Case Number 2501782/20 (V)

EMPLOYMENT TRIBUNALS

Claimant **Mr Thomas Clifford Albert Little**

Respondent **Brinkburn Street Brewery Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP) **On 19 January 2021**
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant Mr T. Bearn
For Respondent Dr L.A. Renforth, Director

JUDGMENT

1. The name of the respondent is amended to that shown above.
2. The claim of unfair dismissal is well founded. I award compensation of £3177.60. The Recoupment Regulations apply. The prescribed period is 1 August 2020 to 2 October 2020. The prescribed element is £959.20. The difference between to total award and the prescribed element is £2218.40
3. I make an additional award under s 38 Employment Act 2002 of two weeks pay being £486

REASONS (bold print is my emphasis and italics are quotations)

1. Claims

The claim form ticked the box for unfair dismissal only. The claimant, born on 19 March 1986, started working for the respondent on 23 July 2018. He was a kitchen porter, later promoted to part time 'Commis Chef' paid £243 per week. He was furloughed in March 2020 and dismissed as redundant effective on 31 July 2020.

2. Issues

(i) Was there a redundancy situation?
(ii) Was it the principal reason for dismissal?
(iii) If so, did the respondent act fairly?
(iv) If it acted unfairly procedurally, what are the chances the claimant would have been fairly dismissed had a fair procedure been followed and when?
(v) Is the claimant entitled to an additional award under s 38 Employment Act 2002?

3 The Relevant Law

3.1. Section 98 of the Employment Rights Act 1996 ("the Act") includes:
"(1) 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 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.

(2) A reason falls within this subsection if it is… that the employee is redundant."

3.2. Redundancy is defined in s 139 which includes dismissal shall be taken to be by reason of redundancy if it is wholly **or mainly** attributable to the fact the requirements of the business for employees to carry out work of a particular kind, 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 "for whatever reason" part of the definition comes from s 139(6) and means an employer need not justify objectively its commercial decision to respond to economic circumstances by reducing the number of employees. Safeway Stores-v- Burrell affirmed in Murray-v-Foyle Meats explains how, if there was (a) a dismissal and (b) a "redundancy situation" (shorthand for one of the sets of facts in s 139), the only remaining question under s 98(1) is whether (b) was the reason of if more than one the principal reason for the happening of (a).

3.3. Abernethy-v-Mott Hay and Anderson held the reason for dismissal in any case is a set of facts known to the employer or maybe beliefs held by it which cause it to dismiss the employee. ASLEF-v-Brady involved dismissal on grounds of misconduct. The words of Elias P in that case would read thus, if I substitute for misconduct the words "redundancy situation." "*It does not follow therefore that wherever there is a redundancy situation which could justify dismissal, a Tribunal is bound to find that was indeed the operative reason, .. reason. For example, if the employer makes the redundancy situation an excuse to dismiss an employee .., then the reason for the dismissal – the operative cause – will not be the redundancy situation at all since that is not what brought about the dismissal, even if the redundancy situation in fact merited dismissal. Accordingly, once the employee has put in issue with proper evidence of basis for contending the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing the principal reason is a statutory reason. … On the other hand, the fact the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There is a difference between a reason for dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords."*

3.4. Section 98(4) of the Act says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) shall be determined in accordance with equity and the substantial merits of the case."

3.5. Dismissal by reason of redundancy may be unfair if there was (a) inadequate warning and consultation (b) unfair selection (c) insufficient effort to find alternatives. R-v-British Coal Corporation ex parte Price defined fair consultation as (a) discussion while 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. The main case on fair selection is British Aerospace-v-Green which held provided an employer sets up a selection method which can reasonably be described as fair and applies it without any overt sign of bias which would mar its fairness, it will have done what the law requires. Taymech-v-Ryan says in choosing pools of employees from which to select an employer has a broad measure of discretion and the important point is that it must give some thought to the matter. In considering what, if any, alternative

employment to offer, an employer should not assume an employee will not accept a reduction in status or pay (Avonmouth Construction-v-Shipway).

2.6. Selection criteria which are objective are preferable to those which are subjective, but in Samsung Electronics U K Ltd-v-Monte De Cruz EAT/0039/11/DM Underhill P. said *"Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement*

2.8.In Polkey-v-AE Dayton Lord Bridge of Harwich said :
"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:
…
(c) that he was redundant.
But an employer having prima facie grounds to dismiss .. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus … in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select redundancy and take such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness .. may be satisfied.

3.14. If the dismissal was unfair procedurally Scope-v-Thornett held though speculation is involved the Tribunal should try to predict what would have happened. The Employment Appeal Tribunal **(**EAT) Judgment in Software 2000 Limited-v-Andrews 2007 ICR 825, is still an excellent summary of the principles ,if amended to reflect changes in the law to read as follows
1. The evidence from the employer may be so unreliable the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
2.The employer may show that if fair procedures had been complied with, the dismissal would have occurred when it did in any event.
3.The Tribunal may decide there was a chance of dismissal … in which case compensation should be reduced.
4.The Tribunal may decide the employment would have been continued but only for a limited period.
5.The Tribunal may decide the employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant that it can effectively be ignored.

3.15. Section 38 of the Employment Act 2002 empowers me to increase awards if the employer has not, when the proceedings commenced, complied with s 1 of the Act by two or four weeks pay . I normally choose the former if the only omission is to give the employee a copy.

4. Findings of Fact

4.1. I heard the claimant, Dr Lee Andrew Renforth and had a small document bundle. Dr Renforth **is** Managing Director of the company named in the heading, a micro brewery with a bar and kitchen in the Ouseburn district of Newcastle. It is a small company with under 25 staff. Its last filed accounts show it had net liabilities before the pandemic started and was anticipating having to take measures to survive.

4.2. Dr Renforth describes the claimant as a part-time Trainee Assistant Chef, otherwise called a Commis Chef. After closure of the bar and kitchen during the first Covid-19 lockdown, there was a major threat to the business. On 30 March 2020 an email told the claimant he would be furloughed and receive 80% of his usual wage. He was to confirm he agreed, told not to submit questions and referred www.gov.uk for answers.

4.3. The email added, due to poor cash flow and sales, and the respondent still not being sure when funding would become available there may be a delay in initial payment. Once the funding was through, it would back date any monies owed. After this initial period, it should go back to payment every 2 weeks. It added

I cannot guarantee how long staff will be furloughed & I may have to lay staff off if this situation changes.

Once Brinkburn is permitted to re-open as normal, we will be in unchartered territory in way of revenue and customer level. You may not be guaranteed employment when we re-open, but let's stay optimistic at this stage.

Stay safe and I hope to see you soon for a beer when this is all over.

4.4. The claimant says he was responsible for specific sections of food preparation/service, day-to-day cleaning and maintenance of the kitchen and equipment. On limited occasions, he may have been the only Chef in the kitchen. He was able to prepare the majority of dishes on the menu unsupervised. His line managers were either the Head Chef or Sous-Chef. He was never the subject of any formal disciplinary action. He received a text from the Head Chef, who was a friend, on 23 June, saying there were no shifts at the time but the business was re-opening on 4 July, downstairs and outside with the burger menu only.

4.5. By the beginning of July Dr Renforth had decided to make 8 of 24 staff redundant. He decided which people were affected, and emails were sent out on 13 July. The claimant's read
After due consideration and the company's need to make some redundancies and applying the organisation's redundancy selection criteria, I am very sorry to confirm that you have been selected for redundancy. Your job role is no longer needed due to the downturn in business and uncertain times moving forward.
Unfortunately, we have not been able to identify any suitable alternative work for you.

Notice to end employment

You are entitled to 1 weeks' notice to end your employment with Brinkburn Street Brewery Ltd, based on your length of service. Your notice period begins on 17/07/20.
We do not require you to work for us during your notice period. You are entitled to take a reasonable amount of paid time off work to look for alternative employment and attend job interviews. Your last day of employment will be 24/07/20.

Untaken annual leave

Any annual leave you have accrued but have not taken at the end of your employment will be added to your final pay. In your case this will be 105.00 hours.

Entitlement to redundancy pay

Due to your length of service, you are not entitled to a statutory redundancy payment.
I know this may be an upsetting and worrying time for you. I would encourage you to accept our offer of any help we can give you in assisting your search for new employment, including a suitable reference. Please contact Claire Wheatley or James Richardson for this.
Please accept my best wishes for your future.
Yours sincerely,
L Renforth

4.6. Dr Renforth believed as long as notice was given before the claimant had two years employment, no redundancy pay wasdue. The claimant pointed out this was not the case, making him due to a redundancy payment. Emails in the bundle in July 2020 between the claimant and James Richardson and/or Claire Wheatley for the respondent show this was resolved.

4.7. Dr Renforth says choosing who to make redundant was not done on a personal basis. Actual positions were removed which could no longer be maintained financially. The redundancies were not made lightly but to enable it to carry on and keep the rest of the workforce employed. The hospitality industry is still seriously damaged in this pandemic and businesses nationally are struggling to stay afloat. He says the respondent is no different. **I accept that.**

4.8. I also accept dispensing with the part-time Trainee Assistant Chef role was reasonable, the claimant was the only one so no "selection" as such was needed. Despite the total absence of consultation I may just have been persuaded this fell into one of the exceptional circumstances spoken of by Lord Bridge in Polkey **until** Dr Renforth said a female kitchen porter named Rae Carter, who had nine months less service than the claimant, was brought back from furlough and, on the day after the claimant's employment ended, another kitchen porter named Placido was recruited. Both are still employed and work between them 20 hours a week on average. His statement had suggested the claimant was not offered the kitchen porter role as an employee in that job at the time was also made redundant as that role was **absorbed by the chefs themselves**. I agree with the claimant that is not credible.

4.9. On 18 August a job advert was put on Facebook seeking new staff - bar and chef roles were advertised. When the claimant asked about this it was said the respondent did not know whether it would get the licence for the upstairs space, but the licence application would have been in and there would have been an anticipation of an outcome positive or negative. Also, when these jobs were advertised, there was no offer to any staff made redundant to be re-employed.

4.10. Dr Renforth said after the bar and kitchen were allowed to reopen and the government introduced the Eat Out to Help Out Scheme in August, he required another fully trained chef to temporarily to run the kitchen alone and this was not a suitable for a trainee chef. **I accept that too.**This was the reason for the job advert of 18 August. He employed a chef for three months to cover this, and when he was not required any longer due to next closure under Tier 4 he was dismissed. He added no chef was dismissed for reasons of conduct. In cross examination he deviated somewhat on that point.

4.11. The claimant was prepared to go back to being a kitchen porter, and in fact a new kitchen porter was hired the day after his dismissal. When I asked Dr Renforth to explain his thinking on this he began to raise the claimant's performance, timekeeping and sick absence. The claimant has a neurological condition which results periodically in cluster headaches and has medical evidence to corroborate that. Dr Renforth put to him his lateness and absences had more to do with "lifestyle" and accused him of coming to work with a hangover at times. The claimant " took the wind out of Dr Renforth's sails" by accepting that sometimes had happened as it had with other members of staff . Dr Renforth also put it to him his heart was never in the job as his real

ambition was to do as he now has done. On 11 September he received an unconditional offer for a Higher Education Course in illustration and design, at the University of Sunderland from September 2020 for which he has a student loan of £9,000 per academic year.

4.12. The claimant's case is simple. Decisions were taken by the company with no transparency and inadequate reasoning stating only he was being made redundant according to the company's redundancy selection criteria, which I now know did not exist. There was no consultation and no discussion of alternative employment. Dismissing him was an arbitrary decision based on nothing more than who Dr Renforth thought should be made redundant. Contributing factors may have included Dr Renforth's belief that with less than two years service there would be no redundancy payment due,no right not to be unfairly dismissed and the business were not going to have to pay the NI and PAYE for staff on the job retention scheme. The claimant was not told he would be able to appeal the dismissal in the redundancy letter

4.13. In addition he has never received a written statement of terms and conditions of employment. The reason he asked to see a copy was to determine when the company believed his start date to be. On 23 July Mr Richardson wrote "*I don't have a signed one here for you, but have attached a blank standard one for you*" and " *If there is any way I can help in your search for a new job, please let me know. I understand that this will be a worrying time for you. I work for quite a few bar/kitchen venues and I will keep my ears open for you*"

4.14. The claimant made initial efforts to find other employment and received two payments of Universal Credit before starting the university course. He was also signed off work for a period after his redundancy due to cluster headaches. I cannot criticise him for not looking harder for work because there is no chance of him finding any at present. I do reject his submission he may not have explored higher education had he not been dismissed. First, I share Dr Renforth's belief it is what he really wants to do and, though he may have remained in the hospitality sector had he been en route to a qualified chef, a job as kitchen porter would not have tempted him.

5 Conclusions and Remedy

5.1. There was clearly a redundancy situation, and it was the principal reason for dismissal . Sir Patrick Elias in ASLEF-v-Brady spoke of *An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords."* The matters Dr Renforth raised about the claimant fall into this category.

5.2. The lack of a selection procedure in itself I would overlook. However the total absence of warning or consultation renders the dismissal unfair because it led to an obvious solution to being missed. At least one kitchen porter was needed. Rae Carter was brought back from furlough part time and , one day after the claimant's employment ended Placido was taken on . Between them they worked 20 hours per week and continue to do so. The claimant could and would have accepted an offer to do what Placido was taken on to do The requirement for flexibility in my view would have meant he could not continue at 30 hours in any capacity alongside his studies but may have done 10 hours for some time at the national minimum wage then £8.72 per hour

5.3. There is no claim for a basic award as a redundancy payment has been received.

5.4. What are the chances the claimant would have been fairly dismissed had a fair procedure been followed and when? He applied for universal credit and received two payments. He began his higher education course and have received first instalment of £3,000, of a student loan amount of £9,000, on 2 October 2020, which will be paid in three payments over the year.

5.5. The requirement for flexibility in my view would have meant he could not continue at 30 hours in any capacity but may have done 10 hours for some time at the national minimum wage then £8.72 per hour. For 8 weeks from termination to receiving the student loan he claims £1,944 I cannot accept that . Had a fair procedure been followed, he would inevitably have lost his job as a Commis Chef when he did but should have been offered the role which went to Placido. He would not have seen that as a career . However, like many in higher education he would have accepted the job while studying and topped up his student loan by £87.20 per week. On the "open market" I can accept he would not have found another job like that, but had he been offered one by the respondent he would have clung onto it. Predicting the future in these times is especially hard but my best estimate is he will either find some job to top up his loan in the next 10 weeks or would have lost the job with the respondent if the decline in the hospitality sector continues.

5.6. His loss of statutory rights claim at £500 is too high for the wage he had of £238 . I award £300. His loss to date is 23 weeks x £87.20 = £2005.60 .10 weeks future loss = £ 872 For no written terms of employment provided within 2 months of being employed I increase his award by 2 weeks of his former wages £486 His claim for a 25% uplift for failure to follow ACAS procedure by not offering an appeal , fails because it does not apply for redundancy

5.7.During the Covid19 pandemic, some Judges have to work from home without printing facilities and typing themselves as I am today. This can lead to typing errors for which I can only apologise.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 19 January 2021