



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mrs J Waters

Connect Distribution Services Limited

RECONSIDERATION HEARING

HELD AT Birmingham **ON** 19th August 2020

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In person

For the respondent: Mr J Heard - Counsel

RESERVED JUDGMENT

The respondent's application for reconsideration of the Judgment dated 31st December 2019 which was sent to the parties on 3rd January 2020 ("the Judgment") is refused. The Judgment is confirmed.

REASONS

1. By a judgment dated 31st December 2019 which was sent to the parties on 3rd January 2020 ("the Judgment") the Tribunal determined that the claimant had been unfairly dismissed. The Tribunal further found that, had the respondent not applied a close mind to the process, that the claimant would have remained employed by the respondent in an alternative role of Brand Manager - Hoover. The respondent applied for

reconsideration of the Judgment. The grounds for such consideration are set out in an application made by the respondent's solicitors which was attached to an email dated 17th January 2020.

2. Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure 2013 ("the Rules"). Under rule 71, an application for consideration under rule 70, must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The application for reconsideration having been received on 17th January 2020 was, therefore, received within the relevant time limit.
3. The grounds of reconsideration are only those set out in rule 70, namely that it is necessary in the interests of justice to do so. On reconsideration a judgment can be confirmed, varied or revoked. If it is revoked it may be taken again.
4. Under Rule 72 if an application for reconsideration has not been rejected on the basis that there is no reasonable prospect of the decision being varied or revoked, the application should proceed to a hearing.
5. In paragraph 28 of the Judgment the Tribunal found:

"The respondent approached the whole process with a closed mind and it was clear that the decision to dismiss had already been made on 26th September 2018 when the claimant was informed that she was at risk of redundancy and once that decision was taken the respondent was not open to other suggestions".
6. At paragraph 29 of the Judgment the Tribunal found *"The same close mind approach was taken in relation to alternative employment..."*.
7. In essence, the respondent applied for reconsideration of paragraph 21 of the Judgment which states :

" I have considered whether a fair process would have¹ been dismissed fairly in any event (the Polkey argument). However, I am not satisfied that if a fair process had been followed that the claimant would have been fairly dismissed in any event. as if the respondent had not approached the matter with a closed mind the likelihood is that the claimant would have remained in employment in the role of Hoover Brand Manager."
8. Mr Heard for the respondent submits that the Tribunal's finding in relation to the Polkey argument (as referred to above) is erroneous on the facts. Mr Heard submits that the Tribunal fell into error in coming to

¹ This should state "I have considered whether a fair process would have **resulted in the claimant being** dismissed fairly in any event (the Polkey argument)...."

the conclusion that it was likely that the claimant would have remained in employment in the role of Hoover Brand Manager and that instead the finding that *“if the respondent had not approached the matter with a closed mind the likelihood is that the claimant would have remained in employment in the role of Hoover Brand Manager”* should be replaced with one of 3 scenarios set out below:

- 8.1 Scenario 1 : Colin Bence would likely have remained in the Hoover role for sound business reasons;
- 8.2 Scenario 2 : Applying a fair selection process between Mr Bence and the claimant would likely have resulted in Mr Bence being chosen for the Hoover role;
- 8.3 Scenario 3: Applying a fair selection process between Mr Bence and the claimant would have resulted in a 50/50 chance of the claimant being chosen for the Hoover role.

9. In support of the respondent’s application Mr Heard refers to paragraphs 19 to 21 of the witness statement of Mr Bould which states:

“19) The Brand Manager – Hoover role had been vacant for a few months and was vacant at the time the Claimant was going through the redundancy process. Whilst the business was recruiting for this position, an employee (Colin Bence, Buying Groups Manager) was managing this account who had previously worked at Hoover for 3 years. He understood the Hoover brand and had previously established relationships with customers. Hoover had some discussions with Andrew Sharp initially regarding their desire to have someone experience in the role, Andrew then came to discuss the matter with me.

20) Hoover specifically requested this employee to manage the account due to his knowledge and experience and as a result the position was withdrawn and absorbed into the Buying Groups position. The contract is estimated to be worth 4 million pounds and as his salary was a joint venture between Hoover and Connect (Hoover paying 50% towards the salary), Connect agreed to absorb the role into the requested employee’s existing role.

21) Hoover were keen to have an experienced individual engage in the role and were supportive of Colin as a candidate, this is confirmed in the email from Bobby Watkins dated 25 September 2019, which can be found at page 122A of the bundle”.

10. Mr Heard also relies on paragraph 19 of the witness statement of Michaela Pugh which states:

“The role of Brand Manager – Hoover was a joint venture between Connect and Hoover. On the 4th October 2018 I was made aware by Carl Bould that the role of Brand Manager – Hoover was being withdrawn. An employee (Buying Groups Manager) had been

managing this account whilst undertaking his current role. He had previously worked at Hoover for 3 years and not only understood the brand but had established the relationships with customers. Hoover had specifically requested the employee to manage this account due to his knowledge and experience and as a result the position was not withdrawn and absorbed into the Buying Groups Manager position.”

11. Mr Heard also referred me to paragraphs 12 and 15 of the witness statement of Leanne Haines. Paragraph 12 refers to a meeting with the claimant on 3rd October 2018 and paragraph 15 to a meeting with the claimant on 5th October 2020 :

“12) The Claimant also presented reasons as to why the role should not be made redundant and presented information on Dyson figures (pages 70-71). The Claimant also expressed an interest in the role of Brand Manager – Hoover and asked to be considered for this role. The Claimant has asked for details of a further role, Category Manager – Purchase and Supply Chain, however, during this meeting she expressed that she felt this was not a suitable alternative. The only available vacancy which the Claimant felt was a suitable alternative was the Brand Manager – Hoover role.”

“15) During this meeting it was explained to the Claimant that unfortunately the role of Brand Manager – Hoover, was not available. This was due to the fact that Hoover had informed Connect that they were happy with the work being completed by the employee who was assigned to cover the brand whilst Connect were seeking to employ someone else in the role. This employee was Colin Bence. Hoover specifically requested that Colin was allocated to the role permanently. The contract is estimated to be worth 4 million pounds. As the position is a joint venture between Hoover and Connect, Connect then withdrew this vacancy and took steps to absorb it into Colin’s existing role. The vacancy was withdrawn on 4th October 2018.”

12. Finally, Mr Heard relies on paragraphs 24 to 27 of Mr Sharp’s witness statements:

“24) In relation to the Brand Manager – Hoover position role being withdrawn, I ensured that this was addressed within my appeal outcome letter. I can confirm that the role been advertised since the 27th July 2018 and that Colin Bence was initially overseeing the role whilst we were recruiting the position. The Hoover role was a joint venture between Hoover and Connect and they pay a significant amount towards the salary. The Hoover contract was in its infancy therefore our main business aim was to get the Hoover products out to market and sell them whilst ensuring the merchandising of the product was out in stores.

25) Following discussions with Hoover it became clear that they wished to have an experienced individual within the role at Connect. I

discussed this Carl Bould and the individuals at Hoover. It was discussed that, given Colin Bence's previous experience, the fact that he was covering the role at the time and had previously been employed by Hoover directly, he was a strong candidate for the position, Hoover were supportive of Colin and were keen to have him engaged in the role. The decision was therefore taken to absorb the vacancy into Colin's existing position. Hoover's support of Colin's suitability for the role is confirmed in an email from Bobby Watkins at Hoover, dated 25th September 2019 and which can be found at page 122A of the bundle".

13. Mr Heard argue argues that the respondent's witnesses maintained their position in relation to the Brand Manager – Hoover role during cross examination and this was not challenged by the claimant with the question that the respondent had decided not to give her the Brand Manager – role come what may. However, Mr Heard accepted that the claimant had referred to Mr Bence getting the role as a bolt on to his as a ruse (paragraph 35 of the claimant's statement refers).

14. In fact, the claimant goes beyond merely saying that there was a ruse. In paragraph 35 of her statement the claimant states:

"Finally, the convenient withdrawal of the Hoover role which was ideal redeployment opportunity. The idea that Colin Bence would have this "crucial" full time role bolted on in addition to another full time role of Buying Groups Manager was a ruse to avoid giving the job to me. Bolting on additional responsibilities was somehow possible for Colin, at the time a new starter in a probationary period, but it was not possible for me with over 6 years' service".

15. Mr Heard further referred to the Tribunal's findings at paragraphs 9.10 and 9.11 :

"9.10 Around 24th June 2018 the respondent recruited a new employee, Colin Bence, within the Major Accounts team to take up a newly created role of Buying Groups Manager. This was a full time position working with all buying groups to plan promotions and trade shows, stock and sales forecasting. Mr Bence was a former employee of Hoover where he had been unhappy and looking to move on.

9.11 Hoover had had a change in leadership and Mr Bence was associated with the old brigade and, as such, he had left their employ to join the respondent. As Hoover were funding the role of Hoover Brand Manager they were not keen on Mr Bence taking up this role. As such the role of Hoover Brand Manager remained vacant although Mr Bence had input on the Hoover launch given his experience".

In Mr Heard's submission these findings of the Tribunal were time specific and Mr Bence's relationship with Hoover improved and he

undertook the Hoover Brand Manager role until August 2019 and when the role is was undertaken by the Head of Finished Goods.

16. Mr Heard submits that the Tribunal made no findings of fact that the respondent would not have appointed the claimant under any fair circumstances nor that if a selection process had been undertaken fairly the respondent would have applied an unfair process and never allowed the claimant to be appointed to the role as a bolt on. Mr Heard accepts the finding at paragraph 19 (referred to above) that the respondent took a closed mind approach but argues that this is not the same as finding that the claimant would never have been awarded the position. He further argues that it was not permissible to reach a conclusion that the claimant could not have done anything based on the finding of the respondent having a closed mind.

17. Mr Heard helpfully confirmed that he was not challenging the finding at paragraph 9.28 of the Judgment:

“During the hearing I was presented with an email dated 25th September 2019 – almost a year after the claimant was made redundant - from Bobby Watkins, Head of Sales & Marketing for Hoover. In this email Mr Watkins reflects on the person specification for the Hoover Brand Manager role. Mr Watkins indicates in his email that he wanted to have an individual who was experienced. I note that in his email Mr Watkins indicated that he was “supportive of this appointment since he was the stand-out candidate for the job description”. I note that Mr Watkins does not say that Hoover had requested the appointment of Mr Bence. Furthermore, there is no contemporaneous evidence confirming that Mr Bence was appointed at the request of Hoover.”

18. However, Mr Heard argues that absent the finding that the Brand Manager – Hoover role was not a bolt on when considering Polkey everything pointed to Mr Bence being selected for the role. Mr Heard submits that on the Tribunal’s finding, had the respondent approached the alternative employment issue with an open mind, and fairly, then it was it was likely that Mr Bence would have remained performing the Hoover role (on the basis of Scenarios 1 or 2 above) or that there was a 50% *Polkey* chance of the claimant being appointed to that role (on the basis of Scenario 3).

19. Further, given that it was a bolt on role that it would not have been given to the claimant. Finally, Mr Heard argues that it is impermissible for the Tribunal to find that the role was full time therefore, in considering the question of Polkey, the role to be considered is that of a part time one.

20. The claimant provided her comments to the respondent’s application for a reconsideration in an email dated 12th August 2020. The claimant points out in her submissions that the 3 scenarios put forward by Mr Heard conveniently ignore the fact that this was a redundancy situation, and the respondent was approaching the matter as a straightforward

selection process to fill a vacancy where Mr Bence and the claimant were competing candidates. The claimant asserts that the respondent had a duty to redeploy her to avoid redundancy and it was finding of fact that the Hoover role was suitable alternative employment. However, Mr Bence was not at risk of redundancy.

21. Furthermore, in relation to Scenario 1 and the respondent's assertion that had a fair process been followed that Hoover would have been consulted about who would have filled the vacancy the claimant points to the finding of the Tribunal at paragraph 9.11 that Hoover were funding the role of Hoover Brand Manager and they were not keen on Mr Bence taking up this role. The claimant asserts that this explains why there is no contemporaneous evidence to support any consultation with Hoover and why the role continued to be advertised externally despite Mr Bence "gatekeeping" the role. The claimant further asserts that this explains why Mr Bence was not given the role from the outset when he joined the respondent despite the respondent's assertion that it was only ever a part time role which could be bolted on. The claimant refers to paragraph 9.28 of the Judgment, the lack of contemporaneous evidence and the fact that the email from Mr Watkins does not indicate that Mr Bence was appointed at Hoover's request. As such, the claimant asserts that it would be wrong to assert that Hoover would have favoured Mr Bence for the role.
22. In relation to Scenarios 2 and 3 the claimant points out that she was in a redundancy situation and not Mr Bence and that they were not competing candidates in a normal recruitment scenario. As such, the respondent was under a duty to redeploy her. Furthermore, in light of the findings at paragraph 9.11 the likelihood of Hoover's input being favourable to Mr Bence is highly suspect and gives no examination of her skills and experience. The claimant further submits that the 50/50 figure referred to in Scenario 3 is plucked out of the air.
23. I have carefully considered the submissions made on behalf of both parties and in particular whether a reconsideration of the Judgment is necessary in the interests of justice.
24. The respondent is clearly unhappy with the Tribunal's conclusion that the claimant was unfairly dismissed by the respondent and that had the respondent not operated a closed mind the likelihood is that the claimant would have remained employed in the role of Hoover Brand Manager. However, a reconsideration hearing is not available to a party to re-argue its case and to revisit the evidence. In this regard I note that the 3 scenarios that were presented at the reconsideration hearing by Mr Heard were not put to me at the full merits hearing.
25. I also take note of the guidance provided by the Employment Appeal Tribunal in the case of **Software 2000 Ltd -v- Andrews and others UKEAT/0533/06** in relation to the question of Polkey:

“The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice”

26. The Tribunal's discretion must be exercised judicially taking into account the interests of both parties and the requirement of finality of litigation, and giving effect to the overriding objective.
27. As set out in the Judgment the respondent was advertising the Hoover Brand Manager role as a full time vacancy until 3rd October 2018 and it was only when the claimant expressed an interest in the role on that date did the respondent decide, the following day, to withdraw it as a full time role on 4th October 2018 and make it a bolt on role for Mr Bence. Furthermore, no contemporaneous evidence was provided of Hoover requiring or even preferring Mr Bence to be given the Hoover Brand Manager role. On the contrary the only evidence before the Tribunal was an email from Hoover, almost a year later, indicating that Hoover were *“supportive of this appointment since he was the stand-out candidate for the job”*. No evidence was provided to show that Hoover were also provided with the claimant's details. Indeed, the decision to remove the Hoover Brand Manager role as a full time role within 24 hours of the claimant expressing an interest in it demonstrates the closed mind that the respondent took throughout the redundancy process. If the respondent was able to make the Hoover Brand Manager role a bolt on role within 24 hours of the claimant expressing an interest in the role then it was in its gift to keep the role as a full time one and to consider the claimant for this role. I also accept the claimant's argument that she and Mr Bence were not in a competing redundancy situation. The claimant was at risk of redundancy, Mr Bence was not. As such, the respondent was required to consider the claimant for suitable alternative employment.
28. In light of this I do not find that the Tribunal fell into error in coming to the conclusion that it was likely that the claimant would have remained in employment in the role of Hoover Brand Manager had the respondent not operated a closed mind.
29. As such, it is not in the interests of justice to grant the respondent's application for reconsideration and the application is dismissed.
30. I note that the parties have not been able to agree on the claimant's compensatory award. As such, this matter will now be listed for a remedy hearing before me.

Signed by

on 25th October 2020

Employment Judge Choudry