



EMPLOYMENT TRIBUNALS

Claimant: Dennis Downer

Respondent: Wesleyan Administration Services Ltd

Heard at: West Midlands **On:** 29th and 30th March 2021

Before: Employment Judge Steward (sitting alone) (CVP)

Representation

Claimant: In person

Respondent: Mr Perry (Counsel)

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent as an IT Mainframe Operations Analyst from the 11th February 2008 until the 8th July 2020.
2. The Claimant was made redundant on the 8th July 2020 but states in his ET1 that the dismissal for redundancy was unfair within Section 98 of the Employment Rights Act 1996. The Claimant asserts that he had key legacy VME mainframe skills. The Claimant states that there was a clear understanding from the commencement of his employment that the legacy system would eventually be migrated and decommissioned. He says there was a plan by all managers to redeploy him post the migration of the system. As a result of this clear understanding the Claimant did not have the opportunity to either train for other roles within the organisation or apply for other posts. He states he was tied to his role as there was nobody else who could carry out his duties. The Claimant says that the Respondent's planning post the decommissioning of the mainframe did not include an alternative role for himself. He had requested the opportunity to work within the Unix Team. The Claimant stated that he had the requisite skills to work within the Unix Team. He was not put forward for any roles within the Unix Team when the opportunity arose in early 2020. The Claimant also says the Respondents consultation process was pre-determined and not transparent.

3. The Respondent states that the Claimant was specifically aligned to the trust mainframe and that the Claimant provided VME support and incident management VME service requests and changes and batch processing support for systems. The Respondent denies that the Claimant was unfairly dismissed as alleged. The Respondent contends that there was a genuine redundancy situation relating to the Claimants role.
4. On the 10th of March 2020 the trust mainframe system was decommissioned. This led to a review of operational roles linked to the trust migration project. As IT mainframe operations analyst many of the Claimants duties ceased including VME support and incident management and batch processing support for the trust.
5. The Respondent suggest the Claimants role was a standalone post. This therefore put the Claimants role at risk of redundancy and the Claimant was notified that his role was at risk on the 8th of June 2020. The Respondent asserts that the Claimant was given sufficient warning that his role was at risk of redundancy. The Respondent conducted a consultation process between the 11th and the 25th of June 2020. The Respondent states the Claimant was assisted to apply for alternative roles within the business during the consultation process. There was an appeal procedure and an appeal hearing on the 27th of July 2020 when the Respondents decision to dismiss the Claimant for redundancy was reviewed and thereafter confirmed on the 10th September 2020.
6. The Respondent disputes that there was ever an agreement or plan to redeploy the Claimant post the decommissioning of the mainframe. Even if there had been an agreement in the past as asserted by the Claimant is irrelevant to the statutory test that has to be applied to the facts in 2020. The Respondent also states that there was no pre determination of the decision to make the Claimant redundant as the Claimant did not work within a 'pool' and had a stand alone position.
7. The Claimant appeared in person and gave oral evidence. The Respondent was represented by Mr Perry (Counsel) and Mr Brightman (Infrastructure and Technical Services Manager) and Mr Jagot (Head of Technology Strategy and Architecture) gave oral evidence for the Respondent. The bundle consisted of 427 pages of evidence.

Summary of the law

8. To be entitled to a redundancy payment an employee will have to show that he has been dismissed. Such a dismissal is categorised as being by reason of redundancy that is where it arises because the business at which the employee is employed closes or closes in the place where he or she works; or where the requirements of that business for the employees to carry out work of a particular kind, or work of a particular kind in a place, have ceased or diminished S.139(1) Employment Rights Act 1996. It is clear from the facts of this case that the Claimant has been dismissed and the Respondent relies on redundancy as his specific role within the organisation is no longer required.
9. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The Employee must show that he was dismissed by the Respondent under S.95. There is no dispute in this case that the

Claimants Contract of Employment was terminated by the Respondent's on the 8th July 2020.

10. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within Section 98. First, the Employer must show that it had a potentially fair reason for the dismissal within Section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.
11. In this case it is not in dispute that the Respondent dismissed the Claimant because it believed his role within the business was redundant. Redundancy is a potentially fair reason for dismissal under S.98(2). Therefore the Respondent has satisfied the the requirements of S.98(2). The burden lies on the employer to show that the reason was a potentially fair reason under S.98(2)
12. S.98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case.
13. The key question is whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee. This effectively imports a "band of reasonable responses" test. It is an error of law for a tribunal to decide the case on the basis of what it would have done had it been the employer. The question must be whether this employer acted in a reasonable way given the reason for dismissal. The band of reasonable responses is a very important step. If the tribunal thinks that one reasonable employer could reasonably have dismissed the Claimant and another reasonable employer could reasonably not have dismissed the Claimant then the unfair dismissal claim will fail. In order to be successful the tribunal must decide no reasonable employer would have dismissed the Claimant.
14. The leading case on the issue of fairness and redundancy remains the decision of the EAT in **Williams v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will give as much warning as possible of impending redundancy to employees, consult them about the decision, the process and alternatives to redundancy, and take reasonable steps to find alternatives such as redeployment to a different job.

Findings of Fact

15. In this section I will record findings of fact.
16. The Claimant states in his ET1 that he was employed by the Respondents since the 8th February 2008 until the date of dismissal on the 8th July 2020. He was employed by the company as an IT Mainframe Analyst. The Claimant stated that his role centred around the Fujitsu VME mainframe which was a specialised Fujitsu IT system. The Claimant stated that he was aware, as was the company, that eventually the mainframe would be decommissioned as a result of being replaced with more modern systems.

17. This was confirmed in the statement of Mr Brightman on behalf of the Respondents. They also accepted that the Claimants role centred around the trust mainframe which was a specialised legacy Fujitsu IT system. Due to advances in technology Fujitsu had moved away from selling and providing support for the system. The Respondents accepted that there was a need to find a new solution to replace the technology going forward. The Respondents also accepted that the time would come when the mainframe would have to be decommissioned as a result of been overtaken and replaced with more modern systems.
18. It was a central feature of the Claimant's case that when it became apparent that the system would be migrated and decommissioned (circa 2015 onwards) that he was given an assurance by the managers at the time that he would not be made redundant. The Claimant says he was made a promise or guarantee that he was a special case. He would be offered the chance to retrain and would be redeployed. He asserted that there was a plan for him to retrain to linux (pages 188-216 generally) Whether there was or wasn't a previous promise or guarantee is not the legal test. The statutory considerations have to be considered at the point of redundancy and whether the decision to dismiss for redundancy was reasonable or not at the time considering the band of reasonableness test.
19. The WeLearn sheets of the Claimant were provided in the bundle from page 188 to 216. These were explored in some detail during the hearing. They were performance and development reviews which included career goals etc. The records from 2018 onward record the following
- "I have chased Andy Greenway for Unix tasks as discussed but no update at present. I will chase again."*(194)
- "Look to assist with Unix support tasks when the opportunity arises exploit this opportunity to explore further opportunities"*(199)
- "Dennis has expressed an interest in moving into the Unix area following trust decommissioning. Buddying would be very beneficial to understand Wesleyan implementations of Unix as he already has a good grounding in RedHat Linux. AG has been contacted to facilitate this cross training in advance of the trust going.....Training plan to be produced and agreed with Pravin (Unix Lead)"*(201)
- "DD to request time from Pravin. Pravin arranging development for Unix"*(203)
20. The WeLearn sheets clearly show that the Claimant had a wish to be retrained and explore the possibility of being redeployed to the Unix Team. Its clear that the Respondents were exploring this as a possibility from 2018 onwards. However there is no evidence contained within the WeLearn sheets that the Claimant had been 'promised' or 'guarantee' an alternative role post decommissioning let alone in Unix. Its clear at that time the Claimant had expressed an interest in Unix and this was something the Respondents were open to progressing. What is also clear is that a training plan was to be produced by the Unix Lead Pravin. This would also seem to suggest that the Claimant was expected or required to complete further training in this area.
21. On the 6.9.19 Mr Brightman sent an email to H Fisher (HR) (69) which was a review of the roles of the employees that worked on the Mainframe (the Claimant and Afton Hill) the email makes it clear that the trust will be decommissioning and that there will no longer be a role for a system administrator.

22. On the 2.12.19 Mr Harrison sent an email to Mr Brightman to ask whether Simon Brett was onboard with the need for Dennis as earlier in the week he was saying that he was needed into 2020 for trust activities. He was asked to double check that DD was not needed post 20/12. He agreed with PYLON when it happened.(75)
23. On the same day Helen Fisher sent an email to Mr Harrison copying in Mr Brightman. In that email Ms Fisher makes it clear that the role carried out by the Claimant will no longer be needed post 20 December and an announcement will be made to DD tomorrow to advise him that his role was at risk of redundancy. The plan was to start formal consultation on the 6th December with the final consultation on the 20th December 2019. The suggestion was that PILON would be paid rather than working full notice.(76)
24. The consultation process had to be postponed due to the Claimants illness. The Claimant being away from work in early December and returning to work on the 27th January 2020. While the Claimant was away ill it would appear that a recruitment process was finalised for new members of the Unix Team. Three new Unix Team members were recruited in December 2019. It should also be noted that the other 2 members of the VME Mainframe team had also left by December 2019. One team member had left Wesleyan and the other, Afton Hill was promoted to Computer Operations Team Leader. The Respondent's suggested there was no reason why the Claimant could not have applied for this internal role but he chose, for whatever reason, not to do so.
25. It was part of the Claimants case during the hearing that the process of consultation adopted by the Respondent's was not fair and transparent. It was a process that had an element of pre-determination. The Claimant will say that the email exchanges in September/December 2019 would seem to indicate that the Respondent's knew that the mainframe was subject to imminent decommissioning and that the Claimant would be made redundant regardless. There was the suggestion that the Claimant was going on PILON and the consultation process was a foregone conclusion and anything but genuine.
26. It's clear that the Claimant's role was by December 2019 a standalone role. In this situation there was not a 'pool' of employees to chose from. The only employee to operate the Mainframe was the Claimant. His post was no longer required and therefore the Respondent's had little alternative but to implement the consultation process in the way they did.
27. On the 17.1.20 Robin Venables and IT contractor sent an email to all the IT staff within the organisation explaining that he had been taken on as a contractor with a remit to recruit a permanent Unix team member. He stated during that email that it had been "a pleasure working with so many great people for the last seven months." This would seem to suggest that the recruitment process for Unix had been underway since the summer of 2019. The Claimant said he was not aware of this recruitment process in evidence. He did not make any application for any of the roles for Unix. The Respondents state the roles in Unix that were filled in December 2019 were not suitable for the Claimant as he did not have necessary skills. Those skills would have taken 3 years to develop. The positions needed filing as a business requirement.
28. Due to concerns over the Claimant's illness and the advent of the global pandemic the consultation period for the claimant was postponed. On the 10th of March 2020 the trust mainframe system was decommissioned. The Claimant was able to provide some printing support for the society generally from the 11th of March 2020 until the 7th of April 2020 when he was then placed on furlough.

29. Claimant was notified that his role was at risk of redundancy by the letter dated the 8th of June 2020. (96-97) This letter set out an explanation of why the Claimants role was now redundant and also the details of the consultation process. The letter also explained that redeployment within Wesleyan would be explored with the Claimant. A redeployment pack would also be provided.
30. The first consultation took place on the 11th June 2020. Claimant raised that he felt he should've been considered for a role working in the UNIX team. The Respondent explained to him that there had never been a position in the UNIX team at his level or suitability. The Respondent explained that the Unix role had not been able to be progressed. The Claimant raised the Windows administrator vacancy in the meeting. It was agreed that he would apply for this role. Unfortunately the Claimant was unsuccessful in applying for the role and he was provided with some feedback from Phil Acey the principal window support system administrator as to why he had been unsuccessful in the application.
31. The Second Consultation took place on the 19th June 2020. Further discussion took place regarding alternatives to redundancy. The final consultation meeting was due to take place on the 25th June 2020 but was extended to 8th July 2020 to allow the Claimant more time and opportunity to consider alternative roles. None of these came to fruition. Further feedback had been received from Arun Sirpal regarding a DBA Administrator Role and Claire Bagnall regarding a Project Management Role. Further roles were discussed during the meeting but none were suitable.
32. The Claimant was made redundant by way of the letter of the 8th July 2020 which also set out the appeal procedure. The Claimant notified the Respondent of his wish to appeal on the 15th July 2020 and the appeal took place on the 27th July 2020. This appeal was not successful and on the 10th of September 2020 the respondent confirmed that the claimants appeal was not upheld the effective date of termination remained the 8th of July 2020

Conclusions on Unfair Dismissal due to Redundancy

33. It is clear that the Claimant was dismissed and the reason for that dismissal was one of redundancy. That is not disputed. The question for the Tribunal is whether the dismissal for the reason of redundancy was fair or unfair. Did the Respondent act reasonably or unreasonably. Was the decision to dismiss for the reason of redundancy within the 'band of reasonable responses' test?
34. After considering all the written and oral evidence the Tribunal finds that the decision to dismiss the Claimant for reasons of redundancy was fair. The Respondent acted in a reasonable way given the reason for the dismissal was one of redundancy.
35. It is clear that the Claimants role regarding the Mainframe was coming to an end. There is no dispute that the Mainframe was to be decommissioned. The WeLearn sheets provided in the bundle show that the Claimant was interested in moving into the Unix Team and this was raised from 2017 onwards. The Respondents were not able to progress this but clearly were attempting to do so. It would appear though there was no role within Unix until the latter part of 2019 when recruitment took place. It would have been unreasonable to expect the Respondents to have created a role within Unix for the Claimant prior to the

recruitment consultation for Unix. The Claimant did not apply for the roles within Unix though it would appear that the consultation process for Unix which was completed by December 2019 had been ongoing for a number of months. The Claimant did not apply for the role that was eventually filled by Afton Hill from within the Mainframe Team. This was a post that was advertised internally and the Claimant could have applied for this role but chose not to.

36. The decision to consider the Claimants role at risk of redundancy was reasonable. The Claimants role was a standalone role. The Claimant, throughout the evidence, persistently referred to himself as a 'single point of failure'. There was no doubt that when the Mainframe was decommissioned his role was at risk of redundancy. This was a reasonable conclusion to reach by the Respondents. As a result of this it cannot be said that the Respondent's had pre-determined the decision to consider the Claimant at risk of redundancy and adopt the consultation process that they did. The Respondents acted in a reasonable way in reaching the decision that they did. The Claimant was the only person who could do the job that was being made redundant by the decommissioning of the Mainframe. As a result of this the Respondents had little choice but to put him in a pool of one with regard to the potential redundancy and had acted reasonably in doing so.
37. The Respondents acted in a reasonable way in adopting the consultation process that they did. The originally postponed the process due to the Claimants illness. The roles within the Unix Team were not suitable for the Claimant and needed skills and training that according to the Respondent would have taken 3 years to develop. Post the decommissioning of the Mainframe on the 10th March 2020 the Respondents were still able to keep the Claimant in a role until the 7th April 2020 when he eventually went onto furlough.
38. The Consultation process was formally set out by way of letter on the 8th June 2020. It clearly explained why the Claimants role was at risk of redundancy. It explained the consultation process. It explained that redeployment would be considered and a redeployment pack was provided. There were 3 consultations. Alternative roles were considered and vacancies explored. The Claimant was able to apply for alternative roles within the organisation during the consultation process and received feedback on the applications. There was an appeal process which the Claimant utilised and an appeal hearing. The results of which were provided to the Claimant. In fact the final consultation meeting was postponed to allow the Claimant extra time to consider alternative roles. The Respondent's consultation process was fair and reasonable. The Respondents implemented the consultation and appeal process in a reasonable way. At the point of the redundancy and the consultation process there were no available vacancies within the Unix Team. The Unix vacancies were some months earlier and those roles had to be filled at that time to meet a business need and requirement. It would not have been reasonable to expect the recruitment for those roles to be delayed to the summer.
41. Therefore the Tribunal finds that the Respondent had a potentially fair reason to dismiss the Claimant pursuant to S.98(2) of the Employment Rights Act 1996 namely one of redundancy. Upon consideration of S.98(4) the Tribunal finds the Respondent acted reasonably in dismissing the Claimant for the reason of redundancy. In doing so the Tribunal has applied the 'band of reasonable responses' test. The Respondent has acted in a reasonable way given the reason for the dismissal.
42. Therefore the Claim for Unfair Dismissal by reason of Redundancy fails.

Employment Judge **Steward**
7th April 2021