Case No: 2206685/2020

EMPLOYMENT TRIBUNALS

Claimant: **Ms C Guarino**

Respondent: **International Currency Exchange Ltd**

Heard via Cloud Video Platform **On:** **16 and 17 February 2021**

Before: Employment Judge Davidson

Representation
Claimant: in person
Respondent: Ms L Hatch, Counsel

JUDGMENT

The claimant's complaint of unfair dismissal succeeds. If the parties are unable to reach agreement on remedy, the issue of remedy will be heard on 12 April 2021.

Employment Judge Davidson

Date 19 February 2021

JUDGMENT SENT TO THE PARTIES ON

22 February 2021

.....
FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.

2. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties other than not all the witnesses
had access to the bundle of documents. This was resolved by the Employment Judge showing the relevant documents to the witnesses by using the 'share screen' function.

3. The participants were told that it was an offence to record the proceedings.

4. Evidence was heard from three witnesses on behalf of the respondent and three witnesses (including the claimant) on behalf of the claimant.

5. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

REASONS

Issues

1. The claim arises following the dismissal of the claimant by reason of redundancy. The issues to be determined were limited to the following:

   1.1. Did the respondent adopt fair criteria when selecting for redundancy?
   1.2. Did the respondent apply those criteria fairly?

Evidence

2. The tribunal heard evidence from Amran Khan (Area Manager), Gillian Pratt (HR Director) and Louis Bridger (UK General Manager) on behalf of the respondent and from the claimant, Luca Cignitti (formerly Foreign Exchange Sales Consultant and RMT representative) and Danny Pender (formerly Foreign Exchange Sales Consultant). The respondent submitted a witness statement from Maggie Townsend (Head of ICE Events) but she did not attend the hearing. The tribunal also had a bundle of documents running to some 190 pages.

Facts

3. The tribunal found the following facts on the balance of probabilities:

   3.1. The respondent is a limited company which operates Bureau de Change branches at stations, airports and high streets including St Pancras station, the Eurostar terminus.

   3.2. The claimant started working for the respondent in July 2003 as a Foreign Exchange Sales Consultant and was based at St Pancras.

   3.3. In November 2019, the respondent observed that the claimant had been absent on 6.5 days and held a welfare meeting with her. At this meeting she informed the respondent that she had a degenerative back problem for which she was receiving chiropractic treatment and that this had been exacerbated by having to move heavy coin bags. Mr Khan agreed that she would not have to move coin bags in future.

3.4. In March 2020, the St Pancras branch closed as part of the national lockdown due to the Coronavirus pandemic and staff were put in the furlough scheme.

3.5. In June 2020, the respondent decided to make a number of redundancies due to the economic downturn resulting from the pandemic. There was a pool of 20 Sales Consultants, of which 10 would be retained. One person took voluntary redundancy, so the selection was 9 redundancies out of 19.

3.6. The respondent undertook collective consultation with the RMT union. The claimant had recently been appointed as a staff union representative and she attended these meetings with Steve Smart of the RMT.

3.7. The respondent identified four section criteria, namely meeting targets, Average Transaction Value (ATV), Sickness (also referred to as attendance) and Disciplinary Record. The respondent scored these criteria according to set ratings and gave weight to them as follows: Targets x 5; ATV x 4; Sickness x 3 and Disciplinary x 2.

3.8. The criteria were applied to each member of the pool and a table was put together showing the comparative scores. Those members of the pool who had not worked for the entire year had their scores increased by the relevant pro-rata amount to give them a score which could be compared with the rest of the pool.

3.9. In response to a representation by the claimant as part of the collective consultation process regarding a possible unfairness in comparing performance statistics due to some employees regularly working shifts which were less likely to have good results (or vice versa), the respondent identified that taking a period of a year as the assessment period would average out any differences which might be caused by this.

3.10. One member of the pool (identified as KW) had joined the respondent on 27 January 2020. For the reference period of the selection criteria assessment, she had been employed for one month, of which the first week was spent being trained on the job by a supervisor and four days were spent on external training.

3.11. Of the 19 employees in the pool, the number of transactions used for the selection criteria ranged from 401 (carried out by KW) to 8,360. The average was 4,280 and the median was 6,248. The claimant was assessed on 6,429 transactions. The two highest scores in Targets, which is weighted x 5, were significant outliers, being 22.0 with the next highest being 17.6. They belonged to employees who had been assessed on 401 and 468 transactions (also outlying amounts), one of whom was KW.

3.12. Once the data had been inputted into the spreadsheet, the claimant was ranked 11th out of 19. KW scored the highest. Only the top 10 avoided redundancy and therefore the claimant was identified as not having scored sufficiently and the respondent began individual consultation with her. She had an opportunity to make representations and she confirmed she agreed with her scores although she disagreed with the selection criteria, for the reasons she had identified during the collective consultation meetings. The respondent did not accept that the selection criteria were unfair and confirmed the decision to terminate her employment by reason of redundancy. She was

given 12 weeks' notice (on furlough) and her employment terminated on 15 October 2020.

3.13. She was given an opportunity to appeal, which she took up and Mr Bridger heard her appeal on 12 August 2020. She repeated her representations regarding the selection criteria, particularly in relation to the ATV and sickness. He looked into her scores and considered what the position would be if ATV scores were disregarded and concluded that she would still have been selected. He did not do the same exercise for sickness. He explained that the selection criteria were objective and could not satisfy everyone. He rejected her appeal.

3.14. Later in 2020, the respondent dismissed the remaining Sales Consultants due to redundancy as the branch remained closed due to Coronavirus lockdown restrictions.

Relevant Law

4. The relevant law is that one of the elements required for a dismissal by reason of redundancy not to be unfair is that the selection criteria must be fair and must be applied fairly.

Determination of the Issues

5. I determine the issues as follows:

Were the selection criteria fair?

5.1. It is not for me to decide what I would have adopted as selection criteria – that choice is a matter for the respondent. However, the criteria should be objective and measurable so far as possible.

5.2. I find that the selection criteria were objective and objectively measurable and the weight given to each of the criteria was a matter for the respondent, with which I take no issue.

5.3. The claimant queried the ATV measure but she was not disadvantaged by her score in this (being ranked 4th) and does not now rely on it as a ground of unfairness. However, I note that the respondent's answer when questioned on the fairness of this criteria given varying shift patterns was that these things even themselves out across a year.

5.4. The claimant does question the attendance criterion on the basis that she has a back condition and this should have been taken into account, particularly as one absence was due to an injury sustained at work. It is well established that attendance can be a valid measure and it is objectively measurable. It may be surprising that a short genuine absence of 5 days should be regarded as worse than, say, a series of longer absences which are certified. Ms Pratt said that it was the frequency of absences, not the number of days absence but this is not borne out by the documentation. However, it is not for me to decide how I would measure absence and I accept that the respondent was entitled to use this measure. A respondent is entitled to include absences even if they are for work injuries but, in any event, the claimant's score for Attendance would not have been affected if this absence had been disregarded.

5.5. I also find that the respondent was entitled to disregard length of service ('last in first out') although it an established objective measure which can be taken as part of a wider range of criteria to avoid having the discriminatory effect identified by the respondent. In any event, there is an argument that rewarding loyalty can be justified as it is a legitimate end. However, the respondent chose not to use that criterion, which was its prerogative.

5.6. I therefore find no unfairness in the selection criteria adopted by the respondent.

Were the selection criteria applied fairly?

5.7. The period over which the assessment was made was 1 March 2019 to 28 February 2020 (except in the case of performance, where the period started in April 2019).

5.8. The respondent maintains the view that all employees should be assessed in the same way, regardless of how long they have been at work in the relevant period. The risk of doing this slavishly is that, while it might be regarded as a fair adjustment not to disadvantage some, it can have an unfair effect on others.

5.9. It is legitimate for a tribunal to determine whether the length of assessment period is reasonable in the application of selection criteria, as a short assessment period may not show the true picture. Most of the authorities on this point approach it from the perspective of an employee being disadvantaged by a short period. In this case, it seems to me that one (or more) of the employees in the selection pool were unfairly advantaged, with the corollary that others were unfairly disadvantaged. There is authority (albeit at Employment Tribunal level so persuasive only) in *Fleming v Leyland Vehicles Ltd ET Case No.S/1561/84* where a six month period was regarded as arbitrary and disadvantaged a long serving employee for redundancy while shorter-serving employees who had avoided sickness over that period were retained.

5.10. One of the employees in the pool, KW, was still in her probationary period during the assessment period and her assessable solo work period was approximately three weeks. Her performance figures were significantly higher than the rest of the pool and she had perfect scores for attendance and disciplinary.

5.11. In this case, I find that the unfairness is not in the assessment period of one year but in the way the application of it to KW without any consideration to whether a fair outcome was reached given her extremely short period of work. Mr Bridger said that employees with very short service were simply 'let go' and did not form part of the selection pool but he was unable to say what the cut-off point was, other than to say that KW was not dealt with in that way. It does, however, show that the respondent acknowledged some difference between short serving employees and those with longer service.

5.12. It is clear that by assessing KW over such a short period, it was possible that a distorted outcome would be the result, particularly as it was the respondent's position that any variations as a result of which branch and what shift an employee works would be evened out over the assessment period of a year. No account appears to have been taken of the fact that KW's figures would not have been evened out over the year. Leon Bridger gave evidence that he was satisfied that 401 transactions was a sufficiently significant number on which to make an assessment. However, he was unable to say whether any of these 401 transactions were done with a supervisor and whether KW was being given

credit for performance which was, at best, shared. Her score for performance (based on a single month but multiplied by the total number of months) was a significant outlier among the other scores and this should have resulted in an enquiry by the respondent to ensure no unfairness had ensued. I find that this was not a level playing field, particularly as so much weight was given to this element.

5.13. In any event, my view is that 401 transactions where the average is over 4,000 and the median is over 6,000 is not a fair application of the selection criteria, particularly when taken with a period of solo work of, say three weeks, compared to other employees working a full year.

5.14. It is not for me to re-score the matrix but I note that the claimant was in 11th place and therefore the highest scoring of those made redundant. She would only have to move up one place to have avoided redundancy.

5.15. I therefore find her dismissal unfair on the basis of the application of the selection criteria.

5.16. I accept that she would have been made redundant in the next wave of dismissals.

Remedy

6. If the parties are unable to agree remedy, a hearing will take place on 12 April 2021 to consider the issue. Any witness statements or documents which a party wishes to rely on at that hearing must be sent to the other party by 29 March 2021.

Employment Judge Davidson

Date 19 February 2021