



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114974/2019 (V)

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Held by Cloud Video Platform (CVP) on 21 September 2020

Employment Judge M Sangster

10 **Mr P McKinnon**

**Claimant
In Person**

15 **Telecom Service Centres Ltd t/a Webhelp UK**

**Respondent
Represented by:
Mr R Byrom -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

REASONS

25 **Introduction**

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.
- 30 2. The claimant presented a complaint of unfair dismissal. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal. The respondent maintained that they acted fairly and reasonably in treating redundancy as sufficient reason for dismissal.
- 35 3. The respondent led evidence from a number of their employees, as follows:

- a. James McKenna (**JM**), currently Director of People Services UK, Africa and India, but at the time of the claimant's employment Head of People Services UK, South Africa and India;
 - b. Steven Elliot (**SE**), Head of UK Operational Training; and
 - 5 c. Hazel Ross (**HE**), Operations Manager - Sky Manager.
4. The claimant gave evidence on his own behalf.
 5. Evidence in chief was taken by reference to witness statements, which had been exchanged in advance and were taken as read.
 6. A joint set of productions was lodged, extending to 199 pages. An agreed
10 statement of facts was included in this.

Issues to be Determined

7. The claimant clarified, at the outset of the proceedings, that he accepted there was a genuine redundancy situation and his dismissal was as a result of this. He accepted that he was appropriately selected as being at risk of redundancy
15 and that appropriate consultation took place. His only challenge to the fairness of his dismissal related to the availability of alternative employment which he felt was suitable for him, but which was not offered.
8. The issues to be determined in this case accordingly were:
 - a. Was the dismissal fair or unfair in accordance with s98(4) of the
20 Employment Rights Act 1996 (**ERA**) considering, in particular, whether the respondent took such steps as were reasonable to avoid or minimise redundancy by seeking redeployment within its own organisation?
 - b. If the claimant was unfairly dismissed what compensation should be
25 awarded, taking into account, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed (**Polkey v AE Dayton Services Ltd** [1987] UKHL 8).

Findings in Fact

9. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
10. The respondent provides outsourced call centre services for clients.
- 5 11. The claimant commenced his employment with Thomas Cook UK Travel Ltd (Thomas Cook) in June 2005. The claimant's employment transferred to the respondent in October 2018. The claimant's role at the time of transfer was Team Leader and he was based in Falkirk.
- 10 12. Thomas Cook's business collapsed and entered into liquidation on 23 September 2019. No further work was available or undertaken by employees on the Thomas Cook campaign after Thomas Cook's collapse. All employees assigned to the Thomas Cook campaign were placed at risk of redundancy. On 25 September 2019, the respondent began collective consultation with the recognised trade union and employee representatives. This was followed by
15 individual consultation. The consultation process lasted 30 days.
13. The respondent was keen to redeploy as many of the at risk employees as possible. At the same site in Falkirk the respondent also had employees working on a separate campaign for Sky. There were more vacancies within the Sky campaign than the number of employees who had been placed risk
20 of redundancy.
14. The roles on the Sky campaign were different to the roles on the Thomas Cook campaign in terms of customer base, products, systems, methodology and processes. Those employed on the Sky campaign were also engaged on different terms and conditions to the individuals on the Thomas Cook
25 campaign. For example, the base salary for the Team Leaders on the Sky campaign was £25,000-£28,000. The claimant's salary was £24,082.38. The respondent determined that the roles did not constitute suitable alternative employment. During collective consultation it was agreed that the at risk employees would be invited to apply for roles on the Sky campaign, if they
30 wished, as an alternative to redundancy. It was made clear that, to be

successful in an application for a role on the Sky campaign, individuals would require to pass a competency based assessment.

15. There was however a low uptake in applications to work on the Sky campaign from the employees who had worked on the Thomas Cook campaign. This resulted in the respondent offering financial incentives to those employees to apply for roles on the Sky campaign, as well as opening up applications to external candidates.
16. All applicants to the Sky campaign, internal or external, require to successfully pass a competency based assessment, which is designed to ensure candidates have the strengths which Sky considers are essential for individuals working in the particular roles. It is a requirement of the respondent's contract with Sky that any of the respondent's employees who work on the Sky campaign have passed an assessment to their satisfaction. Sky places their own employees on the assessment panel to ensure this.
17. The assessment is scored out of 50. The pass mark is 42. Those with a score of 42 or over are deemed to be in the green category and a good fit for the role. Those with a score of 39 to 41 are deemed to be in the amber category, meaning they are a 'potential fit for the role, needs further consideration or development'. Those scoring 38 or under are deemed to be in the red category and not to be a good fit for the role.
18. The respondent collaborated with Partnership Action for Continued Employment (PACE) to assist and support employees during the redundancy exercise and redeployment process. PACE worked to support employees with interview techniques, interview skills and preparation for competency based assessments, including in relation to the assessment for the roles on the Sky campaign.
19. The claimant applied for the position of Team Leader on the Sky campaign and was assessed for the role on 9 October 2019. He scored 24 out of 50 in his assessment. This was the lowest score in his assessment group and one of the lowest scores ever recorded in the assessment for that role. His score placed him in the middle of the red category, meaning he was not deemed to

be a good fit for the role. He was informed that he had been unsuccessful in his application on/prior to 17 October 2020.

20. The vacant Team Leader roles were offered to successful candidates, who had passed the assessment. One of those successful candidates then pulled out of the recruitment process, leaving a Team Leader vacancy. The respondent reviewed the assessment scores of the unsuccessful candidates. The unsuccessful candidate with the highest score was one of the claimant's colleagues, CM. He had scored 36. Whilst he was in the red category, it was noted that he was very close to the 'amber' categorisation. Following discussion with Sky, it was agreed that CM could take the assessment again. Following further support and training he did so, passed the assessment and was offered the role of Team Leader on the Sky campaign.
21. The claimant was not offered the opportunity to undertake further training or to be reassessed, given that he had scored significantly below the pass mark in his assessment. Previous experience demonstrated to the respondent that only those who were very close to the pass mark were able to successfully pass the assessment on the second attempt, following further training.
22. The claimant was not considered for the Sales Through Service Performance Manager role, which was more senior than the Team Leader role (attracting a salary of up to £35,000), given that he had been unsuccessful in his assessment for the more junior, Team Leader, role.
23. There were no other redeployment opportunities available for the claimant.
24. The respondent wrote to the claimant on 25 October 2019 confirming the termination of his employment by reason of redundancy.
25. The claimant appealed the decision to terminate his employment by email dated 3 November 2019. The main points of his appeal were that he should have been offered one of the Team Leader roles on the Sky campaign, or alternatively the opportunity to interview for the Sales Through Service Manager role on the Sky campaign, and he had not received feedback in relation to why his application for the Team Leader role had not been

successful. An appeal hearing took place on 12 November 2019. It was conducted by SE who was accompanied by a notetaker. The claimant had been offered the opportunity to be accompanied at the appeal hearing, but chose not to be.

5 26. Following the termination of the claimant's employment, further Team Leader roles on the Sky campaign became available. One of these was filled, on/around 22 November 2019, by an external candidate, who had previously worked with the respondent, TK. TK had been successful in his assessment for the Sales Through Service Performance Manager role, but was not
10 appointed to the role as preference was given to an internal candidate who was also successful in the assessment.

27. By letter dated 27 November 2019, the claimant was informed that his appeal was not upheld. Responses to each of the points raised in the claimant's appeal were provided.

15 **Respondent's submissions**

28. Mr Byrom, for the respondent, submitted that the respondent had taken all reasonable steps to avoid terminating the claimant's employment by reason of redundancy. The approach adopted by the respondent was agreed in collective consultation. The respondent took reasonable steps to secure alternative
20 employment for the claimant. Whilst there were alternative roles available, on the same site, working for a different client, these roles were not like for like. The respondent was entitled to use subjective selection criteria, and a competitive interview process, when determining who should be offered that alternative employment (*Akzo Coatings plc v Thompson & others* UKEAT/1117/94 and
25 *Morgan v Welsh Rugby Union* [2011] IRLR 376).

29. In relation to the claimant's assertion that he should have been considered for the more senior role, the respondent relied upon the case of *Amazon.co.uk Ltd v Hurdus* UKEAT/0377/10/RN to support their assertion that the relevant question is whether the respondent took reasonable steps to find alternative
30 employment for the claimant, so that he could retain his employment. It is only if there was a vacant post for which the claimant was suitable, but he was not

considered for, it that the employer acts unreasonably in this context. The respondent submitted that it was clear that, having not passed the assessment for the more junior role, the claimant was clearly not suitable for the more senior position.

- 5 30. The respondent acted reasonably in reassessing CM for the Team Leader role which later became vacant. He had scored 36 in the assessment and so was much closer to the amber category than the claimant, who had only scored 24.
31. The respondent took all reasonable steps to avoid the claimant's dismissal on grounds of redundancy. The claimant was however unsuccessful in applying for
10 the only alternative employment available which might have been suitable. The respondent acted reasonably, with reference to s98(4) ERA. The claim should accordingly be dismissed.

Claimant's submissions

- 15 32. The claimant submitted that he should have been offered a Team Leader role on the Sky campaign. He had been unfairly treated, as he was not given the opportunity to be reassessed for the role of Team Leader. Another colleague, who also fell within the red category following their assessment, was given the opportunity to do so. He was also not given feedback in relation to why he had been unsuccessful in his application. He should also have been given the
20 opportunity to apply for the Sales Through Service Manager role

Relevant Law

33. S94 ERA provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principle reason if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is
25 one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA).
34. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so
30 employed, or the fact that the requirements of that business for employees to

carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).

35. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.
36. The House of Lords in ***Polkey v A E Dayton Services Ltd*** 1988 ICR 142 held that *“in the case of redundancy, the employer will not normally have acted 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 its own organisation”*.

Discussion & Decision

37. The Tribunal referred to s98 ERA, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) ERA. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.
38. The claimant accepted that there was a genuine redundancy situation and this was the reason for his dismissal. He accordingly accepted there a potentially fair reason for dismissal.
39. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by

the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** [1982] IRLR 439 that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent.

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40. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in ***Polkey*** in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. One of the three factors referred to (see paragraph 36 above) is that the employer '*takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation.*' It was on the basis of this factor alone that the claimant challenged the fairness of his dismissal.

41. The Tribunal found that the respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the claimant and, in particular, that the respondent took reasonable steps to redeploy the claimant within its organisation, for the following reasons:

- a. The Team Leader role in Sky was not the same as the claimant's role on the Thomas Cook campaign.
- b. It was agreed during collective consultation that individuals would not be matched into the Sky roles. Rather, they would require to apply for the roles and attend an assessment. Only those who were successful in that assessment would be offered roles.
- c. Even if this process had not been agreed during collective consultation, the respondent was bound by the contractual requirements laid down by Sky, its client. The claimant could not have been matched into the Team Leader role on the Sky campaign: only individuals who have passed the

assessment to Sky's satisfaction could take up a position on their contract.

- 5 d. The respondent informed the claimant of the possibility of alternative employment on the Sky campaign. They informed him how individuals would be assessed for these roles and provided training for him in advance of the assessment.
- 10 e. The respondent arranged for the claimant to undertake the assessment for the Team Leader role on the Sky campaign. The assessment was competency based. It was open to the respondent to use subjective criteria to assess whether the claimant was suitable for the Team Leader role at Sky, given that it was a different position to his current role (*Morgan v Welsh Rugby Union* [2011] IRLR 376)
- 15 f. The claimant participated in the assessment and failed, falling well short of the pass mark. The respondent was accordingly unable to offer the claimant the role of Team Leader on the Sky campaign. The respondent had no discretion in this, given their client's strict requirements.
- 20 g. The respondent's decision that they would not provide further training to the claimant and would not allow him a further opportunity to be assessed fell within the band of reasonable responses open to a reasonable employer in these circumstances. The claimant had fallen well short of the pass mark and the respondent's previous experience demonstrated that only individuals who were close to the pass mark were able to successfully pass the assessment following further training. It cannot be said that no reasonable employer would have reached this conclusion.
- 25 h. The only other role available was that of Sales Through Service Performance Manager, also on the Sky campaign. This was a more senior role to that of Team Leader. Given that the claimant had been unsuccessful in his assessment for the more junior, Team Leader, role, it was reasonable for the respondent not to consider the claimant for that
- 30 role.

i. There were no other redeployment opportunities for the claimant.

42. Given these findings, the claim of unfair dismissal does not succeed and is dismissed.

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Employment Judge: Mel Sangster
Date of Judgment: 03 October 2020
Entered in register: 17 November 2020
and copied to parties

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