal of five working days. This was within the respondent's disciplinary and grievance procedure but there was no redundancy procedure referred to by the respondent. The claimant did appeal within five working days. She received the letter of dismissal on 26 November 2019 and sent her appeal by email on 2 December 2019. The respondent said that the appeal raised nothing of substance. However, the appeal

raised a large number of substantive issues. The claimant said that she did not believe that redundancy was the true reason for dismissal, she referred to her impending operation and resulting time off and that she felt she had been unfairly targeted at work. The claimant said the respondent had not provided any reason why she was not able to undertake a full-time sales position which, at the time of dismissal, was available. She also referred to training for alternative roles.

24. If those issues had been considered by the respondent before the dismissal or following the appeal then the claimant may not have been dismissed. If the issues raised in the letter of appeal had been considered by someone who was not involved in the decision to dismiss it could have resulted in the dismissal being overturned.

25. If there had been a redundancy dismissal there was no warning, no reasonable consultation, objective criteria or consideration of suitable alternative employment. There was no consideration of other ways to avoid redundancy.

26. It is not possible to assess the chances that there would have been a fair dismissal by reason of redundancy. If there had been proper consultation or consideration of the claimant's job role and the full-time vacancy that the respondent said that was needed at the time, then it is unlikely that she would have been dismissed by reason of redundancy.

27. The claim of unfair dismissal is well-founded and succeeds.

28. The claimant was paid up to 31 December 2019. This is the date shown on the P45 and I was informed that the pay advice dated 15 January 2020 was in respect of payment for the month of December 2019.

29. The claimant obtained further employment in December 2019. This was to be on the same salary as she had received from the respondent. This new employment was due to commence on 23 March 2020. The claimant said that she underwent her hip replacement on 20 January 2020. Her new employer was willing to allow her the time to recover after her hip operation before commencing her new job. If the claimant had not been dismissed she would have only received statutory sick pay from 20 January 2020. It was agreed that statutory sick pay was in the sum of £95.85 per week. The claimant received universal credit during the period she was unable to work.

30. The position with regard to the claimant's new employment was unclear. She has been unable to commence that employment because of the Covid 19 pandemic. It was said that it had been delayed but the claimant does not know the present position. She has managed to obtain temporary part-time employment working in Tesco from April 2020.

31. The claimant was extremely unfortunate in that the new employment has been delayed due to the pandemic. However, this was a break in the chain of causation. The claimant had obtained alternative employment and the reason for any losses after 24 March 2020 was not as a result of the unfair dismissal but due to a position that was beyond the claimant or the respondent's control.

32. In the circumstances, the award for unfair dismissal is as follows:

Basic Award

Nil as the claimant received statutory redundancy pay.

Compensatory Award

Loss of net pay from 1 January 2020 to 20 January 2020 3 weeks at £392 plus respondent's pension contribution of £6.91.

£1,196.73

Loss of statutory sick pay from 20 January 2020 to 23 March 2020 9 weeks at £95.85.

£862.65

Loss of statutory protection

£500.00

Total unfair dismissal award £2,559.38

The Employment Protection (Recoupment of Income Support and Jobseekers Allowance) Regulations 1996 apply and their effect is set out in the Annex to this Judgment. The prescribed period is the period in which the claimant was entitled to statutory sick pay and received universal credit 20 January 2020 to 23 March 2020 The prescribed element is £862.65 and the balance of the unfair dismissal award is £1,696.73.

Employment Judge Shepherd
13 August 2020