EMPLOYMENT TRIBUNALS

Claimant: **Mr Andrew Denman**

Respondent: **Hampshire County Council**

Heard at: **Southampton** **On: 4 and 5 November 2020**

Before: **Employment Judge Rayner**

Representation
Claimant: **In Person**
Respondent: **Mr E MacDonald, Counsel**

JUDGMENT

1. This has been an in person hearing with all parties attending.
2. The Claimant was fairly dismissed by the respondent by reason of redundancy.
3. The Claimants claim of unfair dismissal is dismissed.

JUDGMENT having been sent to the parties on 5 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Mr Denman, who is a litigant in person in this case, worked for the Hampshire County Council as an Engineer. He was dismissed following a redundancy process which resulted in his redundancy, and he filed a claim to the Employment Tribunal of unfair dismissal on 11 July 2019.

2. The respondent resisted the claim by an ET3 filed on 5 August 2019.

3. The case was initially listed for a two-day hearing in March 2020 but that hearing was adjourned due to the coronavirus pandemic and the case was relisted for a case management hearing instead.

4. On 19 March 2020 a case management hearing was held before Employment Judge Dawson.

5. The case is one of unfair dismissal and the issues defined by Employment Judge Dawson at the Case management hearing were as follows:

6. Was the claimant's role was redundant? Employment Judge Dawson noted that the claimant accepted that there had been a genuine redundancy situation at his workplace.

7. Was there sufficient group or individual consultation? The claimant accepted that there had been some group consultation before selection pools were identified but believed there should have been more consultation with people whose positions were then subject to ringfencing and more individual consultation.

8. The correct identity of the pool from which candidates for redundancy were selected. The claimant says the respondent did not properly apply its mind to the pool for selection.

9. Whether the respondent should have terminated secondments of staff from a third-party organisation, MACE, instead of making HCC employees including the claimant, redundant.

10. Whether the selection criteria were properly applied to the claimant. The claimant's criticisms of the process include the following:

11. That different interview panels were used for the first and second alternative roles which the claimant asked to be considered for;

12. the claimant says the interview process was unfair, and the unfairness he alleges includes a criticism of the questions he was asked and

13. the claimant alleges that he had been identified as a person to be made redundant at an early stage and therefore the selection process was a sham.

The hearing.

14. I heard evidence from Mr Denman on his own behalf, and from Ms Baker, Miss R Thompson and Mr Wallbridge on behalf of the respondents.

15. The parties produced an agreed bundle of documents and also produced a helpful list of agreed facts. I have set them out below in full, including the references to the page numbers in the agreed bundle of documents, as follows:

    15.1. C was employed by R from 30 March 1998 through to 19 May 2019 within R's Property Services Department. In late 2018 a restructure was undertaken. Under the restructure, the three services of Property, Facilities Management and Workstyle were to be integrated.

    15.2. As part of that restructure, C was placed in a "ring-fence" (i.e. a redundancy pool) of 12 H-grade engineers.

    15.3. R's requirements for employees to carry out work of that particular kind were to reduce under the restructure.

    15.4. There was a genuine redundancy situation within the workplace (albeit that C disputes that his <u>role</u> was redundant, because he says that the need for that work to be done remained).

    15.5. C was given advance notice of the consultation process and staff briefing by e-mail dated 26 October 2018 **[39]** – **[40]**.

    15.6. A 30-day consultation period began on 6 November 2018 at a staff briefing. The slides to that briefing are at **[78] – [94].** C was invited to that briefing (**[39] – [41]**).

    15.7. A Staff Briefing Document was produced and circulated to all members of the department. The Document is at **[42] – [72]** and the e-mail dated 6 November 2018 (by which that Document was circulated) is at **[73] – [75].**

15.8. C met with a member of the leadership team on 21 November 2018 to discuss the restructure.

15.9. On 6 November 2018 C was informed that he had been placed in a ringfence according to his role profile and grade (and hence was at risk of redundancy): **[76] – [77].** That e-mail also signposted him to the "Property Futures Consultation website" which contained relevant documentation (**[75]**).

15.10. C was aware of the consultation document at **[78**] **& seq.,** including the consultation process at **[84]**, the ring-fencing as outlined at **[88]**, and the fact that strategic partners were excluded from the restructure **[89]**.

15.11. During the consultation period, C met with a member of the Senior Leadership Team, Rebecca Thompson, to discuss the restructure. After the meeting he sent an e-mail dated 6 December 2018 (**[97] – [98]**) containing the concerns he had raised during the meeting.

15.12. A formal consultation response was provided on 21 December 2018 (**[99] – [102]**).

15.12.1. An e-mail was sent directly to C confirming that following the consultation he remained in a ringfence at Grade H and asking him to complete a preference form. That e-mail also reiterated that any vacancies that arose within the Property Futures restructure team would be shared with staff in the new year. **[103] – [104]** refer.

15.13. C was unsuccessful at interview for two positions in the ringfence (**[134]).** The other candidates received higher scores: **[112].**

15.14. Ms Baker e-mailed C on 25 January 2019 attaching a list of vacancies at grades G & H within the Property Futures Phase 2 review and attaching an application form – **[142]** and in particular **[146].** C did not respond to this e-mail. C says that he did not respond as there was nothing available that matched his qualifications, experience or expertise.

15.15. C's redeployee status was subsequently confirmed in a meeting on 18 February 2019, and by letter of the same date: **[153] – [154].**

15.16. C was invited to an initial Redeployment Support Meeting scheduled for 5 March 2019 **[204].** That meeting was rearranged to 7 March 2019 due to the HR rep being off sick. At the meeting on 7 March 2019, an action plan was produced (**[206] – [209]**) and the next redeployment support meeting was arranged for 1 April 2019 (albeit that this was later cancelled by C due to pressing personal matters).

15.17. On 1 April 2019 Ms Baker sent C an email drawing his attention to a vacancy for the role of "Group Engineer – Structures **[217] – [218].** She followed this up on 8 April 2019 (**[244] – [246]**) and asked whether he had made the recruitment team aware of his redeployee status.

15.18. Ms Baker sent an e-mail on 12 April 2019 to the recruitment team bringing C to their attention and emphasising that he might be suitable for the role and had redeployee status: **[252]**.

15.19. Ms Baker held a further redeployment support meeting with C after his return to work on 1 May 2019 (WS NB para 30).

15.20. Having been unsuccessful in securing either of those roles at interview, C was given the opportunity to apply for remaining vacancies within the structure. C did not do so. C says he did not do so because there was nothing available that matched his qualifications, experience or expertise.

15.21. C was subsequently dismissed.

Findings of Fact made by ET

16. I make the following findings of fact.

17. Hampshire County Council made a management decision to restructure the property department and in particular to look at the structure and staffing of the engineering department. This was the department the claimant worked in.

18. Miss Thompson gave evidence that the respondent was trying to achieve two things with the restructure and subsequent redundancy process. First, they were aiming to make revenue savings on the 2109 programme of work, and secondly to ensure that the respondent retained the level of resource that

matched the forecast for work overall, taking into account that they could foresee see some reductions on the capital side of business as well.

19. The respondents sought to bring together a number of responsibilities which had previously been carried out across 3 grade 12 engineering roles, and looked at whether it was possible to do the roles differently, in order to achieve the revenue savings.

20. This meant considering whether some tasks could be brought together into one new role, whether some tasks could be done more cost effectively and whether some task could be done by those in more junior roles. Some tasks were now required less frequently, and other areas of work had changed or reduced, so whilst there was a redistribution of some existing tasks, the proposed new roles were not the same as the pre-existing roles since they would not be doing the things previous roles had done and would not necessarily be doing things in the same way.

21. The restructure was done in 2 phases. The first phase was to select the management team. The first stage and first phase was to look at all the senior grade posts.

22. Once the management team had been selected, the second stage involved the new management team taking a period of time within which to set a structure which would form the basis of phase 2.

23. I accept the evidence of Mrs Baker and Mrs Thompson as set out in their witness statements and in their oral evidence, as to the background and reasons for the restructure and I find that the decision to restructure the department, which was made at management level, was one which the respondents were entitled to make.

24. The result of that decision, which was prompted by a need to make costs savings, led to a decision to look at how work was done and how the department might be restructured to make those necessary costs savings.

25. A restructured department was proposed, involving redistribution of some work within the department and a reduction in the number of engineers directly employed within the department.

26. The explanation for the proposed new structure and the proposals regarding the way work was to be covered, was set out in a management proposal.

27. The restructure that the respondent proposed involved three roles within the grade H being replaced by 1. The practical result was that there was a proposed reduction in the number of engineers at grade H from twelve to ten. This is the grade that the claimant was employed at and this therefore affected him. This was explained in the witness statement and oral evidence of Ms Thompson whose evidence I accept in this respect.

28. I conclude that because of the decision to restructure and reduce the number of engineering grade H roles from 12 to 10 there was a potential redundancy situation. The claimant was not selected for redundancy at that point, but there was a genuine redundancy situation which affected him within the meaning of the Employment Rights Act and also within section 139 of that Act (1)(b)(i) as read with subsection (6).

29. The respondent decided that the process that they would follow and which they would consult upon would be to ring-fence all engineers within grade H into a pool and ask the engineers within that pool to express a preference to the 10 new posts. The claimant criticises the selection of the pool but I find that the pool was a reasonable one for the respondents to design and that the design of the pool was made after a conscious and reasonable process at a management level.

30. I find that there was a detailed and fair process of consultation which took place over a number of months. This was described by Mrs Baker in her witness statement and I accept her evidence of the process and the timing of the consultation process.

31. The claimant does not essentially disagree that the process was as set out in that statement but criticises it because he felt that there was a requirement for

earlier discussion with individuals and for more discussion with individuals. I reject this criticism.

32. The process set out by the respondents was communicated to all those who were potentially affected at an early stage and at a stage when the proposals were just that. They were a draft of proposals which were to be consulted upon and which included a proposed structure and a proposed process for dealing with the selection to the new posts and for dealing with any potential redundancies.

33. Managers met with all employees affected, including the claimant, in November 2018 and gave a full and detailed presentation explaining the reasons for the restructure and the proposals and process to be followed for selecting employees to fill the new posts, and therefore for identifying those at risk of redundancy.

34. All employees affected were provided with a detailed set of the proposals including charts and flowcharts which they could access online. This was sent to everybody affected and the claimant accepted that he received it.

35. Employees were given information about several ways that they could engage in consultation. They could provide written responses or suggestions, they could meet with Human Resources, they could meet and discuss matters with their own line managers and indeed with others. The claimant took advantage of the offered consultation. He did meet with human resources and did discuss the matter, on his own evidence, with his own line manager as well as one occasion at least with the Chief Executive, a Mr Cockling.

36. I find that the opportunities for consultation were entirely reasonable and were certainly within the range of reasonable responses open to the respondent. I also find as a matter of fact that the claimant himself engaged actively and proactively with that process and that his engagement with individuals was taken seriously and was listened to.

37. Mr Denman raises a concern about notes being taken at one of the meetings he had with Human Resources. He appears to criticise the process of

consultation because the notes themselves were not available and were mislaid for a short period of time. I find that this criticism is not well founded. There was a meeting, there were notes taken and those notes taken and now produced were a reflection of the discussion and the matters raised by Mr Denman.

38. I find that, not only did Mr Denman take advantage of the various ways of engaging with the process of consultation but that his concerns were taken seriously and considered.

39. I find that following the consultation period, that the respondent did in fact make a number of changes to the proposed restructuring and I have been referred by the respondents, as the claimant was referred in cross examination, to a list of those changes and I accept that they are correct.

40. The process for consultation was one which was fair and open, and which took place at a stage in the entire process in which there was an opportunity for those affected to influence and change the outcome. The fact that Mr Denman was not able to change the outcome in respect of his role does not detract from the fairness or overall reasonableness of the process.

41. The pool that was set ensured that Mr Denman and all other grade H engineers were put in a ring-fence and given the option of identifying any of the new roles which they were interested in. This was the first stage of the selection process for the new posts. All engineers were asked to identify any post which they would like to be considered for by way of expressing a preference. Mr Denman expressed a first and a second preference in respect of two posts, and his colleagues did the same.

42. At the same time, the respondent offered a voluntary redundancy package. From the evidence I understand that at least one person in the ring-fenced pool chose to accept voluntary redundancy. Mr Denman was not interested and did not consider it and therefore he along with the remaining engineers in the pool were then asked to attend at interviews.

43. The process or the criteria by which the respondent proposed to select people to the new vacant posts were to use the expression of interest form as an application form. This part of the process would account for 20% of the marks in the selection process for each post.

44. Performance at the interview and the questions asked at interviews would form the basis of the remaining 80% of the score for each post. This was identified in advance and explained to all the engineers in the ring fence.

45. Mr Denman was interviewed both for his first and his second preference post. In respect of both of those interviews, there was a panel of three interviewers. I find that the panel interviewed all candidates in the same way, using pre-drafted questions with model answers which were asked to each candidate. Each candidate was marked on each question using the same scoring system.

46. There were, on the froms I have seen, some discrepancies between the form and the practice at interview. From the documents before me it is evident that in respect of the interviews the marks were given by each interviewer in respect of the questions as marks out of six and not out of four as suggested on the form. However, from the documents, but I find that on the balance of probabilities the panel did in fact do their marking out of six, and I conclude that this was applied to everybody who interviewed and that there was no difference in the treatment of the candidates.

47. I conclude this on the basis of the score sheets that I have been referred to showing the cumulative results for Mr Denman and other applicants.

48. Mr Denman raises a concern that the questions that he was asked did not play to his strengths in the interview. The questions accounted for eighty percent of the total.

49. There is no evidence before me, however, that the questions were anything other than appropriate to the roles for which the individuals were being interviewed for and it is not suggested otherwise by Mr Denman. His criticism is that the questions did not play to his strengths because he did not have some

of the experiences in respect of managing teams, for example, which he was asked about. In this respect he was therefore less able to give good answers.

50. It is evident from the notes of the interview, that this is what happened. His answers were certainly marked down and criticism of them was made on the face of the interview notes. However, nothing about that process on the basis of the evidence that I have seen was other than fair and reasonable. Mr Denman scored the lowest because he was not as good at the interview as others and because he did not have the relevant experience that others had, and he was therefore unsuccessful in respect of his first preference.

51. Whilst Mr Denman may not have done as well on the questions I find that there was nothing inappropriate or improper in either the questions that were set for the interviews or in the way that they were asked or scored for Mr Denman by the interviewers.

52. In respect of Mr Denman's second preference the panel was made up of three people. I accept that there was a difference between his interview panel and the interview panel of the other person who applied for the post. The difference was in respect of one panel member. The similarity between the panels however, was that two members of the panel remained the same and one member of the panel in both these and all other interviews was consistent.

53. The respondents had specifically arranged for one person to sit on all the interviews in order to ensure that there was consistency across the board. I find that this is what happened.

54. I find that in the interview for the claimant's second preference followed the same process as the first in that the same questions were asked to each candidate; the questions were scored in the same way for each person against a model answer, using a standard marking scheme. The claimant was the person who scored least well and therefore, for that reason he did not get the job.

55. Having been unsuccessful in respect of his two preferences Mr Denman was then placed into a second ring-fence because there were some other jobs in his area of work which were potentially suitable.

56. The respondent had 8 ring fenced sections of staff in all and once all interviews of staff within each of the ring-fenced areas had taken place, there were still some vacant posts to be filled. This was because some staff had opted to take voluntary redundancy amongst other things. The respondent therefore offered the remaining posts to those who had been in the various pools or ring fences, but had not been offered a post. This included the claimant. The posts, which were set out in a list included in the bundle were all part of the property services review. The result was that anyone remaining who had not got role as result of ring fence, such as the claimant, was then able to apply for these roles as a priority.

57. Mr Denman did not criticise the respondent for offering these vacant posts as ring fenced posts, but stated that there was nothing suitable he could apply for. He did not apply for the any of the remaining posts.

58. Mr Denman did not apply for any of these roles because he did not consider that any of them were suitable alternative employment. He was not obliged to do so and the respondent does not suggest that he should have done. Nonetheless the process allowed, should he have wished to do so for him to make such an application on a ring-fenced basis.

59. Having looked at that process I find that it was a fair process and that it was again within the range of reasonable responses in terms of the criteria. I have seen no evidence whatsoever to suggest that the process was a sham because, as is suggested by the claimant, he had been identified for redundancy from early on and I specifically reject this part of the claimant's claim that he had been. The process was a fair one, and it was not a sham.

60. The claimant alleges that the respondent did not take sufficient steps to find suitable alternative employment for him. He makes two criticisms in this respect.

61. The first is that the respondent simply didn't take sufficient active steps to find him suitable alternative employment. I reject this. On the evidence I have seen, the respondents took reasonable steps to identify potential suitable alternative employment to make sure that Mr Denman was aware of any vacancies and to flag up internally to other departments and to managers that Mr Denman was facing redundancy and was looking for work.

62. The second criticism is that the respondent did not decide to effectively bump Mr Denman into another role. His criticism is that the respondents did not but should have decided to dispense with some or all of the services of contractors with MACE and should have created a role for the claimant from the work which they had been doing.

63. Management had made a decision at an early stage that the MACE contract workers and the work which they were doing for the council would not form part of the review or the restructuring of the in house function. The tasks which they were carrying out were specific and additional to those done by in house engineers, and it was decided that they would not be taken into account in the redundancy process.

64. I find that none of the engineering roles of the twelve which were to be reduced to ten were jobs which it was suggested at any stage MACE had been doing or would be doing subsequently.

65. What management had decided to do was to reorganise the way that the engineering function was carried out and had done that by reallocating certain of the work functions to the ten new roles and elsewhere in some circumstances where tasks could be taken on by others who were more junior. There was no suggestion at the time that any part of the claimant's role (and the claimant accepts this) was going to be done or were going to be done by MACE contractors. Effectively what the claimant was suggesting was that he should be allowed to take on work which had been done by contractors. The respondents did not take this suggestion on board and chose not to pursue it.

66. A claimant facing redundancy is entitled to be considered for any vacant role and to be treated fairly in the selection process. A claimant is not entitled to be "bumped" into another role and is not entitled to require an employer to effectively create a new and permanent employed role from ones being done by contractors. It was appropriate for Mr Denman to raise this and he confirms that he did so but there was no obligation on the respondents to comply with his suggestion and they did not do so.

67. There was no suggestion that anyone at MACE was doing the job that the claimant did and in fact the claimant has confirmed before me that his main concern was that the work that he did still needed doing but would be done by other Hampshire County Council staff. This is often the effect of a restructuring where the roles are changed and the tasks reallocated or managed in a different way or new technology introduced in order to make do work more efficiently and with cost savings, which then lead to a reduced head count. This is what the respondent chose to do in this case. They were not required to bump Mr Denman into another role.

The Applicable legal principles

68. The employer has considerable latitude in redundancy selection cases and a tribunal must not overstep the mark and impose its own view of what it would have decided. Where an employer had genuinely applied its mind to the questions of whether to make redundancies at all, and if so, what the pool from which to select those as redundant should be, it will be very difficult for an employee to challenge the redundancy .

69. "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83).

70. Where one of the issues in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy the courts shold apply the range of reasonable responses test to the selection

of the pool from which the redundancies were to be drawn (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

71. There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It will be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem (per Mummery J in Taymech v Ryan EAT/663/94);

72. The Employment Tribunal must consider with care and scrutinise carefully the reasoning of the employer to determine if he has “genuinely applied” his mind to the issue of who should be in the pool for consideration for redundancy; and if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.'

73. Where there is no customary arrangement or agreed procedure to be considered, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. (See Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA.) They need only show that they have applied their minds to the problem and acted from genuine motives.

74. In all cases, the employment tribunal must be satisfied that the employer acted reasonably and, in considering whether this is so, the following factors may be relevant:
    74.1. whether other groups of employees are doing similar work to the group from which selections were made;
    74.2. whether employees’ jobs are interchangeable
    74.3. whether the employee’s inclusion in the unit is consistent with his or her previous position, and
    74.4. whether the selection unit was agreed with any union.

75. As a result, the pool is usually composed of employees doing the same or similar work, and an employer risks a finding of unfairness if it includes in the pool a range of different job functions.

76. The identification of an appropriate pool for selection is an area in which tribunals must take care not to substitute their own view for that of the employer. (see Family Mosaic Housing Association v Badmos EAT 0042/13, for example).

Conclusions

77. I conclude that the respondents had applied their mind to the question of whether or not there was a genuine redundancy situation, and that having decided to restructure and reduce the number of engineers they reached the genuine and reasonable conclusion that redundancies would have to be made.

78. The identification of the pool for selection was again a matter which they considered and the pool which they chose to apply in the case of the claimant was a reasonable one.it was comprised of employees doing the same or similar work, and ensured that all the engineers had an opportunity to apply for all the available posts.

79. The process of consultation was adequate and ensured that Mr Denman had every opportunity to raise his concerns before a final decision about the restructure and the process of selection was made.

80. The selection process its self was a fair one, and was carried out in a fair and impartial manner by the interviewers.

81. Once Mr Denman was unsuccessful and at risk of redundancy, he was given sufficient notice and the respondents took reasonable and proper steps to try to assist him in finding alternative employment.

82. Mr Denman appealed against his selection for redundancy and again I find that the appeal process was one that was carried out in a fair manner and was reasonable.

83. Mr Denman raised an issue in closing which he had not referred to either in his pleaded case, his evidence, his witness statement or in cross examination of the respondents. I have taken into account that Mr Denman is a litigant in

person. He is clearly an intelligent man who was given much thought to this case and has represented himself in an appropriate and helpful manner throughout. Nonetheless he did raise a wholly new issue in closing which was that MACE workers may have subsequently taken on work that he had done. He suggests that this indicates some level of unfairness because, as I understand it, he believes he should have been kept on and their services dispensed with.

84. There is no evidence before me that during the time leading up to Mr Denman being made redundant that anyone at Hampshire County Council, was considering transferring any of the grade H engineering work, including that done previously by Mr Denman, to anybody from MACE or to MACE as a whole. This was not any part of the thinking of restructuring of the engineering function at the time. Whilst there was some suggestion that MACE workers may well cover some holes in the process, I find that the evidence is that the intention throughout the process was that the engineering work would be done differently, but that it would be done by Hampshire County Council employees who were retained following the redundancy process.

85. Nor is there any evidence, other than Mr Denman's belief which is unsupported by witness evidence, his own or otherwise or any documentation to show that this has in fact happened subsequently. Even if it has, the redundancy process here, the one that I am considering is one which I have found to be fair in all respects and reasonable in all the circumstances.

86. What may or may not have happened subsequently does not affect that finding. In any event, I accept the respondents' submission that the matter is not properly before the Employment Tribunal that the respondents' witnesses have not had the opportunity to comment and that it is not appropriate to open up a new issue in closing. I draw that conclusion taking full account of the fact that Mr Denman is a litigant in person.

87. In conclusion therefore, I dismiss the claim brought by Mr Denman that his redundancy dismissal was unfair. I find that there was a genuine redundancy situation and that the respondents had applied their minds to the need for redundancies, to the process by which the selections for redundancy would be

made and the pools into which employees at risk would be placed. The process followed was a fair one, and not a sham, and there was meaningful and sufficient consultation with Mr Denman prior to the selection process starting. The respondents took all reasonable steps to identify suitable alternative employment for Mr Denman, but were unable to find him alternative work, and therefore he was dismissed for redundancy.

88. His dismissal took place after a fully fair process which met all the requirements of statute and the decision to so dismiss him was one which was within the range of reasonable responses.

Employment Judge Rayner

Date: 12 January 2021

Reasons sent to parties: 18 January 2021

FOR THE TRIBUNAL OFFICE

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