



EMPLOYMENT TRIBUNALS

Claimant: Mr M Jones
Respondent: BT Facilities Services Ltd
Heard at: Nottingham
On: 21 January 2021
Reserved: 25 February 2021
Before: Employment Judge Victoria Butler (sitting alone)

Representation

Claimant: Mr W Bordell, Counsel
Respondent: Mr B Williams, Counsel

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

1. On the facts, a genuine redundancy situation had arisen as defined in section 139(1)(b)(i) Employment Rights Act 1996 (“ERA”) and the Respondent has therefore, discharged the burden of proving a potentially fair reason for the Claimant’s dismissal.
2. Accordingly, the Claimant’s claim that no genuine redundancy situation had arisen is not well-founded and is, therefore, dismissed.
3. The decision that the Claimant’s dismissal by reason of redundancy was fair stands.

REASONS

Background

1. The Claimant's claim of unfair dismissal was heard on 8, 11, 12 and 13 February 2019 before Employment Judge Blackwell ("EJ Blackwell"). EJ Blackwell made a reserved decision on 13 March 2019 and his Reasons were sent to the parties on 21 March 2019. He determined that the Claimant's dismissal was fair and the claim, therefore, failed.
2. The Claimant appealed this decision to the Employment Appeal Tribunal by a Notice of Appeal dated 24 April 2019. He set out a number of Grounds of Appeal and, at a paper sift, HHJ Auerbach struck out all but the following two:
 - i. The Employment Tribunal simply failed to decide whether the situation which the Respondent termed a "redundancy situation" did in fact fit within the statutory definition of redundancy in section 139 of the Employment Rights Act 1996 ("ERA"); and*
 - ii. Alternatively, the conclusion that the reason for dismissal was redundancy as defined in section 139 ERA, was perverse, as being one that no reasonable Employment Tribunal could have come to."*
3. At a preliminary hearing on 15 January 2020, Choudhury P set down the appeal for a full hearing on the above two grounds.
4. The appeal hearing was heard by the Honourable Mr Justice Cavanagh ("Cavanagh J") on 28 July 2020. He dismissed ground two but upheld ground one and remitted the case to a different Employment Judge, with the re-hearing limited to the question of whether there was, on the facts, a genuine redundancy situation.

The issues

5. The issue before me was confined to considering whether there was, on the facts, a genuine redundancy situation for the purposes of section 139(1)(b)(i) ERA.

The hearing

6. I heard the case on 21 January 2021 and made a reserved decision on 25 February 2021.
7. The parties presented an agreed bundle, incorporating the documents and witness statements used at the hearing before EJ Blackwell. Both produced supplemental witness statements for this hearing.

The evidence

8. I heard evidence from the Claimant and Ms Annie Pope, who was the Continuous Improvement/Customer Experience ("CI/CE") Director at the relevant time. I deal

with her evidence first.

9. Counsel for the Claimant asserted that Ms Pope's evidence was inadequate and says:

"... much of which [her evidence] is unverifiable second-hand reporting of her retrospective recollection of Ms Quinn's¹ views, is of little or no value, especially since Ms Pope herself stood to be one of the key beneficiaries of the restructure, and she only took up her role in February 2017, at which point that restructure had long since been a fait accompli ... Her evidence as to whether R's requirements for employees to do a particular kind of work had ceased or diminished under s.139(1)(b)(i) of the ERA, as at the time when the restructure was decided upon and set in motion, is therefore utterly inadequate for the purpose of discharging R's burden of proving a potentially fair reason for C's dismissal." (paragraph 37.3.3. skeleton argument).

10. Ms Pope acknowledges at the outset of her witness statement that she was appointed as CI/CE Director *after* the planning of the restructure and design of the job description for the new CI/CE role. However, I was satisfied that she was proficiently able to comment on the similarities and differences between the CI Coach and the CI/CE Lead roles, given the following: her operational experience of the Claimant's team pre-2017; her research and discussions with Ms Diane Quinn prior to accepting the role as CI/CE Director; and, from her subsequent experience in implementing the restructure and managing the team. Her evidence was entirely credible.

11. Turning to the Claimant's evidence, the first half of his witness statement deals with his allegation that the Respondent has lied and concealed evidence – namely the recording of his grievance investigation interview with Ms Quinn. The Respondent has made efforts to locate the recording but has been unable to do so, and says it might not exist. The Claimant believes that this evidence "*is objectively the most crucial piece of evidence*" and had it come to light it "*... would have no doubt ended my turmoil 3 years ago*" (paragraph 2 of his witness statement). He explains that the transcript demonstrates how Ms Pope was unqualified to comment on the difference in the roles. Further, he alleged in cross-examination that she was not being honest in her explanations. I reject the Claimant's assertion that Ms Pope was being dishonest and, as above, found her evidence to be entirely credible. As such, the transcript has no bearing on the matter before me.

12. In respect of the substantive issue, the Claimant's view is that:

"It is clear that the respondent has retrospectively scrambled and attempted

¹ Former Service Performance Director – see paragraphs 19-21.

to defend a non-genuine redundancy situation with varying change rationale statements, ... that contradict the evidence of the orchestrator 'Ms Quinn' ... The respondent has even gone as far as to conceal Ms Quinn's investigation interview which is objectively the most critical piece of evidence. Even if the change rationale within the witness statements were made before the 'redundancy' exercise, which they were not, they still do not constitute a genuine redundancy situation." (Paragraph 13).

13. He has clearly suffered great distress consequent of his dismissal and remains entrenched in his position that the redundancy process was a sham, claiming:

"... I was the victim of a subsequent cohesive and malicious attempt to exit me out of the business because I exercised my right and challenged the unlawful activity. I consequently became extremely ill during the process and for a long time post my employment". (Paragraph 15).

14. I do not doubt the Claimant's belief is genuine, but his allegations that the Respondent has consistently lied, backtracked and concealed evidence are entirely unsubstantiated and undermine his credibility. Therefore, where there was a conflict on the evidence, I preferred that of Ms Pope.

The facts

15. I do not rehearse the full facts as found by EJ Blackwell and simply contain them to the single issue before me.

16. The Claimant was employed as a CI Coach at the material time in the Service Performance Team. CI is, in summary, the process of analysing products, services or processes using recognised methodology to improve them, or, in the words of Ms Pope "... *identifying ways to make things work better*" (paragraph 6 of her witness statement).

17. Key elements of the CI Coach job description are as follows:

"... You will coach, lead and facilitate the continuous improvement programme to drive improvements in costs, safety and processes, aligning with BT to achieve the overarching strategic goals.

KEY RESPONSIBILITIES

- *Coach, mentor and guide colleagues through the value of CI, constantly reinforcing the message*
- *Act as a subject matter expert for process and continuous improvement, supporting the identification of opportunities and development of continuous improvement across the business.*
- *Analyse data relating to process, service, and estate performance.*

- *Positively challenge on ways of working, focussing on cost, quality, safety, waste elimination and identifying efficient ways of working.*
- *Analysing data, identifying trends across the business, and working with other coaches to implement national recommendations for change.*
- *Project manage change implementations, including follow up audits on completed recommendations, getting input from other areas on the business, i.e Finance.*
- *Develop project plans, outlining improvements and changes to present to the SLT.*
- *Develop and mentor CI champions for the business.*
- *Development and maintenance of CI SharePoint site.*

SKILLS AND EXPERIENCE

- *Problem solver, who is able to positively challenge peer groups*
- *Strong planning and organisational skills*
- *Excellent oral and written communication skills, able to present to an audience*
- *Effective decision maker and has the initiative to drive the business forward and react quickly to challenges*

BUSINESS IMPACT AND AUTHORITY

A respected manager who will

- *Deliver improved customer satisfaction through effective delivery, engagement and communication.*
- *Direct and influence the adoption of safe working practices.*
- *Improve BT LoB CARE wellbeing index outcomes for satisfaction with the workplace.*
- *Strengthen BTFS' reputation with colleagues, customers and partners.*
- *Lead and influence effectively to drive performance, engagement and decision making.” (pages 57-58).*

18. The key function of the CI Coach was to identify CI initiatives and coach the relevant business areas in their implementation. Whilst the job description provides that a key responsibility of the role was to “*Project manage change in implementations, including follow up audits on completed recommendations ...*”, this did not reflect the role in practice. CI Coaches were not involved in the implementation of initiatives, nor did they provide the relevant business area ongoing support – they let the business area ‘*get on with it*’. Once coaching on the initiative had been provided, their involvement came to an end.

19. In September 2016, Ms Diane Quinn, Service Performance Director at the time, was involved in an overall review of the Respondent's Service Performance Structure to assess its effectiveness. She concluded that to further the

Respondent's service levels to its customers, there should be an increased focus on Customer Experience ("CE"), rather than just CI. In her view, the remit of the CI team was overly focused on the mechanics of process efficiency, rather than its implementation. She discovered that hundreds of initiatives had been identified by the team, but very few had actually materialised.

20. Additionally, Ms Quinn concluded that because the CI Team's success was measured by costs savings, there was no tangible measurement of "*CE impact, Right first Time, people engagement and process efficiency*" (page 66) which were measurements used by BT to assess the Respondent's performance. Ms Quinn determined that the focus should be moved away from cost to the aforementioned measurements to ensure consistency in approach.

21. Consequent of her review, a new organisational structure was proposed. The CI Coach role would become redundant and a new role of CI/CE Lead was introduced. The CI/CE role merged CI (i.e. identifying improvement initiatives) with CE (i.e. leading and implementing those initiatives). The key elements of the job description for the CI/CE Lead were:

"To work with individuals and teams to embed, support and drive Customer Experience (CE) and Continuous Improvement (CI), across BTFS. The role will have responsibility for engaging people at all levels in terms of making sustained change. This role will drive CE, cost and people change improvements, with measurable benefits. CI tools will be the method by which the change is embedded, therefore the role holders will need to be able to articulate and use CI tools to a level at which they can coach others in their use.

KEY RESPONSIBILITIES

The role holder will

- *Work with specific areas of the business to support, enable and drive the change improvements*
- *Build strong relationships with the OD's, RFSM's, FSM's, non-managers and central functions to convince and negotiate different ways of working*
- *Be able to coach people to achieve the step change required in CE and CI*
- *Appreciation of the roles across BTFS and ability to identify the best ways to engage, cajole and re-enforce best practice*
- *To find the best ways to communicate the CE and CI messages. Make the messages interesting, specific and simply*
- *Support the delivery of the CE & CI strategy, ensuring benefits are realised*
- *Support the CE/CI Director and CE/CI programme lead*
- *Focus on CE, CI, Best Value (cost) & People*

SKILL AND EXPERIENCE

- *Understand the need to join together CE and CI*
- *Operations experience*
- *Enthusiastic customer advocate*
- *Ability to use CI tools*
- *Ability to use persuasive written and verbal communications*
- *Has an understanding of how communications can help drive change*
- *Charismatic and engaging style. Will be able people (sic) on their side and able to challenge in the right way to ensure the right outcomes” (pages 208 – 209).*

22. The requirements of the new role were not only to identify initiatives to further CE, but also to implement them. Whilst CI was still an important part of the new role, it was by no means the dominant element. In fact, it only made up circa half the role, the other half being CE and, given the change in emphasis, the overall nature and quality of the tasks were different. The requirement for a 100% CI focussed role had, therefore, diminished.

23. The Respondent considered the new CI/CE Lead role to be sufficiently different to the CI Coach role and, as such, the CI Coaches were not automatically mapped across in the new structure.

24. At the time of the restructure, there were seven CI Coaches and the new structure provided for eight CI/CE Leads.

The law

25. Cavanagh J set out the law clearly in his judgment on this case dated 2 September 2020, as follows:

“14. *The statutory definition of redundancy is to be found in section 139(1), ERA, as follows:*

“139. Redundancy

(1). 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—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

- (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.”

15. *The relevant part of this definition for present purposes is that set out in section 139(1)(b)(i). This provides that an employee will be dismissed by reason of redundancy if his or her dismissal is wholly or mainly attributable to the fact that the requirement of the business for employees to carry out work of a particular kind have ceased or diminished.*

...

17. *The question whether the requirements of the business for employees to carry out work of a particular kind has ceased or diminished, or is expected to cease or diminish, whether at all, or in the location where the Claimant was employed, is a question of fact: **Murray v Foyle Meats Ltd** [1999] ICR 827 (HL), at 829, per Lord Irving of Lairg LC. It is also a question of fact and degree as to whether a new job, with a new job title, is really a continuation of work of a particular kind, which was previously done under a different job title. In **Martland v Co-Operative Insurance Society Ltd** (UKEAT/0220/07, Unrep), Elias P said, at paragraphs 51-52:*

“51 This is classically an area for the Tribunal to determine.... The Tribunal has to consider whether the change in the nature and quality of the tasks and the way in which they were being carried out is sufficient to justify an inference that the work could now be described as being of a different kind or not.

52. There is no single right or wrong answer to that question; it involves assessing all the relevant evidence and reaching a judgment. We have to remind ourselves that it is not for us to make that assessment....”

18. *It is trite law that, in deciding the question whether a redundancy situation exists, the Tribunal is not concerned with deciding whether the employer acted with good commercial sense: **Moon v Homeworthy Furniture (Northern) Ltd** [1977 ICR 117; **James W Cook (Wivenhoe) Ltd v Tipper** [1990] ICR 716. It is not a requirement that the dismissal of the employee actually achieves a cost saving for the employer. Similarly, a particular employee may be dismissed for redundancy if there is a reduction or cessation of the requirements for employees to carry out the type of work that s/he is employed to do, even if there is an increase in the requirements for employees to carry out other work, and the employer is*

generally expanding.

...”

Submissions

26. The Claimant submits that:

(i) there was in fact, no cessation or diminishment, and no expectation of cessation or diminishment, in the Respondent’s requirement for employees to carry out work of a particular kind that was carried out by the CI Coaches, and section 139(1)(b)(i) of the ERA is therefore not satisfied;

(ii) as a result, the Respondent has not discharged its burden of establishing a potentially fair reason for dismissal under section 98 of the ERA; and

(iii) it follows that the Claimant was unfairly dismissed.

27. He says that the changes to the CI/CE role were “*peripheral at best*”. In essence, the two roles were broadly one and the same, therefore, the requirements of section 139(1)(b)(i) ERA are not met. Further, the Claimant asserted that Ms Pope’s evidence was unreliable for the reasons mentioned above.

28. The Respondent submits that the evidence, considered objectively, is that work of a particular kind, namely the CI Coach role, had diminished by virtue of the creation of the CI/CE Lead. There was a clear restructure from the management perspective, meaning that the Claimant’s work, namely the pure CI coaching role (the work of a particular kind), had ceased. Instead there was a different role overall (CI/CE) as described by Ms Pope in particular. This falls squarely within the definition of redundancy in law - it matters not whether the Claimant agreed that this was a good idea or not, or whether he agreed with it at all.

Conclusions

29. My key deliberation was whether section 139(1)(b)(i) ERA was satisfied, and therefore, a genuine redundancy situation had arisen.

30. In addressing this issue, the Claimant focussed on the job descriptions for each role and says in his witness statement:

“One of the clearest ways to show that the role of continuous improvement coach was not redundant is by comparing the redundant job description (57 – 58) and that of the apparent new role (96-97).” (Paragraph 11).

31. He has undertaken a desktop analysis of both and concluded that the differences

were no more than peripheral. This is, in my view, an artificial exercise and the focus of enquiry must be on the day-to-day reality of what both roles entailed. Notably though, on the Claimant's approach, there is clear difference between the roles, namely the absence of reference to CE in the CI Coach job description.

32. In terms of the Respondent's position, I was satisfied that Ms Pope was perfectly positioned to comment on the difference between the CI and the CI/CE roles and her evidence was credible and consistent. She articulated clearly how the CI role was limited to identifying initiatives and coaching the relevant business areas on them and, thereafter, involvement in those initiatives ceased. The CI/CE role encompassed much wider and differing responsibilities and focussed on the entire process of delivering improvements and efficiencies for its customers, from inception to implementation.

33. Aptly, the Respondent accepts that there were indeed similarities, and some elements even identical, in the two job descriptions. Ms Pope explains this at paragraph fourteen of her witness statement as follows;

"Aspects of the skill set were inevitably similar (even identical) between the old CI Coach roles and the new CI/CE Lead roles. The CI/CE Lead would still require the knowledge of existing CI processes to identify and recommend areas for change – and these skills would still be valuable in carrying out the job. However, the key difference in the new CI/CE Lead roles was in emphasis of what the Leads would be doing – both in identifying the full range of improvement opportunities and in leading the improvement activity. There was a deliberate move away from a consultant-type role providing tools and advice, to CI/CE Leads being project managers to partner with the business, and drive and implement change."

34. I am satisfied that her explanation is reflected in the CI/CE Lead job description and, despite what the CI Coach job description says on paper, the CE element was entirely new and not undertaken by the CI Coaches.

35. For completeness, I address the Claimant's attention on a 'CI Restructure Observations Powerpoint' (pages 66-68) used by Ms Pope in a presentation to a Director of the Respondent. He asserts that the heading 'Relaunch CI' on a particular slide demonstrates that the CI role was not redundant. However, I accept Ms Pope's evidence under cross examination that the slides were simply an aide memoire used during a meeting lasting over an hour and not reflective of her report on the change in emphasis towards CE. In my view, the slides add very little to either party's case.

36. Given the facts as I find them, I am satisfied that the CI/CE Lead role was different overall to that of the CI Coach. The CI Coach role was entirely focussed on CI, whereas the CI/CE Leads had a much wider focus incorporating the CE

requirements. As such, there was a diminished requirement for the work of a particular kind carried out by the CI Coaches, and therefore, a genuine redundancy situation had arisen. It matters not for the purposes of s.139(1)(b)(i) ERA that the number of CI/CE Leads in the new structure was greater than the number of CI Coaches in the existing structure.

37. The Claimant has failed to advance any persuasive evidence to counter Ms Pope's explanation of the difference in the roles and, therefore, I reject his assertion that the two roles are in essence one and the same.

38. Accordingly, I am satisfied that the Respondent has demonstrated that a redundancy situation had arisen on the facts and, therefore, discharged the burden of proving a potentially fair reason for dismissal. The Claimant's claim that no genuine redundancy situation had arisen is not well-founded and is, therefore, dismissed.

39. The decision that the Claimant's dismissal by reason of redundancy was fair stands.

Employment Judge Victoria Butler

Date: 15 April 2021

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