EMPLOYMENT TRIBUNALS

Claimants: 1. Ms A Zorzalek

2. Ms J Vasiljeva

3. Ms S Conceicao

Respondent: WM Morrisons Produce Ltd

Heard at: Leeds **On:** 30 November 2020

Before: Employment Judge Knowles

Representation
Claimant: Dr Pandya, Solicitor
Respondent: Ms Thomas, Counsel

JUDGMENT

The judgment of the employment tribunal is that:

1. The correct title of the Respondent is WM Morrisons Produce Ltd.

2. The Claimants' claims of unfair dismissal are not well founded.

3. The Claimants' claims of wrongful dismissal are well founded but because each of them received a payment in lieu of their outstanding notice entitlement upon termination of employment they have established no claim for damages. No damages for breach of contract are awarded.

REASONS

Issues

1. This case concerns the Respondent's closure of the night shift at its Thrapston manufacturing site. That closure resulted in the dismissal of the three Claimants from their roles on that night shift. They claim unfair and wrongful dismissal.

2. References are made in the claim forms and in evidence to matters which might appear to suggest that a claim of discrimination relating the to Claimants' sex was being brought. However, the Claimants confirm that no such claim is being brought.

3. The issues for me to consider are as follows.

4. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or some other substantial reason.

5. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

   a. The respondent adequately warned and consulted the claimant;

   b. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

   c. The respondent took reasonable steps to find the claimant suitable alternative employment;

   d. Dismissal was within the range of reasonable responses.

6. The Claimants' claim form raises no issues relating to their contracts other than to claim damages for wrongful dismissal. The issues for me to determine in relation to each Claimant are:

   a. What was the claimant's notice period?

   b. Was the claimant paid for that notice period?

Evidence

7. This hearing was held fully remote through HMCTS's Cloud Video Platform.

8. I heard evidence on behalf of the Respondent from:

   a. Mr M Peczek, Senior Acquisition and Automation Manager

   b. Ms I Sultana, Manager of the Production Department

9. The Claimants;

   a. Ms A Zgorzalek ("first Claimant")

   b. Ms J Vasiljeva ("second Claimant")

   c. Ms S Conceicao ("third Claimant")

   each attended the hearing and gave evidence.

10. A joint bundle of documents was produced (439 pages). Numbers in brackets in this judgment relate to the page numbers in the joint bundle unless otherwise stated.

11. The joint bundle of documents contained written witness statements for each witness (371-401).

12. Separate to the bundle of documents, both parties produced a written skeleton argument.

Findings of fact

13. I made the following findings of fact on the balance of probabilities. This is not a record of all of the evidence which I heard; it is a summary of the core evidence upon which my conclusions are based.

14. The first and second Claimant's were employed by the Respondent as Production Factory Operatives, the third as Machine Operative. Their dates of commencement of employment were 22 August 2011, 12 September 2011 and 17 November 2014 respectively. Each worked the nightshift at the Respondent's Thrapston production site; 10pm to 6am. At Thrapston, the Respondent packs produce including fruit, nuts, apples, pears, cucumbers, melons and salad lines. The Respondent employed c700 people at this site.

15. In or around November 2019 the Mr Peczek developed and produced a business case for the closure of its nightshift at Thrapston (57). The proposal stated:

"The [sic] continue to be competitive in the market and to drive efficiency we are proposing to remove the current night shift production operation from the site and utilise the remaining capacity during the day work hours to reduce the overall operating costs.

The impact of this proposal will affect the following roles on nights:-

○ *Technical - Quality controller*
○ *Production - Factory Operatives, Machine Operatives, Area Leaders and management*
○ *Warehouse associated services - Warehouse operatives, FLT Drivers, Packaging and Stock Counters*
○ *Canteen - Cooks, Canteen Assistants and Area Leader*
○ *Hygiene on days and domestic cleaner (1 on nights)*

The proposal would mean we would operate production for 16 hours per day, 7 days per week, operating across two shifts from 06:00-14:00 and 14:00-22:00

In reducing production operating time and reorganising operational hours by removing the night shift this will provide the benefit of designated time to clean and complete planned maintenance and asset care.

Taking this benefit into account alongside the night shift removal we would be proposing to review our hygiene team hours and re-organise the work to be carried out on nights as opposed to days. This proposal will impact the hygiene team colleagues."

16. 15 Machine Operatives and 35 Factory Operatives would be at risk of redundancy as a result of the proposal. In total, 89 roles were at risk although a number of new roles would be created on the day shifts which would continue to operate and absorb the nightshift workload. Essentially, the day shifts were under utilised and the night shifts were more expensive because those employees were employed on terms of employment entitling them to a night-shift premium. The business case identifies potential savings of £0.86m per annum. There were added ancillary benefits to the proposals, the closure at night would allow time to be dedicated to hygiene and maintenance for example. The reason the Respondent could make the changes is stated to be that there had, over time, been a reduction in volume going through the site, increased automation and there being capacity on the day shifts. The site is capable of running 21 production lines at a time but immediately before this restructure the morning shift was operating only 15-16 lines, the afternoon shift 11 lines and the night shift 3 production lines.

17. 29 alternative day roles would be created under the proposal; this included 15 Production Factory Operative roles and 8 Production Machine Operative roles. In addition, 8 hygiene team roles would be available during the night shift.

18. The proposals were announced generically to employees on the nightshift on 3 February 2020 (169-170) and staff were provided FAQ' via the notice board (171-172).

19. The Respondent undertook collective consultation over the proposals with their recognised trade union, USDAW. Collective consultation meetings took place between 10 February 2020 and 9 March 2020. Five collective consultation meetings were undertaken and after each of the consultation meetings an update (approved by USDAW) would be placed on the staff notice board (95 to 97, 109 to 111, 124 to 127, 165 to 167).

20. I note from the announcements that from the collective consultation exercise with USDAW that matters were agreed which improved the situation for at risk colleagues such as a 13 week pay protection period, an ex-gratia redundancy payment and an increase in the number of alternative roles available on the day shifts and the night hygiene shifts. Outplacement support was agreed for colleagues unable to find suitable internal redeployment together with reasonable time off for interviews. The deadline for internal job applications was set back twice to facilitate opportunities for redeployment.

21. The Respondent also held collective Q&A sessions with employees on 18 February, 25 February 2020 and 26 February 2020.

22. USDAW did not resist the implementation of the proposals. Generally, notice was served 14 March 2020, the last day of work was 21 March 2020, and any period of notice then outstanding was paid in lieu in addition to redundancy payments.

23. Separate individual consultation took place with the nightshift operatives, including the Claimants. These were undertaken by Ms Sultana.

24. Ms Sultana explains three individual consultation meetings with each of the Claimants.

25. In relation to the first Claimant:

a. 20 February 2020 (210-213) – the first Claimant chose not to be accompanied. The announced changes were recapped. Alternative employment was discussed, the first Claimant stating that she was considering applying for roles. The first Claimant asked what redundancy payment she would be entitled to and the Respondent confirmed that was being discussed with USDAW collectively.
b. 26 February 2020 (219-222) – the first Claimant chose not to be accompanied. Alternative employment on the day shift, the night shift hygiene roles and wider vacancies with the Respondent were discussed and it was confirmed that they are published on the staff notice board. The first Claimant stated that she was 95% sure she would accept redundancy and was not interested in the vacancies that were available. A redundancy calculation was explained (245), which totalled £4,518 plus £2,903 payment in lieu of notice. The first Claimant asked what would happen to her notice pay if she undertook a trial in another role. This was not answered in the meeting, but confirmation that trial periods would count towards notice periods was placed into the FAQ's which were placed on the notice board (175).
c. 4 March 2020 (240-244) – the first Claimant had chosen not to apply for any alternative roles and it was confirmed that her employment would be terminated.

26. Notice of redundancy (259-260) was issued to the first Claimant 12 March 2020. A right of appeal was included in the letter but not exercised by the first Claimant.

27. In relation to the second Claimant, the same three stage individual consultation were undertaken 17 February 2020 (195-199), 24 February 2020 (215-218) and 7 March 2020 (246-250). Notable distinctions between the second Claimant and the first are that the second required a translator and her sister attended for that purpose. The second Claimant confirmed at the first meeting that she could only work nightshifts and would either be interested in the night hygiene role or redundancy. She reiterated interest in that role in the second meeting and the process for applying was explained to her. She also asked about her redundancy entitlement and a calculation was explained to her (£4,518 redundancy and £2,903 PILON). The second Claimant similarly expressed that she had decided not to apply for alternative employment and wished to receive a redundancy payment. A letter (261-262) was sent to her as was sent to the first Claimant. The second claimant also did not appeal.

28. In relation to the third Claimant, her first individual consultation meeting did not take place because she was on annual leave. She received a letter and the announcement and consultation update by post. Similar meetings took place to the meetings undertaken with the other claimants on 27 February (223-226), 3 March 2020 (229-231) and 7 March 2020 (253-257). At the first meeting, Ms Sultana began by explaining what was explained to the other claimants at their first meeting. Alternative job opportunities were discussed and the third Claimant confirmed that she had seen the vacancies. She explained that she could only work night shifts and the process of applying for internal vacancies was explained. She asked what redundancy payment would be made and a

calculation was explained (258), £3560 redundancy and £1,873 PILON. At a follow up meeting on 3 March the third Claimant expressed that she would take redundancy and would not apply for internal vacancies. Her redundancy was therefore confirmed at the subsequent meeting on 7 March 2020. She received a letter as did the other claimants (263-264) and similarly did not appeal.

29. Each of the claimants witness statements are in similar form and they complain about the pool and selection, that their family circumstances were not taken into account in redeployment or selection and that they were required to apply for roles rather than being guaranteed roles. They complain that their skill sets were not taken into account. Each complains that local companies were not contacted regarding redeployment and that time off to search for other work was not granted. They also complain that their English language skills were weak which was not factored into the process.

30. In cross examination however they each accepted that they were aware of vacancies that were available and that translators and translations of documents were made available to them during the consultation process.

31. Ms Sultana accepted in questioning that she had not explored alternative employment outside of the Respondent's business with the claimants but had offered outplacement support through the communications which were placed on notice boards. She explained that their skill sets were taken into account in the redeployment opportunities because it was explained that full training would be provided.

32. The third Claimant stated in answer to questions in tribunal that night hygiene roles were filled on a first come first served basis and that they were already taken but did not explain at what point in the process that was. She also stated that she did not apply when she could because the Respondent would not "guarantee" that she would be successful in getting the role.

33. No notable additions to their evidence were made by the other Claimant's in answer to questions.

34. The Respondent was unable to fill all of the roles in the days shits which were made available to people at risk of redundancy on the night shift.

35. There did not appear to be any factual matters of substance in relation to any of the evidence I heard. All witnesses appeared truthful and honest in their accounts.

36. Each of the Claimant's statements of terms and conditions of work states that their place of work is Thrapston – Produce – Night.

37. The Respondent in its internal processes invited job centre employees to speak to affected employees about alternative employment elsewhere. This was not challenged in evidence other than to suggest that one of the times they attended was not convenient to one of the claimants. However, the claimants made no effort to seek an alternative time or to make alternative arrangements.

Submissions

38. The Claimant's provided a skeleton argument. The Claimant's challenge whether or not there was a redundancy situation, suggesting that there is insufficient evidence to prove to an objective standard a redundancy situation. Their case is that the work was still required, therefore there was no diminution in the requirement for work of a particular kind. It is stated that the decision to pool all of the night shift workers was unfair. It is suggested that this was indirect sex discrimination because it failed to take into account that the claimants worked night shifts to accommodate family commitments although no claim of that nature had been brought by any of the claimants. The claimants assert failures in consultation however these failures are listed as concerning the reasons for redundancy, alternative employment and selection.

39. In closing submissions the claimants stated that that the Respondent had not been reckless in its processes. They noted that the Respondent's size and administrative resources should be taken into account in determining fairness. The timing of individual consultation was stated to be insufficient given the language barriers. Hygiene roles should not have been opened up to the day shift. Jobs were not advertised with training. Alternative job vacancies were often at a distance from where they lived. There was no reminder of the right to find 3rd party employment and take time off. The claimants submitted that they should have, as single mothers, been given preference for the night hygiene roles that were created. The claimants accepted that there was no reason to believe that Mr Peczek had been untruthful in explaining the redundancy situation but his information was insufficient.

40. The Respondent provided a skeleton argument which recites the facts and states that the Respondent is not required to make out an economic or business case (James W Cook v Tipper [1990] IRLR 386. There was no selection, all of the night shift roles were redundant and alternative opportunities available. There was a full consultation process with the trade union and with the claimants who chose redundancy rather than alternative employment.

41. In submissions in tribunal the Respondent submitted that the claimants had misconceived the law; it was not for the tribunal to question the business case. Mr Peczek's account was unchallenged and clearly showed a straightforward redundancy or business re-organisation. The claimants did not state in evidence that they had insufficient time through the consultation process. There is no Equality Act claim and the Respondent was under a duty to treat all employees fairly. None of the claimants made an application for alternative employment. The Claimant's right to time off to seek alternative employment arises after notice is issued and most of the notice period was paid in lieu. The Respondent cannot be held to account concerning offering job opportunities with 3rd parties. Pooling is not an issue because the whole shift closed.

The Law

42. Section 98 of the Employment Rights Act 1996 ("the Act") provides:

43. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show-

a. the reason (or if more than one reason the principal reason) for dismissal

b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
c. A reason falls within this subsection if it is… that the employee is redundant."

44. Redundancy is defined in s 139 of the Act which says that dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for the purpose of which the employee was employed by him either generally or in a particular place or the fact that the requirements of that business for employees to carry out work of a particular kind, again either generally or in the particular place, have ceased or diminished or are expected to cease or diminish permanently or temporarily and for whatever reason. The case of Safeway Stores v Burrell [1997] IRLR 200 fully explains these matters.

45. In Abernethy v Mott Hay and Anderson [1974] IRLR 213 Lord Justice Cairns said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. In ASLEF v Brady [2006] IRLR 576 it was said *"Accordingly, once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so."*

46. Section 98(1)(b) requires the tribunal to consider the reason established by the employer and to decide whether it falls within the category of reasons which could justify the dismissal of an employee – not that employee but an employee – holding the position which that employee held (Dobie v. Burns International Security Service (UK) Ltd [1984] IRLR 329 CA).

47. Whilst it is a matter for the tribunal to determine whether the reason for dismissal was redundancy or another reason, that is a question of whether or not the decision was genuine as opposed to whether or not the decision was a sound and sensible one. There is ample authority from higher courts who have underlined that the obligation upon the employer is not too high, they must show a good commercial reason but a tribunal is not at liberty to investigate the commercial and economic reasons behind the decision (for example see Hollister v National Farmers' Union 1979 ICR 542, CA, and James W Cook and Co (Wivenhoe) Ltd v Tipper and ors 1990 ICR 716, CA). This guidance in important in ensuring that a tribunal does put itself into the position of the employer. An employer is at liberty to close a business or part of a business if it chooses to do so and provided that is genuinely the reason for redundancy, then that is a potentially fair reason for dismissal and the tribunal must go on to consider fairness under Section 98(4) of the Act.

48. Redundancy is a potentially fair reason for redundancy, and if an employer has satisfied the tribunal that on the balance of probabilities the reason, or if more than one the principal reason, for the dismissal was redundancy, the tribunal will then go on to consider whether the dismissal was fair or unfair for the purposes of section 98(4) which:

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the case. Case law has given further guidance on how the question of fairness may be addressed by a tribunal in redundancy cases.

49. In Langston v Cranfield University [1998] IRLR 172 the EAT said we must look at all ways in which a dismissal by reason of redundancy may be unfair. They are (a) inadequate warning, (b) inadequate consultation, (c) unfair selection and (d) insufficient effort to find alternatives.

50. In R v British Coal Corporation ex parte Price [1994] IRLR 72 fair consultation was defined as (a) discussion while the proposals are still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond and (d) conscientious consideration of the response.

51. In British Aerospace v Green [1995] IRLR 433 it was said that provided the employer sets up a selection method which could reasonably be described as fair and applies it without any overt sign of bias the tribunal should find the dismissal fair. On choosing a pool of employees from which to select again the tribunal should only ask whether the choice made is reasonable after the respondent has given adequate thought to the question (see Taymech v Ryan EAT 633/94).

52. In all aspects substantive and procedural we must follow the clear rule in Iceland Frozen Foods v Jones [1982] IRLR 439 (approved in HSBC v Madden [200} IRLR 827) and Sainsburys v Hitt [2003] IRLR 23 that we must not substitute our own view for that of the employer. In UCATT v Brain [1981] IRLR 224, Sir John Donaldson put the matter as follows:

"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, "well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing", because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."

53. A wrongful dismissal by an employee may occur where an employee is dismissed summarily, without notice, in circumstances where summary dismissal is not justifiable, or where the employer acts in breach of a contractual disciplinary procedure. In a case of redundancy or any "no fault" dismissal (where there is no assertion by the Respondent that summary dismissal was justifiable) the question does not concern fairness; it is simply a question of what the terms of the contract were in relation to notice of termination of employment and whether or not the Respondent followed those terms.

Conclusions

54. What was the reason or principal reason for dismissal?

55. I prefer the Respondent's submissions. The claimants misconceive the law concerning the question of what was the reason for dismissal. I remind myself I should not put myself into the position of the employer. Mr Peczek has provided a clear rationale for closing the night shift from the perspective of utilising the day shift capacity and saving the additional expense of a night shift. His evidence has not been challenged. The proposal appeared to me to be quite simple and logical. No other reason for placing the entire night shift at Thrapston has been mentioned in evidence. The Respondent's decision appeared to me to be nothing but genuine. The decision to close the nightshift would amount to a diminution in the Respondent's requirement for work of a particular kind to be undertaken at Thrapston. The claimant's position on this is unsustainable given the fact that taking into account the redeployment activities, whether or not night shift work is capable of amounting to work of a particular kind distinct from the day shift, there was still an overall reduction in the need for employees to undertake the roles in which the claimants were employed. This could justify the claimants' dismissals, subject to the test of fairness.

56. Did the respondent adequately warn and consult the claimants?

57. An announcement to staff was made on 3 February 2020 and five collective consultation meetings took place between 10 February 2020 and 9 March 2020. Collective Q&A sessions with employees took place on three occasions between 18 February and 26 February 2020. Each of the claimants had three consultation meetings between 17 February 2020 and the issuing of notice of redundancy on 12 March 2020. No evidence has been forwarded by any of the claimants that the warning was insufficient or that they did not have the opportunity to discuss their situation with the Respondent. I note that each was afforded the opportunity to appeal their redundancy but none of them exercised that right. The proposal was explained to the claimants early in the process and the claimants had adequate time to make representations as to alternatives to closure of the night shift; no alternatives were put during the internal process and none are put in evidence in tribunal. None of the claimants has suggested anything that they would have said but could not due to insufficient time or opportunity during consultation. All were offered the right to be accompanied. Updates and FAQ's were produced in all three of the claimants first languages. The claimants made no suggestions for the Respondent to consider. In my conclusion, warning and consultation was in all the circumstances of the claimants cases more than adequate.

58. Did the respondent adopt a reasonable selection decision, including its approach to a selection pool?

59. Each of the claimants was contracted to work on the night shift and the night shift was closed. The Respondent was therefore not in position to insist that employees at Thrapston change their contractual shifts from night to day or vice versa. The night and day shift roles were not therefore interchangeable. There was no requirement to pool the different shifts together, even though the duties of the roles on each shift were the same. It was open to the Respondent to determine that it would not, in those circumstances, pool different shifts together. If the Respondent was at liberty to take that decision, and in my conclusion it was, then there is no question of selection criteria or selection processes because the selection was simply down to shift status. The Respondent's approach appears genuine, reasonable and adequately thought out. The claimants' suggestion that

the different shifts should have been pooled together is illogical; in this case that would have meant potentially making day shift colleagues redundant in circumstances where there were more vacancies on day shifts than the Respondent was able to fill from the night shift.

60. The respondent took reasonable steps to find the claimant suitable alternative employment.

61. Each of the claimants has confirmed that the Respondent made available information about vacancies on the day shift, in relation to hygiene roles on the night shift, and other internal vacancies at other sites operated by the Respondent. They were advised that they could apply for the roles. The Claimant's claim that they should have been preferred for the night shift roles because of their family situations but given that there were many more redundancies than night shift opportunities it was not unreasonable for the Respondent to offer to employees at risk of redundancy the opportunity to apply for those roles. The test is one of fairness and although the claimants mention indirect sex discrimination there is no such claim before me nor are their facts upon which one could be made out. The claimants' family circumstances do not, per se, bring an obligation upon the Respondent to favour them in relation to other employees. I have no information concerning how many of the Respondents night shift operatives chose night work because of family commitments, be they male or female. In my conclusion it was not unreasonable in all of the circumstances for the Respondent to invite applications for alternative employment. There is no question that they took adequate steps to make those opportunities clear to each of the claimants. Each of them had discussions with the Respondent in individual consultation about the process for applying for internal vacancies. However, none of them applied and each of them confirmed that they would instead take the redundancy payment. The Respondent did provide the claimants with an opportunity to engage on site with representatives from the job centre concerning external employment opportunities and provided an opportunity for affected employees to receive outplacement support. The Respondent, in my conclusion, took reasonable steps to find the claimants alternative employment.

62. Looking at the case in the round, in all of the above circumstances, in my conclusion dismissal by reason of redundancy was within the range of reasonable responses and the Respondent acted reasonably in treating that as a sufficient reason to dismiss the claimants.

63. Each of the claimants accepted in evidence that they received one weeks' notice of termination of employment and the remainder of their contractual notice as a payment in lieu. Whilst this means that in the absence of a contractual right to make a payment in lieu of notice the claimants claims of wrongful dismissal are well founded, they establish no claim for damages because they accept that they received a full payment in lieu of their balance of outstanding notice.

64. The parties to this claim have waited 6 weeks to receive this judgment with reasons and I apologise for the delay which has been caused by my absence over the holiday period and issues relating to the pandemic which have impacted upon my opportunities to give the case the full consideration it required and was given.

65. I note that the parties to this claim and their representatives have gone to a great deal of effort in preparing their papers and evidence and in particular doing so in a manner that facilitated a smooth hearing through the Cloud Video Platform

which at the time of this hearing was relatively new to the tribunal. For their efforts and professionalism I express my gratitude.

Employment Judge Knowles

Date: 11 January 2021