Case Number: 1601361/2018

EMPLOYMENT TRIBUNALS

Claimant Mr. R. Laybourn

Respondent (1) Stephens and George Ltd (2) The Enfield Printing Company Ltd

v

Heard at: Watford **On**: 10 and 11 August 2020

Before: Employment Judge Heal

Appearances

For the Claimant: in person
For the Respondent: Ms V. Jones, director

RESERVED JUDGMENT

1. The claimant was employed by the second respondent. The complaints against the first respondent are dismissed.

2. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed by the second respondent.

3. There is no reduction in compensation on the ground of 'Polkey'.

4. The respondent was in breach of the claimant's contract in that it gave him 3 weeks' notice instead of 4 weeks' notice.

5. Unless the parties have previously agreed compensation, there will be a hearing listed for 3 hours to determine remedies on **2 October 2020** at **Watford** Employment Tribunal at 10.00am or so soon thereafter as the tribunal may hear it.

REASONS

1. By a claim form presented on 25 September 2018 the claimant made complaints of unfair dismissal and breach of contract (insufficient notice).

2. I have had the benefit of a bundle without page numbers running initially to 29 tabbed sections.

3. Further documents were produced by the respondent at the outset of and during the hearing, namely a Share Purchase Agreement dated 11 July 2016 (redacted by Ms Jones), Financial Statements for the year ended 31 March 2018 for both respondents, a document headed, 'Enfield Printing Company' to which Ms Jones referred while giving evidence in chief, a similar document headed 'pay' and a document headed , 'Redundancy 2016' which contained a set of redundancy scores.

4. The claimant had not produced a witness statement. There were two short witness statements at the back of the bundle for the respondent's witnesses: Mr Andrew LG Jones, Chairman and Group Managing Director of the first respondent and its associated companies and Mr Darren Debattista, Finance Director of both respondents.

5. By email dated 30 July and followed up on 6 August 2020 the respondent requested that the evidence of its two witnesses be heard by videolink, because of problems relating to the Covid pandemic situation.

6. Unfortunately, these two emails did not reach the tribunal file in time and this hearing was listed in person without provision for video evidence.

7. I explored the options with the parties at the outset of the hearing. I suggested that those options were postponement or conducting a hybrid hearing with the two witnesses giving evidence via CVP. On discussion with the parties however the claimant said that he lacked the equipment to conduct a hearing by CVP: he had only a mobile telephone which I did not consider suitable. Ms Jones however suggested a further solution: that she would be able to give the necessary evidence instead. Accordingly, I checked with the claimant what he said the issues were (set out below) and Ms Jones said that she would be able to give evidence about those matters. Therefore, with the consent of both parties I proceeded with the hearing instead of postponing.

8. I have therefore heard oral evidence from Ms Vanessa Jones, director of Stephens and George Print Ltd and Mr Richard Laybourn, the claimant.

9. Neither witness produced a witness statement. Ms Jones gave evidence orally in chief which I supplemented by asking questions. I took the claimant's particulars of claim in his claim form as a witness statement in chief and then asked him further questions. Each witness was then cross examined and re-examined in the usual way.

10. There was correspondence from ACAS in the bundle. I did not read this. Subsequently, I explained to Ms Jones that I did not wish to know about any offers or

negotiations which had taken place because it was important that I make my decision without the risk of influence by such matters.

Issues

11. The issues identified were as follows:

11.1 The issue of time has already been resolved by EJ Alliott at a preliminary hearing on 23 August 2019, the claimant qualifies to claim unfair dismissal and dismissal is admitted.

11.2 What was the reason for the dismissal? The respondent says that it was redundancy which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996. The claimant disputes this. He says that the reason why he was off sick for two months was brought into question during a meeting on 28 March 2018. The claimant also says that a new driver was employed a few weeks before his dismissal. The burden of proof is on the respondent to prove the reason for the dismissal.

11.3 Was the claimant given reasonable warning of redundancy? The claimant was sent a letter first warning him of redundancy dated Thursday 22 March 2018 and he received the letter on Monday, 26 March 2018. The meeting took place and the decision was confirmed on 28 March 2018, two days after he received the first letter.

11.4 Was the pool chosen by the respondent within the reasonable range of responses? There was a pool of one (the claimant). The claimant says that should have been other people in the pool with him and therefore there should have been a matrix selection exercise.

11.5 It is not in dispute that there was no matrix selection exercise although Ms Jones produced a matrix style score for the claimant for the purposes of this hearing in case it was relevant to 'Polkey'.

11.6 Was the redundancy selection and consultation procedure within the reasonable range of responses? If there should have been a bigger pool, was there a fair system of selection, fairly applied? Did the respondent undertake such consultation as was reasonable?

11.7 Should the claimant have been told about the possibility of appeal? Was there a reasonable opportunity to appeal?

11.8 Did the respondent take such steps as were reasonable to look for alternative employment for the claimant? (The option of re-locating to Wales from the London area came up but the claimant declined for reasons to do with property ownership and because he did not know if the employment in Wales would last, even if he moved.)

Breach of contract

11.11 Was the claimant given the notice to which he was contractually entitled?

The Law

12. In deciding whether a dismissal is fair or unfair, there are two stages for a tribunal to consider.

13. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially fair reasons. If he relies only upon one reason and that fails, it follows that the dismissal will be unfair.

14. Second, the tribunal must be satisfied that in the circumstances the employer acted reasonably in treating the reason as a sufficient ground for dismissing the employee. The employer cannot do this if the reason in fact relied upon is neither established in fact nor believed to be true on reasonable grounds.

15. Redundancy is of course a potentially fair reason for dismissal.

16. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The tribunal will not interfere with this business decision.

17. The employee can question the genuineness of the decision, and the tribunal should be satisfied that it is made on the basis of proper information.

18. Essentially an employer is required to provide evidence to show that the alleged reason for the dismissal does have some basis in fact, and that a proper business decision has been reached. If the employer fails to satisfy a tribunal of this, it has not established that redundancy is the true reason for dismissal.

19. In the case of redundancy, the employer will normally not act reasonably unless it warns and consults any employees affected or their representatives, adopts a fair process by which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within its own organisation.

20. In *Langston v Cranfield University [1998] IRLR 172,* the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

21. A crucial preliminary issue in relation to redundancy is to choose the group of employees (’the pool’) from which the selection must be made. The system for choosing this pool must be fair. The pool should include all those employees carrying out work of that particular kind, but may be widened to include other employees such as those whose jobs are similar to, or interchangeable with, those employees. Ultimately the pool from which the selection will be made is for the employer to determine. The test will be whether the choice of pool was within the reasonable range of pools open to a reasonable employer.

Facts.

22. I have made the following findings of fact on the balance of probability. In other words, I do not possess a perfect method of discovering absolute truth. Instead, I read and listen to the evidence placed before me by the parties and then, where there are disputes of fact, I decide, on balance, what is more likely to have happened than not.

Evidence about the reason for redundancy

23. In evidence in chief Ms Jones told me that the reason for the decision to make a redundancy was because the Enfield Printing Company Limited had lost £0.5 million in turnover in the year 2017 to 2018. She said that sales had dropped by £4.5 million and Stephens and George Ltd had also achieved £2million less than budget. She said that a transport review revealed that the system of having the claimant based in Enfield and driving a 'reverse route' was inefficient because the claimant would start work driving straight into the slow traffic around the M25, M4 and M40, while the Wales based drivers would enter more clear roads at the start of their day.

24. There were however no accounts or financial documents in the bundle, no copy of the transport review and no primary evidence to support these assertions about the business decision. Although Ms Jones said that the decision to make a redundancy '*would have*' been made at a budget meeting, no minutes or other documents relating to budget meetings were produced in evidence.

25. Ms Jones said at first that the whole board of Enfield Printing Company Ltd made the decision and it might have been at a board meeting. It might however have been at a management meeting. Later she said that it would have been made at a budget meeting but that she had not herself been present when the final decision was made. This final decision could have been made at an Enfield Printing Company Ltd board meeting by Mr Debattista, Mr Stokes and Mr Jones. Ms Jones said that the budget and other meetings were often not minuted but that there would be subsequent emails confirming what had been said. These were not produced. No board meeting minutes were produced. Ms Jones also said that Darren Debattista produced monthly projections which enabled the board to make quick decisions to respond to the financial situation. No monthly projection was produced.

26. I explained to Ms Jones that 'bare assertions' might not be sufficient to prove her case and that I would need evidence. Therefore, she produced the Financial Statements for both respondents for the year ending 31 March 2018. These did show that the Enfield Printing Company Ltd had suffered a reduced turnover of broadly £0.5 million from 2017 to 2018, however this was in the context of the company moving from a loss of £5,280.652 in the 15 months to 31 March 2017 to a profit as at 31 March 2018 of £4,918,181. Ms Jones confirmed that I had found the relevant page in the Financial Statement. In that context I asked Ms Jones whether the saving of about £20,000 for the cost of one van driver was commercially significant.

27. Ms Jones later explained that the profit made by the Enfield Printing Company Ltd was not what it appeared because Stephens and George Ltd controlled the finances and gave back 20% of every sale that the Enfield Printing Company

contributed to the group. On a £5 million turnover this meant that £1 million was returned to the Enfield Printing Company Ltd. This was to shore up the Enfield Printing Company Ltd balance sheet which was otherwise extremely poor.

28. I asked her why this explanation did not appear in the two witnesses' statements produced by the respondents in the proceedings. She said that the intention had been for the witnesses to attend and provide further evidence. I note that EJ Alliott had ordered witness statements to be full and to contain all the evidence which the witnesses intended to give at the hearing.

29. During cross examination, the claimant asked Ms Jones why Mr Stokes, a director of the Enfield Printing Company had not known of his redundancy, she replied,

'Mr Stokes sent me the email. In it he says, 'get rid of him'

She said that Mr Stokes wrote an email to her, copied to Marcus [Partridge] and Andrew Jones saying, '*get rid of him'*. She said that Mr Stokes said that the claimant was, '*totally unreliable. You'll have to get rid of him*.'

30. Neither that email, nor any chain in which it appeared, was produced. I asked Ms Jones for the date of the email, but she did not reply directly: she said that she did not pay much regard to what Mr Stokes says. She went and looked through a box file of papers which she had in the tribunal, saying that the reason the respondent did not put the email in the bundle was that '*we don't pay a lot of regard to Mr Stokes*.' She did then produce from her box file a different email dated 4 October 2017 in which Mr Stokes wrote to Ms Jones,

'*It's been brought to my attention that Richard Laybourn, who is off sick yet "again"!?, has complained about his wages...*'

31. When I pressed Ms Jones for the email saying, 'get rid of him,' she said that she did not know if Mr Stokes sent it verbally or by text and said that she could not find it. I have been shown no other emails to put the, 'get rid of him' email into context and no contemporaneous evidence of any discussions or decision making about the claimant's redundancy.

32. On the basis of this evidence I have concluded that I cannot rely upon the respondent's evidence about its reason for dismissing the claimant. There is no contemporaneous support for the assertion that they considered the need for a redundancy. There is evidence that a director of the Enfield Printing Company Ltd wanted to get rid of the claimant and had reacted negatively to his sick absence. I have not accepted Ms Jones' evidence that at Stephens and George Ltd, the board paid no attention to what Mr Stokes said: because I have not been shown any of the surrounding correspondence – for example the reaction to either email, or any record of the decision itself - that might support this statement. I note that Mr Stokes may well have been present at any final decision at a board meeting. It seems more likely that Ms Jones had inadvertently disclosed the truth of the situation and that the claimant was dismissed because Mr Stokes wanted to get rid of him.

Chronology

33. The claimant began his employment with The Enfield Printing Company Ltd trading as 'The Magazine Printing Company', as a van driver on 26 January 2015.

34. At all material times, the claimant has lived in Enfield.

35. After three months' probation, the claimant was sent a written statement of terms and conditions of employment. He accepted that he may have been sent a copy with his own details filled in, however this was not produced to the tribunal. Instead, a standard template was produced by the respondent which provided amongst other things that the claimant was entitled to receive one months' notice of termination if he had less than 5 years' service. The claimant accepted that these were his terms and conditions.

36. On 11 July 2016 the first respondent, Stephens and George Print Ltd purchased the shares of second respondent, Enfield Printing Company Limited from Mr. Anthony Stokes. As a share purchase, this was not a TUPE transfer: the two companies remained separate entities. Therefore, the claimant remained employed by the second respondent.

37. At the time of the purchase, Enfield Printing Company Limited was based in a factory unit with offices attached in Hoddesdon. Stephens and George Ltd planned gradually to close production in Hoddesdon over 1 to 1 ½ years.

38. However, the owner of the building in Hoddesdon gave notice in the lease to conclude on 31 December 2016.

39. In that context, Stephens and George Ltd began a redundancy process in the Enfield Printing Company Limited. As a result of that process, the claimant was offered and accepted changes to his role as van driver. In his new role he would start his route in Enfield, drive to the Stephens and George Ltd premises in Merthyr Tydfil to collect goods for delivery, then deliver them in and around the London area and return home. This was in large part the reverse of the route undertaken by the Stephens and George drivers who started in Merthyr Tydfil, collected their goods for delivery there, drove to the London area and then drove home again.

40. Two other drivers employed by the Enfield Printing Company Limited relocated to Wales and by means of a TUPE transfer became employed by Stephens and George Print Ltd.

41. The result was that the claimant remained the only delivery driver employed by the Enfield Printing Company Limited.

42. By letter dated 22 March 2018 but received by the claimant on 26 March 2018, Ms Jones invited the claimant to an individual meeting on Wednesday 28 March to discuss the potential redundancy of his position. She said that she would like to discuss the respondent's business reasons for needing to consider, why the claimant was potentially redundant and his comments on alternatives to redundancy. She told

the claimant that he could bring a trade union representative or a work colleague as a companion.

43. The claimant was the only employee whose role was being considered for redundancy at this time.

44. The claimant attended the meeting on 28 March 2018. Also present were Ms Jones and Marcus Partridge. Mr Partridge is a director of post-press at Stephens and George Limited.

45. The claimant said that he had too short notice to arrange somebody else to be his companion. He had only received the letter on the Monday morning.

46. Ms Jones said that due to the business needs in difficult market trading conditions the respondent had to look at costs in all areas and as a result of this it had to make the claimant's drivers position redundant. This she said was due to business needs and was not personal.

47. Ms Jones said that the respondent was *'£600,000 down year on year profit'*. As a board of directors, they had to be proactive and look at costs going into the next financial year.

48. Ms Jones said that the only option for the claimant was to consider relocation to Merthyr Tydfil. She said the cost of running the claimant's van was too much and not cost effective. Mr Jones had said that he would only trial and assess the viability of the Magazine Printing Company van to establish whether it could be sustained for the longer term.

49. The claimant declined to relocate for reasons to do with the ownership of his wife's house and asked about whether he would be guaranteed two years' service.

50. Ms Jones said that when the claimant had been off work sick, costs had increased dramatically because the business had to use external drivers to cover or use an outside haulier. She said that the claimant had had 38 days sick and holidays additionally and during those periods the van was parked outside the claimant's house.

51. The claimant questioned why he was being made redundant when the business had just employed another driver.

52. Ms Jones said that the respondent wanted the redundancy to take place before the start of the next financial year on 1 April 2018. There was a discussion about whether the claimant would be paid in lieu of notice or work his notice. This issue, which came to involve the return of the van, caused some dispute at the time, however it does not arise for me to resolve and so I leave it to one side.

53. There was no mention of the possibility of appeal at this hearing.

54. By a hand-delivered letter dated 28 March 2018 the claimant correctly pointed out that he was due one months' notice and not three weeks'.

55. Amongst other things, the claimant said that there may be errors in the respondent's procedure. The claimant did not in this letter request an appeal.

56. By letter dated 28 March 2018 Ms Jones wrote further to the meeting confirming that the claimant's position would be made redundant. She recorded that he was unable to relocate to Merthyr Tydfil and therefore he would be made redundant. She apologised but said that transport costs were soaring in an already competitive world.

57. This letter makes no mention of the possibility of appeal.

58. A further letter dated 29 March 2018 dealt with the issue of the claimant returning the van which is not now relevant before me. This letter too made no mention of an appeal.

59. By letter dated 4 April 2018 the claimant asked Ms Jones to accept his letter of 28 March as an appeal regarding his redundancy.

60. By letter dated 10 April 2018 Ms Jones said that the claimant's letter of 28 March made no mention of appealing and gave no details of the grounds of appeal. She concluded,

'*Therefore, I have to inform you that you are out of statutory time to raise an appeal*.'

61. By letter dated 10 April 2018 claimant wrote again to make a 'second formal appeal regarding my redundancy.'

62. The respondent's final letter dated 24 April 2018 dealt with the issue of the return of the company van and authorised a gross redundancy payment of £1434 .38 but made no further mention of an appeal.

63. There was no appeal hearing.

64. Ms Jones told me that the respondent did not have a handbook, or anything on a company intranet, say, which set out the internal procedure for such matters. There was no document which set out a time limit for an appeal and she agreed that the claimant would not have known the time limit for an appeal.

Analysis

65. It is for the respondent to discharge the burden of proving its reason for dismissal. I have found that the respondent has failed to discharge this burden: it has therefore failed to prove its reason for dismissal.

66. I have made this finding on the evidence set out above. Moreover, on the balance of probability, I find that the claimant was dismissed because Mr Stokes wanted to get rid of him and saw him as unreliable.

67. Whether or not Mr Stokes was right in that view is not for me to decide. However, this means that the dismissal was unfair. This was not a genuine redundancy.

68. That being the case, my reasoning need go no further. However, my finding also means that the decision about the pool of one was in fact a decision of personal dislike and therefore was not within the reasonable range of responses.

69. The claimant was given very little warning of impending redundancy: he received the letter of 22nd March on 26 March, in the context of a meeting on 28 March and the respondent wishing for the redundancy to be made by 1 April. The claimant did not have time to find a companion. I do not of course know when the decision was originally made: given the absence of evidence on the point, however the warning is so short that - without any evidence of emergency – I find that it was outside the range of reasonable responses.

69. Consultation cannot have been fair, because it cannot in the circumstances have been carried out with an open mind. The speed of the action and lack of appeal tends further to confirm this.

70. If this were a true redundancy then there would have been an attempt to find alternative employment, however the claimant did not wish to relocate to Wales.

71. There was no appeal and no offer of an appeal. This was also unfair and would have been even had the redundancy been genuine; however, in the circumstances an appeal was unlikely to have been a genuine exercise.

72. For all those reasons I find that the dismissal was unfair.

Polkey

73. A tribunal may reduce compensation to reflect the percentage chance that a fair dismissal may have occurred in any event. This may apply where the unfairness is both procedural and where it is substantive.

74. If a respondent seeks to rely on ‘Polkey’, it is for the respondent to adduce any relevant evidence on which it wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment.

75. However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of ‘seeking to reconstruct what might have been’ is so uncertain that no sensible prediction based on that evidence can properly be made.

76. Ms Jones has produced a matrix showing a scoring she performed for the claimant to show, on the basis of the matrix used in 2016, that the claimant would have been dismissed. Ms Jones did not do the scoring in 2016: this document was produced in June or July 2020 for this hearing. The claimant was not shown the document until shortly before this hearing and he disputes that the respondent could accurately measure his timekeeping. He said that there were particular reasons for his sickness: including 15 days following witnessing a road accident in the course of his duties. There is no point of comparison to anyone else, and no guidance as to how the scoring

should be completed. Therefore, I do not accept this document as a reliable indicator of the chance of redundancy selection.

77. Ms Jones has said in re-examination that the respondent had made further redundancies since the claimant was dismissed so that there were now 4 drivers instead of 7 including the claimant. Stephens and George Ltd have therefore made 2 further drivers redundant.

78. I have no documents however to show me why, how, or when these redundancies were made, whether they were genuine, nor whether the claimant might have been affected by them.

79. In the circumstances I do not consider that I can rely on the respondent's evidence in relation to 'Polkey' and I do not consider that I can properly make a reduction to the compensation on this ground.

Employment Judge Heal

Date: 12/08/2020

Sent to the parties on: .01/09/2020

Jon Marlowe
For the Tribunal Office