EMPLOYMENT TRIBUNALS

Claimant: Miss R Eves

Respondents: International House Newcastle Limited

Heard: Remotely (by video link) **On:** 2 February 2021

Before: Employment Judge S Shore

Appearances
For the claimant: In Person
For the respondent: Mr T Udberg, Managing Director

JUDGMENT

1. The claimant's claim of unfair dismissal was well-founded. She was unfairly dismissed for the reason of redundancy. The claimant did not contribute to her own dismissal, so no deduction for compensation was made for contributory conduct. There was a 50% chance that if the respondent had operated a fair procedure for redundancy, the claimant would have been fairly dismissed, so her compensatory award for unfair dismissal is reduced by 50%.

2. The respondent will pay the claimant compensation for unfair dismissal. Neither re-instatement or re-engagement were sought or were reasonably practicable.

3. No basic award is payable to the claimant because she was dismissed for the reason of redundancy and any basic award has to be set off against any redundancy payment that the claimant received. The two are calculated in the same way and the claimant confirmed that she received he full entitlement to redundancy pay.

4. I find that the claimant is entitled to a compensatory award calculated as follows:

   <u>Immediate Compensatory Award Loss</u>

   Loss of earnings from 28 August 2020 to 2 November 2020 at £1,837.00 per month = £3,674.00

   Loss of earnings from 2 November 2020 to 2 February 2021 at £1,837.00 per month = £5,511.00

The claimant must give credit for her earnings from new employment from 2 November 2020 to 2 February 20211 of £5,305, which leaves a balance due to her for that period of £207.00

The claimant's total compensatory award from 28 August 2020 to 2 February 2021 is £3,881.00 x 50% = **£1,940.50**

Future Compensatory Award

The claimant has future loss of her statutory right to protection against unfair dismissal and redundancy of £500.00 x 50% = **£250.00**

Total Award

The total award payable by the respondent is £1,940.50 + £250.00 = **£2,190.50**

5. This is a case to which the provisions of the Employment Protection (Recoupment of Benefits) Regulations 1996 (SI 1996/2349) apply, as the claimant claimed Universal credit for a period when she was unemployed. I make the following findings:

    5.1. The protected period is 28 August 2020 to 2 February 2021;
    5.2. The prescribed element is £1,940.50;
    5.3. The total award is £2,190.50; and
    5.4. The balance is £250.00.

6. The claimant's claim of breach of contract (failure to pay pension contributions) is dismissed on withdrawal by consent.

7. The claimant's claim of non-payment of holiday pay (an unauthorised deduction from wages) is not well-founded and fails. The respondent did not act unlawfully by requiring the claimant to take holiday during a period of gardening leave and gave the appropriate notice required by regulation 15 of the Working Time Regulations 1998.

REASONS

Introduction

1. The claimant was employed as a Senior Teacher and Examinations Co-ordinator by the respondent from 22 March 2011 to 28 August 2020, which was the effective date of termination of her employment following a notice of redundancy served on her on 18 June 2020. The claimant started early conciliation with ACAS on 25 August 2020 and obtained a conciliation certificate dated 21 September 2020. The claimant's ET1 was presented on 8 October 2020. The respondent is a college specialising in the teaching of and training of teachers in English as a foreign language. Before the claimant's redundancy, it employed approximately 32 staff.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996);
    2.2. Breach of contract (failure to pay pension contributions) contrary to Article 4 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994; and
    2.3. Failure to pay 15 days' holiday accrued that the respondent said it had required the claimant to take during her notice period.

3. The final hearing was heard remotely by video link with the consent of the parties.

4. Standard case management orders were given, which did not include a requirement for the parties to produce a list of issues (questions that I had to find answers to). I created a draft list and discussed it with the parties. I then sent a copy of the list to the parties which was agreed by them. The agreed list of issues was:

Unfair dismissal

1.1. Was the claimant dismissed?

1.2. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. Agreed by claimant.

1.3. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.3.1. The respondent adequately warned and consulted the claimant;
1.3.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
1.3.3. The respondent took reasonable steps to find the claimant suitable alternative employment;
1.3.4. Dismissal was within the range of reasonable responses.

2. ***Remedy for unfair dismissal***

2.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1. What financial losses has the dismissal caused the claimant?
2.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.1.3. If not, for what period of loss should the claimant be compensated?
2.1.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.1.5. If so, should the claimant's compensation be reduced? By how much?
2.1.6. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
2.1.7. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.1.8. Does the statutory cap of fifty-two weeks' apply?

2.2. What basic award is payable to the claimant, if any?

2.3. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Holiday Pay (Working Time Regulations 1998)

2.4. What was the claimant's leave year?

2.5. How much of the leave year had passed when the claimant's employment ended?

2.6. How much leave had accrued for the year by that date?

2.7. How much paid leave had the claimant taken in the year?

2.8. Were any days carried over from previous holiday years?

2.9. How many days remain unpaid?

2.10. What is the relevant daily rate of pay?

Law

3. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

"Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

"Section 98 Employment Rights Act 1996

(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 the dismissal, and

(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-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on 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

(b) shall be determined in accordance with equity and the substantial merits of the case.”

<u>Housekeeping</u>

4. I discussed the case with Miss Eves and Mr Udberg at the start of the hearing to ensure that they were aware of the overriding objective and how it would impact the hearing. We discussed the claimant’s claims and she confirmed that she has been

paid the monies due in pension contributions and was happy for that claim to be dismissed upon withdrawal.

5. We discussed the issues and agreed a list as set out above. We discussed the bundle and the parties agreed that all the documents that would be needed to determine the issues were in the file.

6. I had read a witness statement produced by the claimant from one of her former colleagues; Lesley Dunn. The gist of it was that she felt she had been unfairly treated by the respondent in 2015 during a redundancy exercise. I advised the claimant that I did not find that there was anything in the statement that assisted me to make decisions on the issues in her case and that the requirement of the overriding objective to deal with matters fairly and justly was not served by a witness statement that concerned matters that were five years old and not directly affecting this case. Ms Dunn was not called to give evidence.

7. The respondent produced one witness; Trevor Udberg, its Managing Director, who adopted a witness statement upon which he was cross-examined.

8. The claimant gave evidence in support of her claim and adopted a witness statement dated 22 December 2020, upon which she was very briefly cross-examined. I also heard evidence from Jane Maria Gregory, a former colleague of the claimant's, who adopted a witness statement dated 19 December 2020. Mr Udberg asked her no questions. All the witness statements were taken as read. I asked some questions of the witnesses.

9. The parties produced an agreed bundle of 46 documents. If I refer to a document from the bundle, the document number will be in square brackets.

10. At the end of the evidence, I heard closing submissions from the claimant and Mr Udberg.

11. I then delivered my judgment on liability and remedy. The claimant asked for written reasons and Mr Udberg said he would have to consult his fellow directors on the question of an appeal, which is the prerogative of both parties. I felt it inappropriate to offer the respondent any advice on how to appeal my decision, if that was the decision it made.

12. The hearing was conducted by video on the CVP application and mostly ran smoothly, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

13. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. I make the following findings:

13.1. It was never disputed by the respondent that the claimant had been good at her job. She had initially joined the respondent as an administrator, but had moved into combining teaching and administration. She had obtained a teaching qualification that was referred to as [name], but had not got a qualification that was referred to as 'the Delta', which would have enabled her to teach prospective teachers.

13.2. On 16 March 2020, Mr Udberg had emailed all staff [1] on behalf of the directors of the respondent. The purpose of the email was to advise staff of the impact of the growing health crisis emerging from the spread of coronavirus. He advised staff of measures they should take if they developed symptoms and told them that there was likely to be an adverse effect on bookings.

13.3. I should say at this point that I have taken judicial notice of the devastating financial effect of the pandemic on many employers and their employees. Mr Udberg gave evidence of a huge drop in demand for the respondent's courses at a time of year when they would normally expect surge in bookings which was not disputed. His evidence was not disputed.

13.4. The respondent held two meetings on 16 March 2020. Minutes were taken [4] that were not disputed. I find that the minutes record that "It is highly likely that staff will need to be made redundant." I also find that it is highly unlikely that an intelligent person such as the claimant would not have been concerned that her job was at risk, given the nature of the respondent's business and the growing impact of the pandemic. I find that the respondent had informed the claimant that her job was at risk in March 2020.

13.5. I find that the claimant's evidence that there was no mention in the 16 March meeting of the selection criteria to be used in any redundancy selection process to be credible. It was not challenged and the notes of the meetings on 16 March 2020 were silent on the point.

13.6. The respondent closed its business on 23 March 2020 and its staff were furloughed, including the claimant. The claimant gave detailed evidence about the communication she received from the respondent from 23 March 2020 to 18 June 2020, but I do not find it to be relevant to matters I have to determine.

13.7. On 18 June 2020, the claimant received an email from Mr Udberg with the subject line "A message from International Hose Newcastle". The email said that it followed the meeting on 16 March "and subsequent communications". It went on to state that, as had been explained, the respondent had to make redundancies. The Chancellor had announced a change to the furlough scheme that was due to take effect on 1 August 2020. One of the effects was to increase the contribution that employers would have to make towards payments for employees on furlough.

13.8. The claimant was told that staff would have to take outstanding holidays during furlough and that if dates were not booked by the end of June, they would be allocated as best served staffing issues.

13.9. The email said that the respondent had "prioritised several factors which would affect the potential future prosperity [of the respondent]". These were:

13.9.1. Cost of ongoing payroll;

13.9.2. Skills and qualifications; and;

13.9.3. Adaptability to changing market demands.

13.10. Alternatives to redundancies were stated to have been considered and suitable alternative vacancies had been considered. It was also stated that the respondent had "answered questions on the process outlined above". I saw and heard no evidence that this had been done, so find that this statement did not meet the required standard of proof.

13.11. The email continued:

"As outlined above, after applying the organisation's redundancy selection criteria, I am very sorry to confirm that you have been selected for redundancy."

It then advised the claimant that she was on notice that her employment would end on 14 August 2020. She has 14 days of unused holiday to take during her notice period and she was not required to work during that period. She was placed on 'gardening leave'.

13.12. The claimant was notified of her entitlement to redundancy pay and advised of her right to appeal if she "…believed that [she] had been selected unfairly…"

13.13. I find that the respondent's actions in advising the claimant of her redundancy in the way I have described above to be far below the standard expected of a reasonable employer. I reject Mr Udberg's evidence that the respondent could not engage in individual consultation because he believed that the staff were all on a private WhatsApp group and confidentiality could not be maintained. He believed that if one person was consulted with, they would tell all their colleagues. I fail to see how that situation is any different to the situation that is likely to prevail if all the employees are at work. In that situation, everyone can see when someone is being called for a consultation meeting and can see their reaction when they return. It is likely that they will talk to one another.

13.14. I find that the explanation put forward by Mr Udberg is entirely unreasonable.

13.15. I find that there was absolutely no attempt to engage the claimant in a discussion about the evolving need for redundancies. I have found that she was aware that redundancies may be possible, but even the email advising her that she was dismissed did not set out what the actual criteria had been that had been used to select her.

13.16. I find that the dismissal email was entirely silent on what the criteria for redundancy were. The claimant was told what factors the respondent was considering when making decisions about its future prosperity (see paragraph 13.9 above), but not that these were the criteria for selecting candidates for redundancy.

13.17. I find that giving an employee the opportunity to dispute their redundancy by an appeal is not consultation.

13.18. I find that the respondent failed to adequately consult the claimant.

13.19. I find that the respondent has not shown on the balance of probabilities that it adopted a reasonable selection decision.

13.20. I find that the respondent did not bring evidence that showed on the balance of probabilities that it took reasonable steps to find the claimant suitable alternative employment.

13.21. I find that dismissal was not within the range of reasonable responses.

13.22. I found Mr Udberg's evidence on the selection pool, the criteria used for selection and the actual scores given to the claimant to be vague, evasive and not credible. For example, he was unable to say whether the employment cost of an employee was their gross salary, gross salary plus on cost (employers NI contributions, pension payments etc.) or some other metric.

13.23. I find that the respondent made a large number of errors in the dismissal email and subsequent correspondence with the claimant, including miscalculating her length of service and redundancy entitlement, miscalculating her holiday pay entitlement, miscalculating her notice entitlement, miscalculating her termination date, referring to PILONs, when the claimant was serving her notice whilst on gardening leave, etc.

13.24. I should say, however, that all the errors it made were raised by the claimant and addressed to her satisfaction. I should also note that the claimant's response to the redundancy email did not raise complaints about the fact of her redundancy, just the other mistakes that I have highlighted above. I find that this is indicative of an acceptance on the part of the claimant that her redundancy was likely, if not inevitable.

13.25. The claimant raised the issue of the redundancy process in an email of 23 June 2020 [19]. The respondent replied on the same date [20] with what I find to be a vague and evasive manner. However, the

claimant accepted what was said by another email on 23 June 2020 [21] and even thanked the directors for the information, writing that "That is the information I was looking for." I find that this acceptance is also evidence that the claimant realised that her redundancy was a real possibility.

13.26. The respondent told the claimant that she was one of the most expensive employees (although I heard unchallenged evidence that there were two colleagues who were retained who were on higher pay). The claimant accepted this to be true. She thought she was one of the 6 or 7 best paid employees.

13.27. She was told that she did not have the Delta qualification, which she accepted.

13.28. She was told that she had less experience than others in delivering teacher training and young learners' courses, which were seen as growth areas for the respondent. The claimant said she had experience in administration those areas.

13.29. I find that whilst the respondent failed to consult at all, failed to show that it employed a reasonable selection decision and failed to show it had considered suitable alternatives, I have to take account of the agreed evidence that the respondent had 32 employees and made 13 of them redundant. 2 of the 6 administration staff were made redundant and 11 of the 26 teaching staff were made redundant.

13.30. It therefore follows that given the claimant's admittedly higher salary, her lack of the Delta qualification and her lack of experience teaching potential teachers, I have to find that if a fair procedure had been used, there must have been a chance that the claimant would have been fairly chosen for redundancy. I put that chance at 50%.

13.31. The claimant was unemployed for two months. Her average net monthly salary was £1,837.00, so I find that she should be fully compensated for that loss.

13.32. She then found employment on a temporary contract from 2 November 2020. SH remains in that employment to today. I find that she has mitigated her loss. The difference between her old net salary with the respondent and her current pay totals £207.00 over the three months she has had the job. She turned down a permanent position to remain in her current job, as she thinks there are opportunities for advancement.

13.33. I therefore find that she should not be compensated for her future loss, other than to award her £500.00 for loss of statutory rights.

13.34. No basic award is payable because the reason for dismissal is redundancy and the claimant (eventually) received the correct amount of redundancy pay.

13.35. The claim of breach of contract for failure to make pension payments was dismissed on withdrawal, as the claimant accepts that she has now been paid what she was owed in respect of that head of claim.

13.36. Regulation 15 of the Working Time Regulations 1998 permits an employer to tell an employee when they are to take leave, provided they are given sufficient notice. I find that the claimant was given sufficient notice, so the 15 days' holiday it was agreed (eventually) that she had accrued were taken and paid for during the notice period.

14. As I indicated in the hearing, I have empathy for the position that the respondent found itself in, but have found that it breached the law on the process to be used if a fair redundancy dismissal is to be effected.

Employment Judge Shore
5 February 2021