EMPLOYMENT TRIBUNALS

Claimant: Ms K Kelly

Respondent: Skanska UK PLC

London Central Region by CVP on 17 and 18 February 2021

Before: Mr J S Burns

Representation
Claimant: In person
Respondent: Mr M Humphreys (Counsel)

REASONS FOR THE JUDGMENT DATED 18/2/2021

Introduction

1. This was a claim of unfair dismissal.
2. The Claimant was acting in person and it was unclear from her ET1 and witness statement whether she was claiming unfair constructive dismissal based on bullying or just an unfair redundancy dismissal. I discussed the matter with her at the beginning of the hearing and she confirmed that she was not claiming the former but only the latter.
3. I raised at the beginning of the hearing a further quasi preliminary issue namely whether the Claimant had resigned or been dismissed. If she simply resigned, then, in the absence of an unfair constructive dismissal claim, she could not claim unfair dismissal. I referred the parties to Martin v Glynwed Distribution Ltd [1983] ICR 511, CA. in which Sir John Donaldson MR said as follows: "*Whatever the respective actions of the employer and the employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who really terminated the contract of employment?' If the answer is the employer, there was a dismissal*". Mr Humphreys was good enough to refer me to Optare Group v TGWU 2007 IRLR 931 in which, in a collective redundancy case, resigning volunteers count towards the numbers with whom the employer has to consult, because ultimately it is the employer who is bringing the employment to an end, even if they resign in response. In the light of these authorities, after hearing the evidence and submissions, I decided the point in favour of the Claimant because she was told she was being made redundant with effect from 30/3/20 and encouraged to get another job outside the Respondent. She did so before the end of her consultation period but the new employer needed her to start immediately so the Claimant asked if she could cut her redundancy consultation short and this was agreed so she left with a redundancy payment and pay in lieu of notice on 19/3/2020. This was a case in which the Respondent controlled and caused the termination although the Claimant chose the exact timing. In these circumstances she is to be treated as having been dismissed for redundancy.

4. I heard evidence from the Respondent's witnesses Ms F Lynch, (the Respondent's Head of Document Control), and then from Ms S Ravalia, (an Associate HR business Partner), and then from the Claimant.
5. Where the evidence of the Claimant differed from that of the Respondents, I preferred that of the Claimant, because of the straightforward manner in which she gave it, and because what she stated in supported by the contemporary documents.
6. The documents were in a joint bundle. The hearing was conducted by CVP because of the Covid 219 epidemic. There were no technical problems.

Findings of Fact

7. The Claimant was employed by the Respondent from 9 May 2002 until the termination of her employment on the grounds of redundancy on 19 March 2020.
8. At the time of her redundancy, the Claimant's role was that of a 'Senior Document Controller' (SDC) on the Respondent's project at 60 London Wall. The Respondent is a project development and construction contractor that provides services across the UK and employs approximately 5,400 employees across its various sites. The Respondent is part of the Skanska group which delivers construction expertise globally.
9. The document control work at 60 London Wall diminished in late 2019.
10. While the Claimant was called and paid as a SDC, and I have noted what the Respondent has stated about the difference between SDC and Document Controller (DC) work, I prefer the Claimant's evidence that in practice there was a very substantial, if not complete, overlap between the Claimant's work and the ordinary DC work. The Claimant's SDC title was really a result of her long service rather than any clear distinction in work.
11. For the past many years, when the Claimant finished her work on one project, she would move onto the next one. In late 2019 the Respondent was working on the tender for a new project at premises called Blossom Street. Having regard to the previous pattern over many years, this would have been the natural next project for the Claimant to work on. Instead in November 2019, when the Claimant's work on 60 London Wall had already diminished, Ms Lynch, without asking the Claimant whether she could take up the DC work required at Blossom Street, instead recruited two DCs into the Blossom Street project, namely Paula, a former receptionist and protégé of Ms Lynch, who started in November 2019, and a second DC who started in December 2019 but departed in January 2020, leaving an unmet need for DC work at Blossom Street.
12. The Claimant was absent from work with health problems from 6 January to 18 February 2020.
13. When she returned on 18 February she was told by Ms Lynch and Ms Ravalia that she was at risk of redundancy. She immediately went to look for internal job vacancies and found that the Respondent was advertising for a DC. She went straight away to Ms Lynch to ask if she could take the role but Ms Lynch said that the advertised role was unsuitable for the Claimant because it required "*Bim level 2 experience*" which the Claimant did not have. There was another DC role available which Ms Lynch said was suitable for a graduate only. The Claimant pointed out that the adverts she had seen did not mention these requirements. However Ms Lynch explained that the Claimant was regarded as unsuitable for the DC roles which were being advertised.
14. I asked during the hearing for evidence that the DC roles filled or advertised at this time included these requirements but none was produced. The documents in the bundle which refer to the vacancies (such as page 85, and 105 to 108) do not mention these requirements. It is not shown that the persons such as Paula or anyone else who was

recruited at DC level around this time, in fact met these requirements. I find that they were not in fact mandatory requirements.

15. The roles which were being advertised were for DCs to do work which the Claimant could have done and which she should have been given instead of making her redundant. The DC role, which was still being advertised when the Claimant was dismissed, was for a maximum starting salary of £38000 which was comparatively similar to the Claimant's salary of £42600.
16. There was a meeting between the Claimant, Ms Lynch and Ms Ravalia on 22/2/20 and another on 27/2/20. The note of the latter meeting is at page 114, which said to have been written by Ms Ravalia, containing details of a claimed discussion in which Ms Lynch and Ms Ravalia invited and encouraged the Claimant to apply for any DC role but the Claimant declined, saying that such a role would not meet her skill level and she would be willing only to take a role at the same or higher level as SDC. I do not accept that this document (114) is an accurate record of the meeting for a number of reasons –

    - Firstly, it is plain from the fact that the Respondent was filling and advertising for new DCs to do work which the Claimant could and normally would have taken on and at the same time starting a redundancy process against the Claimant, that the Respondent did not want the Claimant to do the work. If the Respondent wanted the Claimant to fill the DC role, it would have asked her rather than acting as it did. The suggestion that in the meeting Ms Lynch and Ms Ravalia invited and encouraged the Claimant to apply for any DC role, is inconsistent with the rest of their behaviour.
    - Secondly, the claimed note was not shown or disclosed to the Claimant at the time, contrary to good HR practice, but were seen by the Claimant for the first time when the Respondent gave disclosure of it shortly before the Tribunal hearing, nearly a year after the meeting.
    - Thirdly, immediately after the meeting Ms Lynch sent a letter dated 27/2/2020, probably drafted or co-authored by Ms Ravalia, to the Claimant which expressly refers to the discussion which had taken place at the meeting on the subject of potential alternative employment, but it makes no reference whatsoever to any discussion about the vacant DC role or the Claimant saying she did not want to apply for them.
    - Fourthly, the Claimant did apply unsuccessfully for other alternative jobs, within the Respondent but outside her natural field of SDC, which indicates that she was anxious to retain her employment with the Respondent and make significant adjustments for this purpose.
    - Fifthly, the Claimant terminated the redundancy process and started alternative work through a third party agency on 19 March 2020 working freelance without any job security and minimal pension at an hourly rate and without paid holidays, and, at first at least, for less than she would have been able to earn if she had applied successfully for the DC role advertised internally by the Respondent. If the Claimant had been given a genuine chance to apply for the internal DC job naturally she would have done so.
    - Sixthly, on18 March 2020 the Claimant sent an email page 139 to Ms Lynch which was copied to Ms Ravalia stating *"having seen todays vacancy list, I see that the position of DC is still being advertised. It is a shame that I am unable to take up this role in order to stop my redundancy and enable me to continue my employment with Skansa*." It is possible to interpret this in more than one way. The Respondent's submission is that the Claimant was expressing regret that for her own reasons she was unable to accept a lower paid role. I reject this submission. If the Claimant had discounted and was not interested in the DC role she would not have had any reason to mention it. By far the most natural interpretation is that the Claimant, even then, wished to be allowed to take

that role and was expressing her regret that she had been told by Ms Lynch that there was no point in her doing so. It is notable that neither Ms Lynch or Ms Ravalia wrote back to tell the Claimant that she could apply if she wished to, which they would have done if that was the true position.

- Seventhly, when the Claimant complained to the Respondent in her letter dated 22 May 2020 and in her ET1 presented on 16/7/2020 she mentioned as her main point the fact that she was not offered or told she could apply for the DC roles

17. I find that the DC roles were not discussed at the meeting on 27/2/20 and that the reason for this was that the Claimant had already been told she was unqualified for them.

The law

18. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

a. the fact that his employer has ceased or intends to cease –(i) to carry on the business for the purpose of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or

b. the fact that the requirements of that business –(i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"

19. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

Where the 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) –

> *depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*

shall be determined in accordance with equity and the substantial merits of the case.'

20. Where redundancy is established, 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 for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.
21. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. R v British Coal Corp ex parte Price 1994 IRLR 72 at para 24.
22. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. Thomas Betts Manufacturing Ltd v Harding 1980 IRLR 255 CA. However in choosing the pool the employer must act reasonably and must have a justifiable reason for excluding a particular group of employees from the selection pool where the excluded category do the same or similar work to those who are up for selection. British Steel PLC v Robertson EAT 601/94.

23. The employer must seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service. Williams v. Compare Maxam Ltd 1982 IRLR 83

24. The employer should try as far as reasonable to find alternative work within its own organisation and where appropriate within other companies in the same group

25. It is not the function of the Industrial Tribunal to decide whether it 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. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

Consideration

26. I accept that the Claimant's role was redundant in the sense that the Respondent did not need her to retain the title and pay and, in theory at least, the obligation to perform the more onerous duties of a SDC. The Respondent had a diminished need for employees to do SDC work.
27. It was reasonable to put the Claimant in a pool of one because of the other 3 SDCs, two were based outside London and all three were embedded in their own long-term projects and it would not make business sense to pull them out.
28. From a formal point of view the redundancy consultation process was reasonable, with the exception of the fact that I have found that accurate notes of the meetings should have been taken and sent in draft at the time to the Claimant for her approval
29. The matter was not handled fairly or within a range of reasonable responses. The Claimant was well-suited to fill the DC roles which were being filled and advertised at the time, shortly before, during and after the redundancy consultation period. Rather than filling the DC roles with other new and newer employees, the Respondent should have offered the Claimant a DC role in the Blossom Project or simply allowed to retain her title as SDC but asked to take a pay cut to match the maximum salary available for the DC role – as a way of retaining her employment at the reduced salary of £38000 per annum. If she had been offered that she would have accepted with alacrity.
30. As she was not offered it ,and told instead she should not be suitable, (whereas she was suitable) the Respondent failed to perform its duty to avoid the redundancy by redeployment. The Claimant was unfairly dismissed.
31. After I had delivered the above reasons orally on 18/2/21, Mr Humphries asked for permission to call a witness to give evidence that the alternative role DC role offered a salary of only £35000. I refused this application as the document at page 106, which was commented on during the evidence, showed that the salary was offered in the range £35000 to £38000 and I found that the alternative role should have been offered at the higher figure to the Claimant; and the suggested further evidence should have been given, if at all, before my judgment, and the application was a late attempt to undermine it.

Remedy

32. Claimant has already received her statutory redundancy pay so cannot claim a basic award.

33. She has received 12 weeks notice pay

34. Brookson Solutions Limited payslips produced by Claimant show gross pay earned by Claimant from 19/3/20 to 12/2/21 (47 weeks) = £32654.59. 47 weeks at £38000 (the salary she should have been given by the Respondent – hereafter called "the notional salary") would have been £34346.15 a difference of £1691.56 gross and £1255 net.

35. Had Claimant not been dismissed she would not have received notice pay paid net (calculated as 73% of £9849) = £7189 so this has to be deducted from her losses.

36. Disregarding employer pension contributions, the Claimants likely gross earnings from 12/2/21 onwards are likely to be at the rate of about £774.92 gross per week actually worked (not including any paid holidays) which is about the same as the notional salary. Hence, I do not find it just and equitable to award loss of salary from 12/2/21 onwards

37. I find that but for the dismissal the Claimant after the date of dismissal would have been employed by the Respondent until her 66th birthday (12 June 2024), a period of just over 4 years, but no longer.

38. Had the Claimant not been dismissed she would have received from the Respondent as pension employer contributions based on the notional salary of 8% for one year (£3040) and 7% for each of three years (£7980) = £11020.

39. The Claimant's payslips over the last 11 months since dismissal, show that in addition to her gross pay the Claimant is receiving from her current "employer" (Brookfield Solutions Ltd) employer pension contributions at the rate of about £19.59 per week. Assuming a 48 week working year the Claimant will get £940.32 x 4 = £3761 as employer pension contributions over the about 4 years from dismissal to her 66th birthday. So her net employer contribution pension loss is £11020 - £3761 = £7259.

40. The Claimant received a travel allowance but this would have been included in the £38000 notional pay. The Claimant received a BUPA allowance as a SDC but would not have if retained as a DC.

Compensatory award is therefore

Loss of statutory rights	£500
Loss of net salary from dismissal to 12/2/21	£1255
net employer pension loss to 12/6/24	£7259
Deduct net notice pay	(£7189)
TOTAL	£1825

Employment Judge Burns
22/2/21
For Secretary of the Tribunals
Date sent to parties
26 February 2021