RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Coventry**

Respondent: **Barleylands Glassworks Ltd T/A Ashes into Glass**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **4th February 2021**

Before: **Employment Judge Reid**

Representation
Claimant: In person
Respondent: Mr Watts, director

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was video (V) (fully remote). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the Tribunal were as set out below.

JUDGMENT (Reserved)

The Claimant was unfairly dismissed by the Respondent, contrary to s94(1) Employment Rights Act 1996.

Note: a remedy hearing has been booked with the parties for 4th May 2021 at 10 am (see below).

REASONS

Background and claim

1. The Claimant was employed by the Respondent as an administrative assistant from 28th September 2016 to 28th July 2020 when he was dismissed by reason of redundancy, having been furloughed in March 2020.

2. The Claimant's claim was for unfair dismissal in two ways. Firstly he claimed that the Respondent had failed to follow a fair redundancy consultation process. Secondly he claimed that the scoring system using to select him was not fairly applied to him and that had he been scored fairly, he would have at best not been selected at all or at least have scored the same as two other colleagues meaning that the likelihood of being selected would have been significantly reduced because there would have been three of them at the lowest score. The issue about the amount of notice pay referred to in the claim form had been resolved by the parties.

3. The Respondent's case was that it had acted fairly in the urgent and unexpected financial situation it had found itself in from March 2020 and that the Claimant had been uncommunicative with the Respondent during the relevant period. The Respondent said that it had used a skills based assessment to select staff for furlough at the end of March 2020 and used the same assessment again when it came to making the later redundancies in July 2020, no changes to that method being identified as necessary in the light of the Respondent's then situation.

4. The Claimant attended the (video) hearing and gave evidence. Mr Watts who took the decision to dismiss also attended and gave evidence. I heard oral submissions on both sides. There was a bundle to page 274 to which was added a further spreadsheet dated 30th March 2020 (page 275) showing the scores for the packing team (which in practice completed the spreadsheet at page 104 which did not include that department's scores). I identified with the parties that this hearing would cover liability only in the light of the time available but that it would include the issue as to whether there should be a Polkey deduction from the Claimant's compensation if he won his claim. Both parties were already aware of what a Polkey deduction meant. I provisionally booked a ½ day remedy hearing with the parties for 4th May 2021 at 10am (video), if the Claimant won his claim.

5. Although Mr. Watts took the decision to dismiss he did not take the March 2020 furlough decision which was taken by the Claimant's manager Ms Nicholson who completed the March 2020 spreadsheet scores as to who was selected for furlough; this was the scoring system subsequently used again by Mr. Watts when selecting the Claimant for redundancy in July 2020. The Respondent did not put forward Ms Nicholson as a witness and/or obtain a witness statement from her. This meant that there were two significant areas on which the Tribunal did not have her evidence. These were firstly her explanation of (a) how she had scored the Claimant in the March 2020 furlough spreadsheet (given he challenged four areas of his scores) and (b) her explanation as to how it was that she told the Claimant (and two other of his colleagues) on 25th March 2020 that they were the ones selected to be furloughed from the office department, but yet the Respondent's case was that the furlough scoring spreadsheet did not exist until 26th March 2020 after which Mr. Watts asked each department manager to score their team using that spreadsheet. Secondly there was no evidence from her about a conversation the Claimant said he had had with her on 6th July 2020 when he says he asked her for details of the redundancy consultation process (which request was not passed on to Mr. Watts), which the Claimant said she ignored.

6. I have taken into account that from March 2020 onwards the Respondent was faced with an urgent and unexpected financial crisis as part of my consideration of whether the Respondent acted reasonably when it dismissed the Claimant for redundancy. The Respondent is a relatively small employer with (by the time of the claim) 24 employees.

7. The Respondent raised the Claimant's motivation for bringing this claim in Mr. Watts' witness statement (page 245 final para) and said his lack of communication during the furlough period was a deliberate attempt to strengthen a planned Tribunal claim. Whether or not that was the case, the Claimant's motivation is not relevant to the matters the Tribunal has to decide which is whether the Claimant was fairly selected and whether a fair procedure was followed by the Respondent. A lack of co-operation would only be potentially relevant if for example the Claimant failed to attend redundancy consultation meetings/discussions which the Respondent had specifically arranged with him or failed to get in touch when specifically asked to do so so that a meeting/discussion could be booked.

Findings of fact

The selection criteria and scoring of the Claimant

8. I find that the March 2020 furlough selection criteria were re-used when it came to making decisions about the redundancies which took effect in July 2020; at this time 6 employees across different departments were made redundant, all of whom had previously been furloughed in March 2020. Of the 17 staff furloughed in March 2020 11 were not made redundant at this time. I find that re-using the same selection criteria and scores for the redundancy exercise as had been used for the furlough exercise was reasonable based on Mr Watts' oral evidence that when reviewing the situation there was still around a 20% decrease in work across all departments (ie the basic financial situation had not improved) and that he reviewed in around May 2020 when redundancies became a probability that the furlough scoring was still relevant. I find it was generally reasonable for the Respondent to 're-use' the furlough scoring system given its economic situation and the short gap in time between the furlough exercise in March 2020 and when redundancies began to be considered. However it meant that any flaws in the March 2020 scoring system were replicated in the redundancy exercise. In addition it was Ms Nicholson who did the March 2020 scoring and Mr.Watts who took those scores to underpin his decision to dismiss meaning he was unaware of any issues which might need reviewing or reconsidering for the purposes of the redundancy exercise because he took the scores at face value; this was particularly important as the decision was now whether to dismiss and not just to furlough. In the economic and urgent circumstances the Respondent found itself in I find the criteria used were reasonable albeit they were quite broad (which Mr. Watts accepted).

9. I find that the pool for selection in the redundancy exercise in the case of the Claimant was him and the two other colleagues who had been furloughed from the office department (Adam Turner and Steven Mills who had scored 4 in the furlough exercise when the Claimant had scored 3). I find that it was reasonable for the Respondent not to treat the entire furloughed workforce as

one pool because of its need to reduce costs spread across all departments; the decision to deal with each department separately was reasonable. It was also reasonable in the urgent financial situation it was in to have in the pool for each department those staff who had already been furloughed and not include those who had not been furloughed, given the relatively recent furlough decisions based on the Respondent's financial situation.

10. The furlough criteria for the Claimant's department were under the heading 'office' (page 103) across seven broad headings of activity. I find that they were necessarily (given the urgent economic climate) and reasonably quite broad and did not drill down into the detail of an individual's job at the furlough stage. This was reasonable because ultimately it was a decision about who would be furloughed and not at this stage a decision about who would lose their job entirely. It is not for the Respondent to prove that the Claimant did none of these kinds of work at all in order to justify scoring him no points in particular areas.

11. In the absence of any evidence from Ms Nicholson to contradict what the Claimant says he (plus his two other furloughed office department colleagues) was told at a team meeting on 25th March 2020 or explain how he was told at that meeting that he was going to be furloughed with effect from 31st March 2020, two days before Ms Nicholson was sent the scoring spreadsheet by Mr. Watts for completion (page 67), I find that Ms Nicholson had already made her assessment before sent the spreadsheet which was said to be how the difficult decision was to be made. Whilst I accept based on Mr. Watts' oral evidence that the broad furlough selection criteria had been already discussed with the managers, in the absence of any evidence from Ms Nicholson as to how she had already made her decision by 25th March 2020, I find that the spreadsheet she then completed was an after the event rationalisation of a decision already made. That fed into the redundancy selection process as the same scores were used without (based on Mr Watts' oral evidence) Mr. Watts being aware of that discussion on 25th March 2020 or knowing that it might be reasonable to at least revisit those scores.

12. The Claimant challenged his score in four areas: orders, post, social and stock check. The Respondent had accepted that the Claimant did work in these areas. I find based on Mr. Watts oral evidence that the criteria (when used in the redundancy context) were a hybrid consideration of firstly the employee's existing skill set/experience (but not to be equated to their performance) and secondly an assessment of who were the best staff to keep for the remaining jobs going forward. I find based on his oral evidence that Mr Watts was able to give some degree of an explanation as to how the Claimant had been scored on three of the areas the Claimant challenged (social, stock check and orders) but he was not able to do so to such a degree for the criteria 'post'.

13. Of the office department team the Claimant was the only employee who did not score a point under the heading 'post'. In his oral evidence Mr. Watts accepted that dealing with post was part of the Claimant's role but said that Ms Nicholson had not awarded a point for this as she though it was not something the Claimant did regularly. She did not attend to give evidence about how she had concluded this and to address the points raised by the Claimant on this point in paras 11.4 to 11.6 of his witness statement.

14. The Claimant also pointed out that several colleagues (not in the office department) had been awarded a point for 'post' when they did not work in the office, but the Claimant did. Whilst the different departments were reasonably treated separately and so it is not the case that this necessarily had any direct impact on the Claimant's selection, it throws into doubt that the various managers, albeit faced with a difficult and urgent task, were generally applying the relevant criteria fairly within their department, also taking into account the managers were also scoring themselves (in some cases quite highly) in this exercise. Mr Watts accepted that Nickolas Rowe had awarded himself a point for this on a tongue in cheek basis (because he helped with the post once a year around Christmas) and that Wayne Stevens had awarded himself a point for post (and to two of his team George Hayday and James Genes), accepting that the spreadsheet was not that clear as to sticking to the criteria identified for the particular department (albeit the Claimant benefitted from this as getting a point under Accounts, page 104).

15. Under the heading 'social' I find based on Mr. Watt's oral evidence that the Claimant's input to social media (principally via Facebook) was focused on the overseas (US) orders he was particularly responsible for and that as a result of the pandemic the US office was closing and that this part of his role was disappearing. Mr Watts accepted that the Claimant did some UK work but I find that the assessment of this particular criteria was reasonably within the margin of a managerial decision as to how the majority of the Claimant's experience could be used going forward, in the light of the collapse of the particular market he had focused on. This also applied to the criteria 'orders' as that was the focus of the Claimant's order based work, though he did do some work on UK orders too. This is not a finding that the Claimant did no UK based work in these areas (see his witness statement paras 11.7 to 11.11 in which he gives examples of his work) but the decision not to score him points on these two areas was reasonably within the Respondent's management remit at the time given the disappearance of overseas work and it is not for the Tribunal to tell the Respondent how it should make its business based decisions or to require a perfect selection exercise.

16. The final heading was 'stock check' which I find based on Mr Watts' oral evidence meant a full office stock check. Again whilst the Claimant was responsible for certain aspects of stock (see his witness statement para 11.2) this was predominantly a responsibility of Ms Nicholson and Megan Jones (Ms Nicholson's de facto deputy). It is not for the Tribunal to decide whether the third employee in the department to get a point for this was right or not.

17. Taking the above findings of fact into account I find that the only selection criteria not fairly applied to the Claimant in the redundancy exercise was the criteria 'post'. That means he would have scored the same 4 points as his two other colleagues and a selection would have had to be made between the three of them. Based on Mr. Watts' oral evidence, that further exercise would then have involved drilling down into more of the detail of the individuals' experience and the type of work going forward. I assess therefore the chance that the Claimant would have been dismissed in any event as a one in three chance because it is not possible to sensibly construct what would have happened beyond that.

The redundancy process

18. I find generally that the Respondent endeavoured to keep staff informed after the furlough decisions had been made, at a difficult time for the business.

19. On 18th May 2020 the Respondent emailed staff (page 76) setting out various possibilities being considered including voluntary or compulsory redundancies as two possibilities out of 6. The email did not require a response unless the member of staff had questions and they were told that their input would be requested in due course on the option(s) decided upon. The next email asked for volunteers for redundancy (page 78) to contact their manager but did not ask for the staff to get in touch about anything else (except if they needed help with a mortgage holiday application). Mr. Watts in his evidence characterised this second email at page 78 as an email in effect putting staff on notice that they were at risk of redundancy but it did not do that, merely asked staff to volunteer if they wished to. That was an offer open to all staff not just those furloughed which would mean that all staff were being put on notice of possible redundancy, when in practice the pool for selection was only those who had already been furloughed and who were therefore at risk. I therefore find that the Claimant was not specifically notified in this email that he in particular was at risk of redundancy.

20. The third email to the Claimant (page 79) said that if he wanted to discuss the decision to select him/had any questions he should get in touch ie he was told he was now at risk. What this email also did not do was invite him to a meeting/discussion to discuss his redundancy, which meeting could have taken place on the phone due to restrictions on face to face meetings. That would have been the Claimant's opportunity to be told how the scoring had been done and to challenge his scoring or explore any alternatives to redundancy (accepting that those might have been extremely limited in the circumstances). The email put the onus on the Claimant to get in touch in effect if he wanted to but did not require him to do so and it was not for the Claimant to set up a redundancy consultation meeting/discussion. The email did not ask him to get in touch so that a meeting could be arranged or for any other reason. The onus was on the Claimant to get in touch and only if he wanted to discuss it or had any questions.

21. Mr. Watts asked Ms Nicholson to chase the Claimant on 6th July 2020 as he had not been in touch. In the absence of any evidence from Ms Nicholson, I find she called the Claimant (his witness statement para 9) who confirmed he had got the email. The Claimant then called her back to ask when he would receive details of the redundancy process to which her response was that the Respondent would be in touch. I find based on Mr. Watts' oral evidence that this question was not passed on to Mr Watts.

22. Mr Watts then wrote to the Claimant on 24th July 2020 (page 82) confirming that he was being made redundant with effect from 28th July 2020. It did not tell the Claimant that he could appeal that decision. Notwithstanding this, the Claimant raised a grievance on 24th July 2020 (page 83) which was in affect an appeal, so he was not in fact disadvantaged in not having been specifically told in the letter he had a right of appeal because he knew from ACAS that he did (and he expanded on this further on 6th August 2020, page 97). He raised the

fairness of the redundancy process. Mr Watts replied (page 86) saying that the Claimant had been invited to engage by phone or email but had not done so. Whilst I find that the Claimant had not been communicative after getting the email at page 79 on 26th June 2020 he had not been asked to get in touch or told that a meeting needed to be arranged with him, He had been asked to get in touch by phone or email if he wanted to which is not the same thing as it put the onus on him (when the process was the Respondent's responsibility) and only if he wanted to. This was not therefore a case of an employee not responding to a specific request to get in touch to arrange a consultation meeting/discussion or not responding to an invitation to a meeting/discussion or not attending a meeting/discussion.

23. I find that the Respondent arranged an informal meeting (page 105) to discuss the points the Claimant had raised for 13th August 2020 which I find in practice to amount to an appeal hearing even though couched as 'informal' because in practice it was to discuss his by now detailed grounds of appeal dated 6th August 2020. I do not find as alleged by the Claimant (page 106) that the purpose of the meeting was unclear (that was disingenuous given he had written such a detailed appeal) or that it was reasonable to put it off as suggested (page 107) because of an argument they had had some five months previously at a time of high stress for everyone. I find it reasonable for Mr. Watts to then conclude that the meeting was not going to go ahead and that therefore there was in practice no failure by the Respondent to hold an appeal.

24. Whilst the pandemic has some bearing on a redundancy process conducted in such difficult circumstances and taking into account the Respondent is a relatively small employer, a fair redundancy process consultation in all the circumstances could have been conducted by telephone (for meetings/discussions).

Relevant law

25. Redundancy is a fair reason for dismissal (s98(2)(c) Employment Rights Act 1996). The test is whether the dismissal for redundancy is fair in all the circumstances (including the size of the employer) the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissal (s98(4) Employment Rights Act 1996).

26. *Williams v Compair Maxam Ltd 1982 ICR 156* laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors suggested that a reasonable employer might be expected to consider were whether the selection criteria were objectively chosen and fairly applied, whether employees were warned and consulted about the redundancy and whether any alternative work was available.

27. A fair procedure will usually include a warning of provisional selection for redundancy, conformation of the basis for selection, an opportunity to comment

on the selection assessment, consideration of any alternative employment and an opportunity for the employee to raise any other matters they wish to. There should usually then be a right of appeal.

28. It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction) (*Compass Group v Ayodele [2011] IRLR 802*). *Software 200 Limited v Andrews [2000] ICR 82* identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

29. The ACAS Code of Practice (Disciplinary and Grievance Procedures) (2015) does not apply to a redundancy dismissal.

Reasons

30. Taking the above findings of fact into account I conclude that the Claimant's dismissal was unfair because firstly (based on the evidence before me) there was a failure to fairly apply the selection criteria of 'post' to him at the furlough stage (and so replicated in the redundancy exercise) and secondly there was a failure to warn and consult with him, even taking into account the pressures the Respondent was under as a small employer in very difficult economic circumstances; a reasonable consultation could have been quite brief and conducted by telephone and if the Claimant had not wanted to take part in it the Respondent would be likely not have acted unreasonably in proceeding with the redundancy without his input. The onus was not on the Claimant to initiate or organise that consultation process.

31. When factoring in findings as to a one in three chance of still being selected, this means that the Claimant's compensatory award (in principle his net loss of earnings for the period of unemployment) would be reduced by one-third to reflect the finding that he would have had a one third chance of being dismissed in any event applying *Polkey.*

32. The Claimant has received his statutory redundancy payment so will not also be awarded a basic award. The ACAS Code of Practice (Disciplinary and Grievance Procedures)(2015) does not apply to redundancy dismissals so there can be no uplift to compensation for a failure to follow it, as claimed in the current schedule of loss.

33. The Respondent said at this hearing that it would not be arguing a failure to mitigate by the Claimant though I do not treat this as a formal concession at this stage, given the Respondent was not legally represented. A finding that a claimant has failed to mitigate their losses can result in a reduction to their compensatory award.

34. The Claimant has claimed Universal Credit. If the Tribunal decides the compensatory award that benefit will be subject to recoupment. How this (and compensation generally) works is explained at Guidance note 6 in the Presidential Guidance on general case management available at https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

35. If however the parties settle the claim between themselves without a further hearing, the benefit will not be recouped and the parties can take it into account in assessing the Claimant's actual losses.

36. Given the above guidelines, the parties may now be in a position to agree the amount of the compensation payable to the Claimant (using the services of ACAS with whom both sides have been in touch). A remedy hearing has been booked for **4th May 2021 at 10 am (video) (3 hours)** and the parties are to notify the Tribunal by **20th April 2021** whether they still need that remedy hearing (though they can of course still settle after that date). If they do need a further hearing, orders are attached.

Employment Judge Reid

5th February 2021