EMPLOYMENT TRIBUNALS

Claimant: Mr Steven Davis
Mr Paul Davis

Respondent: David Phillips Furniture Limited

Heard at: Manchester (by CVP) **On:** 15 and 16 March 2021

Before: Employment Judge Ross

REPRESENTATION:

Claimants: Mr B Williams, Counsel
Respondent: Ms R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimants' claims of unfair dismissal are well founded and succeed.

2. The case will proceed to a Remedy Hearing at 10am on 24 June 2021 (by CVP).

REASONS

1. The claimants, who are brothers, were both employed by the respondent-a company which supplies furniture to residential property companies and private clients. In May 2019 the claimants were informed that the business was to restructure its pay and grading system. The result was that both claimants would receive a significant reduction in their rate of pay of approximately 20% of monthly salary. The claimants could not afford to reduce their pay by this amount and declined to accept the change. The respondent dismissed the claimants by letter dated 30 July 2019 when they declined to accept a new contract with the reduced terms and conditions.

2. The claimants brought claims for unfair dismissal to this Tribunal.

3. It was agreed at the outset of the hearing that the issues for the Tribunal were:-

    (1) Was the reason for the claimants' dismissal some other substantial reason (SOSR) pursuant to Section 98(1)(b) Employment Rights Act 1996?

    (2) If so, did the respondent act reasonably in treating this as a sufficient reason for dismissing the claimants, applying Section 98(4) Employment Rights Act 1996.

    (3) If the Tribunal found the termination of the claimants' employment unfair, should any compensation awarded to the claimants be reduced to reflect:

        (i) Any failure by the claimants to mitigate their losses and/or

        (ii) The fact that the claimants' employment would have been terminated in any event (in reliance on **Polkey -v- A E Dayton Services Limited 1987**) and/or

        (iii) Any contributory conduct on the part of the claimants.

4. It was agreed at the outset of the hearing that the Tribunal would deal with liability only at this stage.

5. For the respondent I heard from Mr Knight who was the respondent's Human Resources Director at the relevant time (from October 2018 until 18 October 2019) and from Mr Elsey the Chief Operating Officer of the respondent from January 2017. I heard from both claimants.

Facts

6. I find the following facts. The respondent carries out largescale bespoke furniture installations for new builds and refurbishments. This includes building and installing pieces of furniture for" high end" private clients to fitting out show apartments for professional property companies,in what is known as a "dressed to sell" job to dealing with lower end installations such as delivering and assembling flat pack furniture for student accommodation and in the private rental sector.

7. The respondent has sites in Manchester and London. Both the claimants were employed at the Manchester site. Mr Paul Davis had been employed by the respondent as a Furniture Installer from 26 October 2012 and his brother Mr Steven Davis from November 2009. Accordingly, they had seven and ten years' service with the respondent respectively.

8. Mr Paul Davis had an employment contract signed on 30 November 2015 (page 127 to 130) which was supplemented by an additional document entitled revised remuneration, page 147 which was issued to him on 17 April

2018 and set out his salary arrangements as of 5 March 2018. Under those terms he was entitled to pay at an hourly rate of £11.51 for any hours up to and including 45 hours per week and £16.72 per hour in respect of any overtime in excess of 45 hours. Mr Steven Davis was employed under a contract which he signed on 14 December 2015 (page 131 to 134). His contract was supplemented by an additional document entitled revised remuneration (page 146) issued also on 17 April 2018 setting out salary arrangements of 5 March. He was entitled to an hourly rate of £11.91 and an overtime rate of £16.72.

9. I rely on Mr Elsey's evidence that between 2017 to late 2018 the revenue of the business declined. His evidence he relied on an annual report from 2018 showing a net loss of £7,825,382 (page 181). He stated "matters were progressively getting worse in Manchester as they continued to lose well trained staff (due to ongoing pay grade issues).

10. I find that Mr Elsey had a discussion with the claimants and other installers at the employee forum in March 2018. He promised to increase their wages. I find the business was concerned that they would lose these installers to a company who was a rival, Loft (see email of Ruth Chamberlain to Gary Elsey on 10 April 2018 page 145).

11. I find this was a base salary increase of £5,000 per person (see Mr Elsey paragraph 32). This was the salary increase the claimants received in the letter of April 2018.

12. I find there was a background of financial instability at the respondent company.

13. I find that in July 2018 the respondent took on new staff on flexible contracts on more money than their permanent staff (see page 154). I find that some of the permanent staff (not the claimants who were on a higher rate of pay) were aggrieved about the difference in pay.

14. Mr Elsey and colleagues came to the conclusion that the inconsistency in rates was a problem as was the fact that over time various supplements had been added causing "massive hereditary problems". It was agreed there should be a "grading project" which Mr Elsey suggested delaying to the end of October 2018, see page 150.

15. I find there was a lack of understanding between employees about flexible employees and permanent employees. Mr Elsey explained in an email dated 21 January 2019 "X is a permanent employee not a flexi. The flexi workers have increased pay to account for holidays. Permanent do not as they are automatically paid holiday. Also, the reason we have flexi workers is that we can flex their hours. This will be more obvious from next month when on quiet days we stand down the flexi workers so there will be days when they will not be paid". He went on to say "I don't know X base hourly rate and what level he is assigned however I can confirm that all pay and grading is being reviewed and announcements will commence in February. Manchester will have this implemented first as standardised pay across all the installers".

16. The claimants were described in document 146 and 147 as each being on pay band G4. There was no document in the bundle to show the respondent's grading system at that time. Mr Elsey's evidence was that there was a grade 0, where employees were receiving different rates of pay for doing the same job. He said there were multiple different pay treatments for overtime in respect of grade 2 and 3 individuals. Some received time and a half, others received time and three quarters whilst some did not receive overtime at all.

17. He stated and it was not disputed by the claimants that there were regular complaints from employees about how pay was calculated not least due to the number of different supplements which were applicable. It is not disputed that this was taking up a large amount of time, both for managers sorting out the issues and for payroll which was run weekly.

18. I find that in February 2019 Mr Elsey presented proposals to the board and shareholders with a new proposed structure of 15 tiers from Band 1 Grade A to Band 5 Grade C and to reduce further to 8 tiers by 2021. See page 212 to 220, 221 to 234 and 235 to 241. The current structure was identified at p236 but with the proviso "it is extremely hard to find the current structure, the figure below was the situation from two years ago. Since then there have been various amendments, due in part to decisions on compliance with minimum wage expectations."

19. Mr Elsey said he received shareholder approval to standardise the pay grade system towards the end of March 2019.

20. In March 2019 there was a mass resignation of the London warehouse operatives. The complaint was that their pay was insufficient. I find that with the new grading system as per page 244 was then applied to the London warehouse operatives, who received an increase in pay.

21. So far as the grading structure was concerned Mr Elsey said he devised it with the Finance Director and a couple of others. He said, "we tried to map people in as closely as we could to what they were already on". When asked how the pay structure was devised and how employees were mapped across he said there was a spreadsheet. He said he came up with the structure first and then mapped across the workers and identified a rate of pay which the business could reasonably afford. He also said he had done the mapping prior to February 2019 and realised by then that four installers and one other would be substantially negatively impacted but the rest of the employees would be positively affected. He agreed in cross examination that it was "robbing Peter to pay Paul". He also agreed that it was a fair assumption there was a risk that he would lose staff where their pay had significantly reduced.

22. In terms of numbers of installers, he said there were seven installers in Manchester and twelve warehouse operatives. He said as part of the restructure the warehouse operatives would receive an extra 25 pence in their pay. He confirmed they would not receive a daily subsistence rate. He said this meant the warehouse operatives would receive roughly the same amount

of money as the installers and that the warehouse operatives would now carry out installing if needed.

23. The Tribunal did not see the spreadsheet showing the detailed mapping across of employees, nor contracts or information in relation to change of duties of warehouse operatives.

24. In or around March 2019 the respondent transferred out workers when it sold a contract for social housing, the Derby Project as it considered the project was no longer financially viable.

25. It is not disputed that the respondents held three collective meetings with affected employees in Manchester and three individual meetings with the claimants about the change in pay structure. Mr Knight has not retained the minutes he says he took of the individual and collective meetings. It is agreed the claimants saw the pay/grading restructure proposal power point 212 to 220. The respondent made the reduced pay offer letter to each claimant dated 26 June 2019 (pages 258 and 259). Mr Steven Davis was pay band 5 grade C and Mr Paul Davis pay band 3 grade C.

26. A timeline of the consultation is found in Mr Knight's email of 14 July 2019.

27. On 9 May there was a briefing to all employees. A selection process for employee representatives took place, no ballet was required because there were an appropriate number of representatives nominated. One of them was an installer affected by the reduction in pay. There was a collective meeting on 14 May, 23 May, 29 May. Individual consultation meetings were on 4 June, 12 June and 3 July for Mr Paul Davis. At the final meeting on 22 July he was given a letter terminating his employment when he did not accept the reduced terms. Mr Steven Davies also attended individual meetings on 4, 12 June and 3 July. On 15 July he set out his concerns (p289) to which the respondent replied on 23 July.(p264-5).At the final meeting on 30 July he received a letter terminating his employment when he did not accept the reduced terms. Mr Steven Davis was placed on garden leave during his notice period.

28. I find a list of affected employees at Manchester is at page 293. I find O – INS stands for Installer, O – WH stands for Warehouse. The list shows ten installers. Mr Elsey said that the flexi installers were not on the list, these were the permanent staff. Of those ten, four were severely impacted in a negative way, two of whom were the claimants. The other six had an increase in pay. Of the four, three of them left although one has returned.

Applying the law to the facts

29. I turn to the first issue. Was the reason for the claimants' dismissal some other substantial reason (SOSR) pursuant to Section 98(1)(b) Employment Rights Act 1996.

30. It is for the respondent to show the reason for dismissal.

31. I am satisfied that the respondent has shown they had a business reason for the regrading structure they introduced. I remind myself it is not for me to decide whether I consider the business reason to be sound but whether a reasonable employer would consider it so.

32. This is a low threshold. See **Catamaran Cruises Limited -v- Williams and Others 1994 IRLR 386** and **Kerry Foods Limited -v- Lynch 2005 IRLR 680**.

33. I accept the evidence of Mr Elsey that there was a business need to reorganise the pay structure because of complexity of the different rates and allowances, the difficulty in retention of employees, disgruntlement of some of the workforce about insufficient rates of pay, the time being spent by managers and payroll ensuring that the workers were paid correctly and the need to move from a weekly to monthly payroll. Another reason given by Mr Elsey for the restructuring although it was not in his witness statement and only became apparent in cross examination was that when bidding for a job the business had to include the labour cost and if an installer was on a high hourly rate that impacted the ability of the business to bid effectively against a competitor Accordingly, I find the respondent has shown the reason for dismissal was some other substantial reason.

34. I turn to the next issue. Did the respondents act reasonably in treating this as a sufficient reason for dismissing the claimants, applying Section 98(4) Employment Rights Act 1996?

35. In determining this question, I remind myself that it is not for me to substitute my own view.

36. In this case there was a conflict between the interests of the respondent business and the needs of the claimants.

37. There is no dispute that the detriment to the claimants was very significant. The change in remuneration was not modest, it was a cut of 20% which for the claimants, both men with families, was a cut they simply could not afford. The detriment was compounded because both men had long service with the respondent. Mr Steven Davis had worked for them for almost ten years and Mr Paul Davis for almost seven years. This demonstrates loyalty to the respondent. There was no dispute they were good workers. In addition, they had worked long hours for the respondent -their contract of employment was for a standard 45-hour working week. It was not disputed they worked overtime in excess of those hours. The men gave evidence of family life missed whilst they were working for the respondent. I found them clear and straightforward witnesses.

38. For the respondent, some of the evidence was contradictory. On the one hand Mr Elsey gave clear evidence of a background of financial problems with the respondent. He gave evidence that the annual report for March 2018 showed a net loss of £7,824,382 (page 181). On the other hand, he conceded that the regrading was not a costs exercise. The evidence for the respondent was that the 2020 pay regrading led to a number of long term benefits but Mr Elsey conceded that the regrading itself did not save the

business money. He said in cross examination "it wasn't about cost savings per se". He added "we didn't think this would save money on pay".

39. The reason it did not save money on pay was that in the new regrading system (see page 293) at Manchester, all the warehouse staff benefited from an increase in pay as did six installers. The four installers who were disadvantaged were the two claimants and two others.

40. Mr Elsey also gave evidence that one of the reasons for the regrading exercise was that there was a "disparity in pay rates and who was being paid what had led to a number of well trained staff leaving the business to join competitor businesses" (paragraph 22). Yet the effect of this regrading exercise was that he lost 3 out of 4 affected installers from the business in Manchester (although 1 later returned.)

41. Furthermore, Mr Elsey on his own evidence had contributed to the disparity in pay rates because he agreed that he authorised an increase in pay for both claimants and two other experienced installers in Manchester with effect from March 2018. His evidence was that this was a base salary increase of £5,000 per person at that time.

42. In balancing fairness, I must look at how the company implemented the change. On the one hand, the company went through a procedure. They held collective meetings and individual meetings explaining their proposals. On the other hand, although the respondent was well aware of the very serious impact on the four installers no serious consideration in reality was given to ameliorating the effect of such a substantial wage cut upon them.

43. Mr Elsey was somewhat contradictory in his evidence. On the one hand he said he was familiar with the concept of red circling. The respondent's document setting out the changes refers to red circling, see page 237 "existing staff initially may be mapped to band 3 grade C although they may not be a driver. These employees will be red circled at this pay grade until future pay awards or promotion bring them to the appropriate grade. In effect they will mark time upon then".

44. In the Questions and Answers section of the same document the company poses the question what is red circling? It answers "Red circling is a term used when the company maintains an employee's remuneration level for a period of time until other employees in the same grade catch up, the length of protection will be no more than two years". The Tribunal relies on its industrial knowledge that red circling usually means that an employee is paid a higher rate for a period of time for a particular reason.

45. Red circling as described by the respondent in these circumstances did not benefit the claimants. They would receive an immediate substantial pay cut.

46. In this case Mr Steven Davis was mapped to pay band 5, grade C, see page 57 to 8.There was no provision for red circling his existing pay. Mr Paul Davis was mapped to pay band 3, grade C. There was no red circling benefit for him either because although red circling is stated to apply at this band and grade

,the pay ascribed by the respondent to pay band 3 Grade C was significantly lower than the pay he was receiving under his contract.

47. Mr Elsey was asked about pay protection and red circling for those employees seriously negatively affected. He said he was familiar with the concept of pay protection but had discounted it at the beginning when preparing the grading structure because it would lead to inequalities and said the difference in pay between different employees was one of the reasons for introducing the grading structure.

48. I find Mr Elsey's evidence about pay protection in cross examination to be confusing. On the one hand, he said that pay protection and red circling had been considered and pay protection ruled out at the outset of the process. On the other hand, he said later he was willing to consider it. These two positions are inconsistent. I find given that Mr Elsey said he had ruled out pay protection at the outset then that was the true position.

49. Mr Elsey said redcircling or pay protection would lead to inequalities but did not appear to attach any weight to the difference between a variety of ad hoc rates of pay with varying enhancements developed over time causing confusion and disgruntlement compared to a clear structure with a rationale for any difference in pay whilst the difference in pay was phased in over time.

50. I remind myself of the guidance of Langstaff J in **Garside and Laycock Limited -v- Booth 2011 IRLR 735** " In respect of that section 98(4) question, an Employment Tribunal must look at the circumstances as identified by (4)(a); but it also has to determine the question, "in accordance with equity." That word may have a particular force in circumstances where for instance an employer proposes cuts in the wages of the workforce. It may be highly relevant to a decision as to fairness for a Tribunal to consider upon whom of the workforce those cuts would fall. Here it may well be that they fell across the workforce as a whole, but, speaking more generally, there may be situations in which management proposes a cut to the pay of those who are not in management, but retains the pay of those who are in management as it has always been. A Tribunal would have to consider whether equity, with its implied sense of fair dealing in order to meet a combined challenge of reduced trading profits, would be served by dismissals of those refuseniks not in management in such a case. Similarly, reasonableness will depend much upon the procedural aspects of a decision. That often requires a close focus upon the nature of those proceedings and how appropriate they were. It might involve issues as to the extent to which the workforce were or were not persuaded by reasons which were not good and proper reasons for adopting a common approach in favour of cuts, when otherwise they might not have done so."

51. I remind myself once again that I must not substitute my own view.

52. I find the business reality is that Mr Elsey, as he candidly said in evidence, was prepared to take a risk that he would lose the experienced installers in Manchester when he dismissed them as they would not accept the terms but that was a risk he was prepared to take.

53. I take into account that it is not a case about reduction in costs. Mr Elsey said this. Though there were savings by the payroll reorganisation and advantages in costing a job on a fixed rate for installers, there was no immediate saving in the pay restructure.

54. On considering equity and fairness, although the respondent has shown a business reason for harmonisation of the wage structure, when considering equity and the substantial merits of the case I find the respondent did not demonstrate the reason for the allocation of the rate of pay to the pay band to which the claimants were allocated.I find a reasonable employer of this size and undertaking would not have dismissed so quickly longserving employees without considering or exploring all alternatives to dismissal such as red circling or pay protection or significant phasing in over time of the changes to pay, particularly where the pay differential between the 4 affected installers and other employees was caused partly by the respondent's action giving the 4 installers a pay increase the previous year,2018.

55. The claimants, although consulted about the changes, did not realise the impact of the changes were likely to be so detrimental to them personally until 23 May and did not receive written confirmation until they attended individual meetings on 4 June 2019. By the end of July, the claimants had received letters terminating their contracts and offering them re-engagement on the very reduced terms. Taking into account the lengthy service of the two individuals and the severe impact upon them and the fact that the business had raised their pay significantly only just over a year earlier, I find that conducting the balancing exercise and having regard to equity as required by Section 98(4),the dismissals were unfair for the reasons given above and accordingly the claimants claims succeed.

56. I turn to the remaining issues which relate to remedy. It was agreed any issue in relation to mitigation of loss would be considered at the remedy stage if the case proceeded to that stage.

57. It was agreed any Polkey issue or contributory fault issue would be dealt with at this stage.

58. I turn to consider the principle in Polkey. I have found this dismissal was substantively unfair. This is not a dismissal which was fair but for a procedural error.

59. I am satisfied that if the respondents had raised alternatives to the imminent 20% pay cut, the claimants would have engaged with them, in a bid to save their jobs. I find Mr Steven Davis raised the issue of hours in his consultation and also said at Tribunal he would have been interested in any sort of pay protection scheme. I rely on the evidence of Mr Steven Davis that having worked for the respondent for 10 years, he had anticipated continuing to work for the respondent for the rest his working life

60. I remind myself of the guidance in Software 2000 v Andrews [2007] UKEAT .I have found the respondent discounted any concept of red circling or pay protection at the outset of the regrading for the negatively affected installers at Manchester and also fixed the reduced rate for the claimants job role from

the outset of the regrading. There is therefore no evidence before me of what a reasonable respondent might have done in these circumstances to ameliorate a 20% pay cut. The only evidence is from Mr Steven Davis that he would have engaged positively if the respondent had put forward alternative suggestions. The only other evidence I have is that some employees were entitled to have their pay frozen for up to two years until other employees caught up under the respondent's own red circling procedure.

61. I find that given their length of service, both claimants would have remained with the respondent if they had offered alternatives to dismissal and re engagement with a 20% pay cut.

62. I find it is not significant the claimants did not appeal the dismissal. I rely on my finding that Mr Elsey had closed his mind to red circling or pay protection or retaining the existing pay rates for the negatively affected installers at Manchester when he launched the new pay structure and there was therefore no prospect of that position changing at appeal.

63. Accordingly there is almost no evidence for me to engage in a speculative exercise of what might have been. On the information I have, I find that both the claimants would have remained with the respondent if there was any alternative to a termination of contract and new terms with a 20% pay cut. This finding is based on Mr Paul Davis evidence above, their lengthy service and the fact they were regarded as good workers by the respondent and the evidence that the respondent was willing to red circle some employees pay for a period of 2 years.

64. I turn to contributory fault. There was no such argument for Mr Paul Davis. It was agreed he had an unblemished record.

65. The respondent sought to argue that Mr Steven Davis should have a Polkey reduction because he would have been dismissed for conduct or that his compensatory award should attract a contributory fault deduction for a post he placed on Facebook when he was on his notice period.(p290.)

66. I accept the evidence of Mr Steven Davis that he had an otherwise unblemished record and that he apologised for the post.

67. I find that a reasonable employer of this size and undertaking would not have dismissed an employee for one post of this nature when his previous record was clean and he had apologised.

68. Accordingly for these reasons I find it is not appropriate to make a Polkey deduction.

69. Furthermore in terms of a deduction to the compensatory award, although it may be considered culpable conduct, it did not cause or contribute to his dismissal and so I decline to make any deduction.

Employment Judge Ross

31 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
6 April 2021

FOR THE TRIBUNAL OFFICE

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