



EMPLOYMENT TRIBUNALS

Claimant: Mr. D Pender

Respondent: International Currency Exchange Limited

Heard at: London Central

On: 11 March 2021

Before: Employment Judge M Joyce

Representation

Claimant: In person

Respondent: Mr. K Sonaike (Counsel)

RESERVED JUDGMENT

This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

It is adjudged that:

The complaint of unfair dismissal is not well founded. The proceedings are accordingly dismissed.

REASONS

Claims and Issues

1. The Claimant has brought a claim of unfair dismissal. The issues were agreed at the start of the hearing as follows: (i) What was the reason or principal reason for the dismissal? (ii) If the reason was that the Claimant was redundant, was the reason fair or unfair? In particular, (a) was a fair procedure followed? and (b) was the decision fair in substance? (c) If the claim was successful, what remedy was due to the Claimant?

Hearing: Procedure, documents and evidence heard

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2. The Tribunal heard evidence from the following witnesses on behalf of the Respondent: Ms. Gillian Pratt (HR Director), Mr. Amran Khan (Area Manager), Mr. Louis Bridger (General Manager). In addition, the Respondent produced a witness statement from Ms. Margaret Townsend (Head of Events). Ms. Townsend did not attend as a witness. The Claimant did not object to Ms. Townsend's statement being considered and stated that he would not have had any questions for her if she had attended in person. Mr. Luca Cignitti (RMT Union Representative), and Ms. Carmela Guarino (Staff Appointed Representative) gave evidence on behalf of the Claimant and the Claimant also gave oral evidence.
3. The central issue to emerge at the hearing was whether the decision to make the Claimant redundant was fair in substance.
4. There was a Tribunal bundle of approximately 164 pages. Both parties made oral closing submissions at the conclusion of the hearing.

Facts

5. The Respondent is a company that provides currency exchange services to members of the public. The Claimant commenced employment with the Respondent on 13 December 2011 as a currency exchange consultant/sales consultant. The Claimant worked within the bureau de change operation at Kings Cross Station. He worked solely at the Kings Cross branch and did not rotate around the other 4 branches comprising the St Pancras and Kings Cross Stations. There was no redundancy procedure, contractual or discretionary.
6. On 15 May 2020, Mr. Louis Bridger, General Manager, sent a letter to all staff explaining that the Covid-19 pandemic was having a significant impact on all travel related business.
7. On 5 June, Ms. Gillian Pratt, HR Director, sent Mr. Steven Smart (RMT Union Official), and Ms. Carmen Guarino (Staff Appointed Representative), an email which included a letter dated 5 June intended for staff members, a collective consultation letter to the RMT, copies of the proposed restructuring process, draft selection criteria and a revised roster.
8. On the same date Mr. Bridger sent a letter to staff, including the Claimant. He stated that there was very little demand for currency exchange and that the impact of the Covid-19 pandemic was likely to continue for an undetermined period of time. Consequently, the Respondent was in the position of having to consider making a number of employees redundant. Recipients of the letter, including the Claimant, were advised that they were at risk of redundancy.
9. The Respondent anticipated that 12 sales consultants out of a pool of 20 would need to be made redundant. Following voluntary redundancies, this figure reduced and it was anticipated that 10 sales consultants out of a total of 19 would need to be made redundant.
10. On 10 June 2020, a meeting was held between Mr. Smart, Ms. Guarino, Mr. Amran Khan (Area Manager), Ms. Pratt and Mr. Jason Davies (HR and Training Manager). At the meeting four selection criteria with their

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respective weightings were set out as follows: one-to-one sales performance data with a weighting of 5, average transaction value (ATV) with a weighting of 4, disciplinary record with a weighting of 3 and attendance with a weighting of 2. The period of review of the above selection criteria was from 1 March 2019 to 29 February 2020, with the exception of the one-to-one sales performance data which would be evaluated from April 2019 to February 2020. For anyone who did not have the length of service corresponding with the period of review, their data would be averaged on a pro-rata basis.

11. Given their higher weightings, the one-to-one sales performance, and the ATV criteria were the most important of the four selection criteria. This reflected the Respondent's desire to retain the best performing staff members. The ATV criterion was based on the average value of a transaction which was calculated by dividing overall turnover by the number of transactions. The focus of that criterion was on the sales consultant's ability to 'upsell' to the customer. In other words, to sell more currency to the customer than the customer may have initially intended to exchange. The one-to-one sales performance criterion was based on an assessment of the how often the sales consultants had reached their sales targets as compared with the area average.
12. At the meeting it was agreed that the selection criteria were fair in principle, and that Ms. Guarino would revert to staff to discuss them further. The selection criteria did not take account of length of service. I find that there were two principal reasons for this, namely a desire to reduce the number of any claims of discrimination on the basis of age, and also the Respondent's wish to focus on performance as the primary basis for retaining staff.
13. On 18 June 2020, a further meeting was held with the same members present from the meeting of 10 June 2020. Ms. Guarino confirmed that no one had expressed an interest in job sharing or working part-time. The selection criteria were further clarified. In particular, Ms. Guarino raised a concern on behalf of staff about the ATV criteria on the basis that staff did not rotate around branches and they believed this could negatively affect their ATV. Mr. Khan stated that ATV was considering averages for a long period during which it was expected that staff would move around the various branches. He emphasized that ATV was considering the quality of each transaction and the sales skills associated with that transaction. It was further explained that in the event of a tie in the overall scores once the selection criteria had been applied, the Respondent would rely on the criterion of one-to-one sales performance to be determinative.
14. On 29 June 2020, a further meeting was held with the same participants as the 5 June 2020 and 18 June 2020 meetings. Ms. Guarino had not received any further questions or feedback regarding the selection criteria and she agreed that the criteria were fit for use. Ms. Pratt confirmed that there were no other vacancies available in which to place staff facing redundancy.
15. On 6 July 2020, an additional meeting was held with the same attendees. Mr. Khan had applied the selection criteria and identified the nine staff members to be made redundant. The Claimant was one of these nine. He received a total score of 101 points across all four selection criteria, which

placed him at 17th overall out of the 19 staff members evaluated. On 10 July 2020, at a further meeting it was agreed that those nine staff members would be written to in order to ask them to attend one-to-one meetings to go through their individual scores following application of the selection criteria.

16. The first ranked staff member had approximately 4 weeks of data to be taken into account, which was pro-rated as had been agreed at the meeting on 10 June 2020. The total number of transactions considered for the first ranked staff member when applying the selection criteria was 401. The Claimant's total number was 3,959 transactions. The average number of transactions across all 19 staff members was approximately 4,000. The staff member ranked 13 had 690 transactions over the relevant period, and staff member ranked 18 had 657 transactions.
17. On 13 July 2020, Mr. Davies wrote to the Claimant informing him that due to the score he had received following application of the selection criteria he was at risk of redundancy. Mr. Davies invited the Claimant to a further meeting on 17 July 2020.
18. At the meeting with Mr. Khan and Mr. Davies on 17 July 2020, the Claimant raised a number of objections to the selection criteria, and in particular the application of the ATV criterion. In sum, he stated that due to a low number of transactions and low customer flow at his branch he had been negatively impacted by the application of the ATV criterion. He also objected to the attendance criterion on the basis that staff were not required to produce a doctor's certificate for absences under 7 days and taking account of uncertified absences was therefore unfair.
19. On 21 July 2020 Mr. Smart, Mr. Khan, Ms. Pratt and Mr. Davies held another meeting to consider the next steps following the one-to-one meetings with the nine staff at risk of redundancy. They decided that those nine staff would be written to, informing them they were now made redundant and giving them the right of appeal. It was confirmed that there were still no vacancies available in order to accommodate those who were to be made redundant.
20. By letter dated 24 July 2020, Mr. Khan sent the Claimant his redundancy notice. In particular, on the point regarding the use of ATV, Mr. Khan explained that the criterion considered averages over a long period of time, in addition to sales skills and the quality of each transaction. As to the attendance criterion he stated that the non-requirement of a doctor's certificate for periods of illness under seven days was a government requirement and not a standard imposed by the Respondent. Mr. Khan informed the Claimant of his right to appeal against the decision to make him redundant.

The appeal

21. By email dated 30 July 2020, the Claimant wrote to Mr. Bridger informing him that he wished to appeal. In his email, he reiterated his claims regarding the use of ATV. He also queried whether he had in fact ranked in the bottom nine staff out of 17.

22. By letter dated 8 August 2020, Mr. Bridger informed the Claimant that his appeal against the decision to make him redundant would be considered on 13 August 2020. On 13 August 2020, the appeal hearing took place. The Claimant raised the issue of the application of the ATV criterion. He also stated that length of time in service should have been used as a selection criterion. He did not maintain his objection to the application of the attendance criterion. Mr. Bridger expressed the view that hypothetically he could see how the ATV could be influenced by the type of customers, and stated that he would look into the issue further. He stated that length of time in service had not been used as a criterion as it could be viewed as discriminatory.
23. By letter dated 18 August 2020, Mr. Bridger informed the Claimant that his appeal had been unsuccessful. As to the application of the ATV criterion Mr. Bridger stated that he had recalculated the scores without the ATV criterion and that the Claimant still ranked in the bottom 10 staff members. I find that without the ATV criterion being taken into account, the Claimant ranked joint tenth with another staff member, but due to his lower score on the 'one to one performance' criterion he placed within the bottom 10 staff members. He therefore still fell to be made redundant. Mr. Bridger had recalculated the scores without the ATV criterion being included to assess whether it would have made any difference to the overall outcome. He concluded that it did not.

Evidence provided at the tribunal hearing only

24. As to the application of the ATV criterion, in their oral evidence at the Tribunal hearing, Ms. Guarino and Mr. Cignitti, RMT representative, stated that the customers that would frequent the Kings Cross branch, manned by the Claimant, had less money to exchange when compared with customers who frequented the other 4 branches comprising the St Pancras area. This evidence was not contained in their witness statements, nor was any specific data provided. On the other hand, in their oral evidence Mr. Khan and Mr. Bridger's position was that there was no discernible difference in the types of customers attending the various branches and that the opportunity to 'upsell' to each customer was equal.
25. I did not place weight on this argument because this evidence was not contained in Ms. Guarino and Mr. Cignitti's witness statements, nor was any specific data provided. But, to the extent that I am able, I find that there was no discernible difference between customers attending the various branches in terms of the amount of money each had available to exchange.
26. In November 2020, the remainder of the sales consultants from the St. Pancras area, who had not previously been made redundant, were made redundant.

Legal Framework

27. The Claimant invokes the protection against unfair dismissal enacted in Part X of the Employment Rights Act 1996 ('the 1996 Act'). The key provision is s98. It is convenient to set out the following subsections:

- (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 – ...
- (c) is that the employee was redundant ...
- (4) 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) –
- (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.

28. The ACAS Code does not apply to cases of redundancy.

29. Part XI of the 1996 Act sets out the provisions relating to redundancy. The relevant subsections of s139 are provided 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—

- (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.**

30. From *Earl of Bradford-v-Jowett* (No. 2) [1978] IRLR 16, I derive the principle that a Tribunal may not substitute the selection criteria it would have chosen for those used by the employer. It can interfere with the employer's choice only when the criteria used are those which no reasonable employer would have used in the way that the particular employer did.

31. Tribunals should not generally get involved with the minutiae of how individual scores are arrived at, as indicated by the Court of Appeal in *British Aerospace Plc-v-Green and others* [1995] IRLR 433, and again by the Court of Appeal in *Bascetta-v-Santander* [2010] EWCA Civ 351. Instead the Tribunal should focus on whether the employer has a good system in place for assessing employees against the criteria.

32. From *Iceland Frozen Foods Ltd-v-Jones* [1982] IRLR 439 EAT and *Post Office-v-Foley; HSBC Bank-v-Madden* [2000] IRLR 827 CA I derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a 'band of reasonable responses'.

33. Remedies for unfair dismissal include compensation, which divides into basic and compensatory awards. The former is calculated as the claimant's weekly earnings (subject to a cap) multiplied by his or her years of continuous service, but subject to this (1996 Act, s122):
34. The compensatory award may also be reduced, among others, under the '*Polkey*' principle.¹ This holds that, where a dismissal is found to be unfair on procedural grounds but the employer shows that, absent the procedural flaw, there would have been at least a real possibility that the claimant would have been dismissed in any event, the award must be adjusted downwards to reflect that possibility.

Conclusions

35. What was the reason or principal reason for the dismissal? I have no hesitation in finding that the reason was redundancy. Not only does the Claimant accept that redundancy was the reason for his dismissal, the available evidence points to the fact that the requirements of the Respondent to carry out the work of sales consultants had diminished.
36. Accordingly, the reason for the Claimant's dismissal was that he was redundant and as such was a potentially fair reason for dismissal.
37. Was the decision to dismiss the Claimant on grounds of redundancy fair or unfair? I start first with the procedure, and I find that a fair procedure was followed. In May of 2020, Mr. Bridger wrote to all staff informing them of the difficulties being faced by the business due to the Covid-19 epidemic. This was followed by a further letter in June 2020 advising that redundancies would be necessary. A collective consultation letter was sent to the RMT and Ms. Guarino was appointed as a staff representative to make representations on behalf of staff. The selection criteria were also provided.
38. A number of meetings were held throughout June and July 2020, which were attended by Ms. Guarino. The notes of those meetings demonstrate that Ms. Guarino had the opportunity to make the concerns of staff known regarding the application of the criteria, and in particular the ATV criterion. While Ms. Guarino made reference in her oral evidence to not being in a position to raise certain concerns due to her lack of experience, I find that she was given that opportunity and that she did raise concerns on behalf of staff.
39. Additionally, the notes of the meetings disclose that the Respondent was seeking to follow a process which limited the number of redundancies to those necessary. Ms. Guarino had canvassed the possibility of staff working part-time or on a job-sharing basis. No staff members expressed an interest in these alternative working arrangements. The notes also provide that the Respondent had assessed whether there might be other suitable roles for the staff members who were to be made redundant but that no alternative roles were available.

¹ *Polkey v AE Dayton Services Ltd* [1987] UKHL 8.

40. The Claimant's score was correctly calculated applying the four selection criteria and he was informed of the outcome. He was invited to a one-to-one meeting with Mr. Khan and Mr. Davies, which he attended on 17 July 2020. At that meeting he voiced his concerns as to the selection criteria. On 24 July 2020, his formal redundancy notice was sent to him in writing and he was informed in clear terms of the reason for his redundancy.
41. Furthermore, the Claimant was given the opportunity to attend an appeal hearing with Mr. Bridger at which he again raised his concerns regarding the ATV selection criterion in particular. That appeal hearing was followed by a letter dated 18 August 2020 informing the Claimant that his appeal had been unsuccessful and providing reasons for that decision.
42. In all the circumstances the redundancy process was permissible and within the 'band of reasonable responses'.
43. Turning now to substance, at the Tribunal hearing the principal point of contention emerged as the fairness of the application of the ATV criterion. At the Tribunal hearing, the Claimant did not maintain his objections relating to the application of the attendance criterion. I find that it was within the band of reasonable responses for the Respondent to choose and apply the four selection criteria that formed the basis for the scoring of the Claimant and his colleagues, including the ATV criterion. I have found that it was reasonable to use these criteria and I also find that the decision to dismiss was reasonable and therefore fair. It was entirely within the purview of the Respondent to determine that it wished to retain staff on the basis of performance, as opposed to length of time in service. The ATV and the one-to-one sales performance criteria were designed to achieve this aim.
44. As to the application of the ATV criterion to the Claimant, the Claimant maintains that due to his branch receiving a different type of customer with less currency to exchange as compared with customers attending the other four branches, his ATV scores were lower. I cannot agree. As noted above, on the evidence before me, I do not consider there was any discernible difference between the type of customer attending the Kings Cross branch as compared with other branches in terms of the amount of money they had available to exchange. That being the case, I find that the fact that the Claimant was not rotated among other the other branches within St. Pancras did not make the application of the ATV criterion to him unreasonable.
45. Turning to the scoring of the first ranked staff member, at the Tribunal hearing, the Claimant contended that the first ranked staff member had performed better on the one-to-one sales performance target and the ATV criteria for various reasons all of which he suggested showed the unfairness of the criteria. These reasons varied from luck on her part, to her being assisted by her supervisor as a relative newcomer, to being placed at branches where she had more access to international travellers with more currency to exchange.
46. I find that there was insufficient evidence before me to determine on what exact basis the first ranked staff member scored highest on the one-to-one sales performance and ATV criteria. It could equally have been that she ranked first due to her ability as a sales person. The issue is whether the

criteria were fair and whether they were applied fairly. I find that they were. The scores the first ranked candidate achieved on the criteria were the highest and her score was calculated correctly. The fact that the first ranked staff member performed better in relation to the selection criteria does not demonstrate that the application of those criteria to the Claimant was unreasonable.

47. At the Tribunal hearing, the Claimant advanced the argument that 401 transactions were an insufficient number to use as a basis for evaluating the first ranked staff member's performance. I find that 401 transactions over an approximate four-week period was sufficient to enable the Respondent to evaluate the first ranked staff member's performance.
48. As to the pro-rating of the scores, this was agreed by the staff representative Ms. Guarino at the meeting on 10 June 2020 and was applied correctly. Further, the application of the selection criteria did not, contrary to the Claimant's position, favour those who had been in their posts a shorter period of time, or those who had concluded a lower number of transactions. For example, the staff member ranked 13 had completed 690 transactions, and the staff member ranked 18 had concluded 657 transactions. These figures were far below the average number of transactions of approximately 4,000, yet both staff members were within the pool of nine staff to be made redundant.
49. In considering fairness, I further take account of the fact that the Respondent had sought to limit redundancies to those necessary by assessing whether there were viable alternatives through job sharing, part-time working or through other vacant roles. In all the circumstances the redundancy was permissible and within the 'band of reasonable responses'.
50. I turn to the question of *Polkey*. I find that if, contrary to my view, the dismissal was unfair on a procedural ground, no compensatory award would be appropriate because, but for the flaw in the process, it is inevitable that the same result would have followed. In considering this issue I have had regard to the fact that Mr. Bridger had calculated the Claimant's scoring without reference to the ATV criterion, and that the Claimant still came within the group of nine staff members to be made redundant. As such, Mr. Bridger and Mr. Khan would have reached the same decision, and the outcome would have been the same.

Outcome

51. For all of these reasons the claim fails and the proceedings are dismissed.

Employment Judge- **M Joyce**

Date: 30th March 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
31st March 2021

FOR EMPLOYMENT TRIBUNALS