



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Jane Tatham

v

Virgin Holidays Limited

Heard at: Watford

On: 26 & 27 September 2019

Before: Employment Judge Bartlett

Appearances

For the Claimant: in person

For the Respondent: Mr Michelle

JUDGMENT

1. The claimant's claim for unfair dismissal fails.

REASONS

The issues

1. Prior to the final hearing this case had two preliminary hearings. The preliminary hearing which took place on 12 February 2019 set out the issues in this appeal as follows:

"I understand the claimant's claim (which is now only of unfair dismissal) to be that she was dismissed unfairly because her divisional manager, Ms Kelly Worsnop, did not like her. There was a genuine reorganisation in that role that the claimant did (that of retail sales manager) was deleted from the respondent organisation, and a new role of "area manager" (managing four stores) was created in its place, but it is the claimant's case that Ms Worsnop carried out an unfair selection procedure by marking the claimant's interview and presentation given in support of her application for that new role wholly unfairly..."

2. At the start of the final hearing I checked with the parties if this summary remained correct. Ms Tatham initially stated that her claim had become much wider but following discussions it became clear that the key issue remained whether or not criteria for redeployment into this role had been fairly applied.
3. The claimant's case was that her manager, Kelly Worsnop (KW), a divisional manager, who (jointly) carried out the assessment of the claimant's presentation which was a key part of the application for redeployment as an area manager did not objectively assess the claimant. Instead KW used her personal view of the claimant to determine the claimant's application for redeployment. The claimant's case was that KW's view of the claimant was that she was difficult to handle and KW was intimidated and threatened by the claimant's experience and capabilities. The claimant's case was that the following demonstrated unfairness in the application of the assessment criteria:
 - 3.1 KW did not like the claimant as was evidenced by:
 - 3.1.1 KW's lack of support in relation to the threatening behaviour and harassment the claimant received from a former colleague JB;
 - 3.1.2 emails from KW dated around 4 March 2017 which related to the claimant leaving the Lakeside store;
 - 3.1.3 emails between KW and MP around 6 May 2017 which were rude and unprofessional.
 - 3.2 KW used her dislike of the claimant to unfairly manipulate the score she was awarded in the presentation part of the application for redeployment;
 - 3.3 Katie Squires (KS) who assessed the candidate presentations with KW colluded with KW to unfairly mark down the claimant;
 - 3.4 KW was friends with another applicant CF (who was successful in applying for the same area manager role for which the claimant had applied). She had assessed CF's presentation with KS and she had unfairly marked CF highly;
 - 3.5 CF had not complied with the brief and had presented using a flipchart not a printout and not using PowerPoint. As CF had not complied with the brief she should have been rejected. The fact that she was not indicates unfair application of the assessment criteria;
 - 3.6 after one successful candidate refused a role it was offered to the next highest scoring candidate who identified that area as a preference but this should have been subject to a new recruitment exercise;
 - 3.7 a candidate who was appointed had only scored 6/12 (below the benchmark) in the presentation.
4. The claimant did not:

- 4.1 make a complaint about the general redundancy process in terms of consultation requirements;
- 4.2 assert that the selection criteria were not objective.

Case Management

5. Shortly before the final hearing the parties had exchanged a number of emails which concerned the disclosure by the respondent of 51 pages of additional documents. At the hearing the claimant said that she had not had time to look at them and wanted them to be excluded.
6. I told the claimant that I would need to take 1.5 hours to read the witnesses statements and key documents before I started to hear the witness evidence and that she could use that time to read the documents. I also told her that I did not wish to exclude documents which might be useful to her and she could not know if they were or not if she had not read them. She decided that the 1.5 hours (which turned out to be 1hr 20 mins) would be sufficient time to read them and confirmed that this was the case after the break.
7. After the break the claimant requested that the section of the newly disclosed documents which was the emails between the claimant and the respondent's advisors were excluded because they were not relevant and the issues they raised were covered elsewhere.
8. I decided that the documents would be allowed into evidence. As the claimant's objection was based on a lack of relevance and duplication, I considered that it was in the interests of justice to allow them in.

Evidence

9. At the hearing the Tribunal heard evidence from Adam Greghni (AG), Kelly Worsnop (KW), Katie Squires (KS) and the claimant. Each witness took the affirmation and was asked questions in cross examination. The evidence is recorded in full in the record of proceedings.

Issues not in dispute

10. The following issues were not in dispute:
 - 10.1 the claimant's dismissal was part of a country wide restructuring which resulted in the creation of area managers and the removal of other roles such as the claimant's retail sales manager role;
 - 10.2 under this restructuring the claimant's role of retail sales manager would no longer exist and retail sales managers were pooled;
 - 10.3 76 employees were placed at risk of redundancy;

- 10.4 retail sales managers were permitted to apply for a newly created role of area manager;
 - 10.5 the claimant, like all retail sales managers who applied for the area manager role, had to complete an online test and carry out a presentation as part of the assessment process;
 - 10.6 coaches were automatically allocated to area manager roles;
 - 10.7 the claimant completed the online test;
 - 10.8 the claimant completed the presentation stage of the process and her presentation was assessed by KW and KS;
 - 10.9 the claimant was scored 4/12 for her presentation;
 - 10.10 SS had been allocated an area manager role even though she had only achieved a score of 6/12 for the presentation.
11. Before the matter reached the final hearing the claimant was unaware that a minimum score or benchmark was applied such that an individual was required to get a score of 7/12 for the presentation to be considered for redeployment to the role of area manager. However, by the time of the final hearing it was accepted by both sides that the respondent had imposed this benchmark and that the online test was only used in a tie-break situation. It seems most regrettable that the respondent was not able to confirm this to the claimant some time ago. This requirement is not set out in the consultation documents or the respondent response to the claimant's grievance letter and it is understandable that the failure to inform her of this until a late date has caused her some concerns.

Background

12. The claimant worked for the respondent as a retail sales manager from 1 September 2014 until 8 September 2017. It was not disputed that she was dismissed on 8 September 2017 and paid in lieu of her notice.

The law

13. The issue of analysing an employer's assessment of employees against criteria in a redundancy situation has been considered in many cases in front of Employment Tribunals and the Employment Appeal Tribunal.
14. These cases have established a number of principles which I must apply when assessing this case. These include the following:
- 14.1 **Buchanan v Tilcon Ltd 1983 IRLR 417** sets out that where an employee complains about unfair selection the employer only has to prove that the method of selection was fair in general and that it was reasonably applied to the employee;
 - 14.2 **British Aerospace v Green [1995] IRLR 437** sets out: "*in general the employer who sets up a system of selection which can reasonably*

be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him, adding that “to allow otherwise would involve a serious risk that the system itself would lose the respect with which it is presently regarded on both sides of industry, and that tribunal hearings would become hopelessly protracted.”

- 14.3 cases have confirmed that all the employer has to show is that it has set up a good system of selection which had been reasonably applied. For claimants to succeed in a claim that an employer had acted unfairly there would need to be evidence of bad faith, victimisation or similar **Taylor and others v BICC Brand Rex Ltd and BICC Cables Ltd [UKEAT/651/94]**;
- 14.4 in **Semple Fraser LLP v Daly EAT 0045/09** the EAT made it clear that the question for the tribunal is whether, overall, no reasonable employer could have dismissed the claimant. A Tribunal is not allowed to scrutinise in detail the application of the selection criteria and neither is the tribunal allowed to substitute its own view for that of the employer;
- 14.5 clear evidence of unfair and inconsistent scoring is likely to make a dismissal unfair.

Submissions

15. The claimant made oral submissions which are set out in full in the record of proceedings and can briefly be summarised as follows:
- 15.1 the claimant was only told in August 2019 that a benchmark of 7/12 had been applied to the presentation and had only been provided with written evidence of such on the first day of the tribunal hearing;
- 15.2 AG’s grievance outcome inaccurately stated that he carried out an interview with an employee when he had not;
- 15.3 the emails concerning the claimant departing from the Lakeside store demonstrated that KW acted unprofessionally towards the claimant;
- 15.4 failing to use the online scores which were objective left the redundancy process open to manipulation;
- 15.5 KW was biased towards CF as she had a personal friendship with her;
- 15.6 CF had not complied with the brief for the presentation as she had used a flipchart rather than PowerPoint;
- 15.7 CF’s presentation and notes on it should have been retained instead they were destroyed;
- 15.8 if the 7/12 presentation benchmark had been applied objectively SS should not have been offered an area manager role;
- 15.9 even if the claimant’s online score had been taken into consideration in a combined score she would not have been offered the area manager role;
- 15.10 she would not have changed her presentation because she has been successful in interviews in the travel industry by adopting this approach;

15.11 the respondent's selection for area managers roles allowed favouritism to play a part and it did.

16. Mr Michelle made written submissions (which I will not repeat here) and which he supplemented with brief oral submissions which can be summarised as follows:

16.1 the claimant cannot succeed in her claims that KW manipulated the presentation assessment because KS was a marker in the assessment and she had no connection or ill feeling towards the claimant;

16.2 the claimant only stated that she wanted to be considered for an area manager role in the North London region. CF's score was substantially in excess of the claimant and she would have been offered this role ahead of the claimant in any event unless the Tribunal accepted that CF should have been rejected because she completed her presentation on a flipchart and failed to meet the brief.

Findings of fact

17. I accept the claimant's claim that KW did not particularly like the claimant. It is not necessary for me to consider the reason for this. I recognise that different people have better relationships with some people than others for little or no reason or sometimes good reason. I do not accept that KW had such a dislike of the claimant that it amounted to animosity.

18. I accept the claimant's evidence on this issue because she provided detailed evidence about her excellent relationship with her previous manager (BM) and that she had not enjoyed the same relationship with KW. I also found the emails dated 6 May 2017 between KW and MP were not kind about the claimant. In cross-examination KW sought to explain the content of these emails by setting out the context of these emails which was that the claimant had complained to MP about the pressures of working at the Cheshunt store but when KW had offered her a move to another store the claimant had refused it. KW's evidence was that this showed that the claimant said different things to different people and that was the thread of the discussion between her and MP in the emails. I asked KW to explain what she understood "*I think she plays people up a lot, like Ben*" to mean and she stated that it was that the claimant had said different things to her and MP as explained above. I did not find this evidence convincing. The comments in the email seemed to me to be of a more personal nature. Even though KW accepted they were not the most professional emails I found her attempt to explain the comments as relating to concerns about the claimant's welfare and saying different things about this to different people was unconvincing.

19. It is undisputed that the claimant was subject to a course of intimidation and harassment by a former employee. This appears to be very serious. I recognise that there are emails which show that KW took action to assist the claimant but

in light of the claimant's evidence that she did not have 1-2-1 meetings with KW and did not have close contact with her I find that the level of support that the claimant may have expected as a result of the particularly distressing and seriousness of the situation was not provided.

20. I find that the Lakeside emails set out KW raising some business concerns and a response from the claimant. They do not indicate anything beyond their face value or that there was a serious disagreement.
21. When these these factors are combined with the claimant's evidence that she had a close working relationship with her previous manager which had not been replicated with KW and the Lakeside emails, I accept the claimant's claim that KW did not particularly like the claimant.
22. However, this issue is not determinative of the case and I must consider whether KW's personal feelings for the claimant unfairly influenced the assessment of the claimant for the area manager role.
23. The claimant felt strongly that she had not been treated fairly. The tribunal regularly sees cases where an assessment process has been adopted for new roles or promotions which only takes into account the interview or assessment whilst apparently taking no account of, the sometimes, years of positive performance reviews. These processes frequently create feelings of unfairness in employees.
24. I find that the respondent's assessment process of the presentation involved:
 - 24.1 two individuals one of which is a HR professional and the second of which is the divisional manager who would manage the successful candidates;
 - 24.2 these two individuals carried out the scoring and made notes;
 - 24.3 the scoring was carried out immediately after a presentation;
 - 24.4 a moderation meeting took place on or around 1 August 2017.
25. As I have set out above that the claimant considers that there are various indications that she was not assessed fairly. In addition to what I have set out in this judgement the claimant identified considerable background information as to why she felt she was unfairly treated.
26. I was concerned by KS' admission that some days after the claimant's presentation, and after the claimant had asked for copies of the notes that were made about the presentation, she added to these notes. The reasons KS gave for this were that her notes had been brief and as these were being provided in written form to the claimant rather than with a verbal explanation she wanted to explain fully in writing the reasons for her marks. It seems to me that adding to the notes without there being any identification on them as to what was added would have raised the claimant's concerns.

27. I find that KS' notes of the claimant's presentation include an erroneous reference to "Christine". However I cannot infer from this fact that the claimant's presentation was not considered fully or fairly as a credible explanation for this was given: it was a mistake.
28. It was uncontested that KS had no prior relationship with the claimant and that she had not spoken with the claimant prior to the presentation. I find that this indicates that she had no personal connection with the claimant which would influence her assessment of the claimant. I find that KS' witness statement dealt in detail with an assessment of the claimant's presentation. This also corresponded with KW's evidence. In light of this detailed and consistent evidence and the lack of motivation for KS to assess the claimant unfairly, I find that she was not unduly influenced by KW and made her own decision.
29. I find that KW did not seek to unfairly influence KS: not particularly liking the claimant is not sufficient to establish that she acted unfavourably to the claimant.
30. I accept the respondent's evidence that there was a moderation of the scores and the selection of candidates on or around 1 August 2017.
31. KW denied that she was friends with the successful candidate CF. She also denied that any relationship with CF influenced her assessment of CF. It is a part of human nature that some people have better or more friendly relations with others in the workplace. I am prepared to accept the KW had a more friendly working relationship with CF than she had with the claimant. I accept her evidence that they were not friends.
32. The claimant's claim was that this friendly relationship meant that CF was not excluded from being considered for a role despite failing to comply with the presentation brief. I find that the presentation brief gives a strong indication that it was expected that a printed out presentation was provided by the candidates and that this would be interpreted as meaning a printout of a PowerPoint presentation. KW's evidence that retail sales managers were not provided with a laptop as part of their work and therefore they could not be expected to use one in their presentation was convincing. I may have expected individuals to receive extra marks for using technology under the "Live Red" category. However, as case law establishes, I am not permitted to substitute my own judgement.
33. A considerable amount of evidence was provided on the situation of SS as set out above. I can understand how, when this is combined with all the other factors in this case, this would create feelings in the claimant that the rules were not applied fairly and she was not treated fairly. The respondent's reason was that SS was a near miss with the presentation score having been awarded 6/12 and if they did not give the role to her they would have had to recruit externally

and make SS redundant which was not attractive to the business. I find the respondent's reasoning rational and compelling. I find that this is the reason why SS was offered an area manager role and that this was independent of any considerations relevant to the claimant.

Decision and Conclusion

34. The factors which indicate unfairness to the claimant are:

- 34.1 KW did not particularly like the claimant;
- 34.2 KS' notes were amended after the claimant's scoring was completed;
- 34.3 KS' notes referred to a "Christine" when no such individuals were in the brief or mentioned by the claimant; and
- 34.4 CF received a higher score for the presentation than the claimant.

35. The factors which indicate that there was no unfairness to the claimant are:

- 35.1 two individuals carried out the scoring for the claimant only one of which was KW. This means that KS was a counterbalance to any alleged pre-decision by KW;
- 35.2 I accept KS' evidence that she was not unduly influenced by KW and made her own decision;
- 35.3 there was no motivation for KS to be biased against the claimant;
- 35.4 the scoring is not obviously unfair. As case law establishes I am not permitted to go through a detailed assessment of the claimant's presentation and mark it myself. Taking into account the notes (and my concerns about them set out above) and the detail provided in KS' witness statement I find that the scoring was not obviously unfair.

36. I find that the situation with SS is not relevant to my assessment of the claimant's situation.

37. Taking all of the above factors into account, I am not satisfied that there is sufficient evidence to establish that there has been unfairness in the assessment of the claimant's presentation. She has not established that she was unfairly not selected for redeployment as an area manager.

38. This means that the claimant has not established that she was unfairly dismissed and her claim must fail.

39. If I was wrong in my assessment above and that bad faith had tainted the respondent's decision that the claimant was not successful in redeployment, I would have concluded, for the same reasons, that the marking of CF, was also tainted by bad faith. This would have meant that the claimant was unfairly dismissed however I would have found that there is a substantial chance that had a fair process been followed the claimant would have been dismissed in any event. This is because the selection process used objective criteria and

there was evidence to show that the claimant had not presented in a way which matched what the respondent wanted. I would have applied a 60% reduction under Polkey.

Employment Judge Bartlett

Date: 30 September 2019.....

Sent to the parties on:31/10/2019 ...

.....H. Panesar.....
For the Tribunal Office