**Case No: 3320175/19**

# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Michael Spencer** | **v** | **Lifting Equipment Engineers Association Ltd** |

**Heard at:** Watford by CVP **On:** 22 and 23 April 2021

**Before:** Employment Judge Anderson

**Appearances:**

**For the Claimant:** Ms Ismail (counsel)
**For the Respondent:** Ms Zakrzewska (litigation consultant)

**JUDGMENT** having been sent to the parties on 7 May 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. By a claim form presented on 11 July 2019 the claimant complained of unfair dismissal by way of an unfair redundancy process which led to his dismissal on 12 April 2019.

2. The respondent filed a response on 6 September 2019 resisting the claim.

**The issues**

3. The parties had agreed a list of issues as follows:
    a. **Unfair Dismissal (s.94 ERA 1996)**
        i. What was the reason (or principal reason) for the Claimant's dismissal?
        ii. Was the reason (or principal reason) a potentially fair reason for dismissal identified in Section 98 Employment Rights Act 1996? The Respondent relies on redundancy or SOSR business reorganisation.
        iii. Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant, in all the circumstances of the case?
    b. **Redundancy**
        i. Was the Claimant dismissed? If so,
        ii. Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one

of the other economic states of affairs in section 139(1) exist)? If so,

iii. Was the dismissal of the Claimant caused wholly or mainly by the state of affairs identified at stage 2 above?

iv. Did the Respondent:-

1. Give adequate warning to the Claimant, prior to the role being made redundant;
2. Enter into meaningful consultation with the employee (R v British Coal Corporation and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72);
3. Take reasonable account of the Claimant's representations on the Price Bailey report?
4. Provide the Claimant with a meaningful opportunity to challenge his redundancy selection assessment?
5. Consider suitable alternative employment?

c. **SOSR**

i. Was there a business reorganisation carried out in the interests of economy and efficiency?

d. **Reasonableness**

i. Did the Respondent follow a fair procedure?

ii. If the Tribunal finds that a fair procedure was not followed, would the Claimant still have been dismissed if a fair procedure had been followed? [Polkey v AE Dayton House of Lords, 1988 ICR 142, Andrew Software 2000]

## Evidence

4. I heard evidence from each of the parties via cloud video platform. I received a single agreed bundle of documents of 190 pages. In addition, the claimant filed a witness statement and the respondent filed four witness statements from Ross Maloney, Andrew Wright, Paul Fulcher and Jessica Coxsedge.

5. The witnesses gave evidence at the hearing, except for Ms Coxsedge, who was unable to attend.

6. Part way through the hearing as a result of questions raised with the respondent's witnesses, I received three further documents, which were two versions of the employee handbook dated 2015 and 2019, and a redundancy flowchart.

## Relevant Findings of Fact

7. The claimant was employed by the respondent as a finance manager from 22 October 2012 until his dismissal on 12 April 2019. The respondent is an association that represents members in the lifting industry.

8. The claimant, on a number of occasions, and as documented in the bundle on 23 October 2018, 14 December 2018 and 30 January 2019, raised the issue of his excessive workload with Ross Moloney, the respondent's CEO.

9. On 5 February 2019, Ross Maloney met with three companies that provide services including finance function outsourcing. Before this meeting took place Mr Moloney wrote to one of the three companies stating that the respondent was *'looking for a potential partner who will provide all our*

*financial services…'* and *'we will be particularly interested in the following:… Plan for transition. What do you see as being necessary for a smooth handover from an in-house to an outsourced function?'*.

10. On 7 February 2019, one of the three companies that met with Mr Moloney on 5 February 2019, Price Bailey, sent a detailed proposal document to Mr Moloney with a covering email including the words *'in respect of the initial scoping exercise, we would need to be onsite for up to half a day with access to your systems and preferably with your current finance manager available to discuss the current processes. We can consider nearer the time how this is explained to him, and under what guise we are attending.*' That proposal included on page 1 the following line '*Our understanding is that you are looking to replace your financial controller with a fully outsourced solution.*'

11. Mr Maloney replied on the same day (7 February 2019) '*Thank you for your time on Tuesday. We were very impressed by you and your proposal and we want to engage you as our partner. Clearly, I hope to do this with the minimal possible disruption. As discussed I would like this to be a case of you coming in, ostensibly to do a full review, possibly in order to identify deficiencies. In this way, I hope we will have no disruption. But once in control you will basically sort it out so that we can get the service we need.*'

12. The brief to the three companies was not provided to the tribunal. All of the respondent's witnesses gave evidence that the brief was wide ranging and the companies were asked to look at a number of options including the complete outsourcing of the function. On the evidence provided I find that the respondent invited proposals on the basis that the entire finance function would be outsourced and the finance manager (the claimant) would be dismissed.

*13.* On 15 February 2019 Mr Moloney emailed Jessica Coxsedge and the claimant following a conversation with the claimant about his being overworked and needing additional resource. He instructed Ms Coxsedge to meet with the claimant to discuss the additional resource required and possible recruitment. He said that he had spoken to Price Bailey and *'they are going to give us some consultancy when they look at the same sort of thing.'*

14. I find on the evidence that despite the instruction to Ms Coxsedge it was not the intention of Mr Moloney to consider additional recruitment at this point as he had already decided that the finance function was to be fully outsourced and in fact this email was the pretext on which to have Price Bailey in the office to carry out the review referred to in the email exchange of 7 February 2019.

15. Price Bailey attended the respondent's premises on 5 March 2019 and subsequently provided a system review document to Mr Moloney on 8 March 2019.

16. On 26 March 2019 the claimant contacted Mr Moloney to tell him that his car had broken down and may need to be scrapped. He asked to work from home until he had transport.

17. On 27 March 2019. Mr Moloney set up a telephone meeting between himself, the claimant and Ms Coxsedge. Working from a script he advised the claimant that following the systems review which Price Bailey had carried out on 5 March 2019 that *'an option is to improve our systems and processes, outsource remaining functions and have other members of the LEEA team perform management functions. This means that your role is being fragmented into various parts both internally and externally. Regrettably, as a result, your role will be disbanded.*' He went on to say, *'it is important that you understand that no final decisions have been made yet and this is why we are consulting with you now. We want to hear your views and ways of avoiding redundancy.'* The claimant asked to see the Price Bailey report.

18. On 28 March 2019 Ms Coxsedge sent the claimant a letter confirming that his role was at risk of redundancy and enclosing a copy of the Price Bailey system review document dated 8 March 2019.

19. Neither at this point or at any other point during the dismissal process was the claimant provided with a redundancy policy or guidance on the redundancy process.

20. Mr Wright, the respondent's deputy CEO, told the tribunal that he had access to a suite of documents including redundancy guidance from the respondent's external HR providers, and followed it. I accept that he was provided with this information. The tribunal was not provided with the document or documents and I make no finding as to whether it was followed.

21. A first consultation meeting was held between the claimant, Andrew Wright, and Ms Coxsedge on 2 April 2019. The claimant challenged the findings of the Price Bailey report and noted that there were no costings. At that meeting, Mr Wright said. *'Unfortunately there is no option for alternative employment within LEEA as there are no vacancies that match your skill set.'* Following the meeting, the Claimant sent by email a detailed analysis of the Price Bailey review raising a number of issues with its conclusions.

22. On 3 April 2019 Mr Moloney wrote to the claimant saying that he would review the proposal, i.e. his email of 2 April 2019.

23. The second consultation meeting was held on 8 April 2019. Mr Wright said that Ms Coxsedge had put the claimant's comments to Mr Moloney but that his view was that the claimant's proposals would be twice as costly as the outsourcing cost. The claimant asked if anyone had gone back to Price Bailey with his queries. Mr Wright said he did not know the answer to that. The claimant noted again that he had not been given costings for the project.

24. Following that meeting Mr Wright emailed the claimant, on 8 April 2019, with an explanation of the respondent's position and its reasons for preferring outsourcing to recruitment.

25. A third and final meeting was held on 10 April 2019, at which the

consultation process was finalised and Mr Wright advised the claimant that his position was redundant.

26. The same day a notice of redundancy was sent to the claimant with information that included his right to appeal against the decision to dismiss him. The claimant submitted an appeal on 16 April 2019. He again raised the fact that he had not seen costings from the Price Bailey report and that Mr Moloney had failed to discuss with him his criticisms of the report.

27. An appeal meeting was held between the claimant and the appeal manager, Paul Fulcher, chairman of the association's board of directors, on 23 April 2019. On 1 May 2019 Mr Fulcher wrote to the claimant advising that he upheld the decision to dismiss him. Mr Fulcher said that his investigations confirmed that the process was initiated, progressed and concluded, correctly and fairly.

## Submissions

28. At the end of the hearing each party made submissions.

29. Ms Ismail for the claimant said that the claimant accepted that it was not for the tribunal to look beyond the facts of how the redundancy arose and also accepted that the outsourcing of the finance function led to his redundancy. However, the claimant did dispute that the respondent had acted fairly or reasonably or followed the guidance in *Polkey,* which is that the respondent must consult with employees at risk of redundancy, select those at risk fairly and consider alternative employment. She said there had not been a fair consultation, nor attempts to find alternative employment. A fair consultation is one in which the employer has an open mind, capable of being influenced which would mean starting the consultation at a sufficiently early stage to allow for consideration of alternatives. Ms Ismail said that the decision to outsource the finance function had already been made before the consultation commenced, the consultation exercise was carried out in haste because the decision had already been made and was simply a matter of the respondent going through the process in name rather than substance. Ms Ismail said that if the tribunal was persuaded that the dismissal was procedurally unfair then there should be no deductions to the damages claimed. The respondent had not challenged the claimant's mitigation evidence and on the respondent's evidence it was not possible to conclude that the claimant would have been dismissed in any event. The only reason given was cost and the claimant has argued that the respondent did not look at all of the tasks the claimant was responsible for, nor did it reveal the costings from Price Bailey.

30. For the respondent Ms Zakrzewska said that the respondent had a fair reason for dismissal which was redundancy, it carried out a full and meaningful consultation. The claimant was warned that his job was at risk, he was invited to three consultation meetings and was afforded a right of appeal which he exercised. She said that the respondent's requirements for a finance manager had ceased or diminished, the outcome of the consultation had not been predetermined and the respondent had investigated alternative employment but there were no suitable alternative jobs. Ms Zakrzewska said that if the dismissal was procedurally unfair that

the claimant would have been dismissed in any event and there should be no *Polkey* reduction.

## Law and Conclusions

31. The question I need to answer is whether the dismissal was fair or unfair. This is a two stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

32. Section 98 of the Employment Rights Act 1996 identifies a number of potentially fair reasons for dismissal which include at s98(2)(C) that the employee was redundant. I am satisfied on the evidence that the Claimant was dismissed for redundancy.

33. It is not the role of the tribunal to consider or challenge the business decision of the respondent and I find that the respondent has satisfied s139 (1) Employment Rights Act 1996 in that it has shown that the requirements of the business for an employee to carry out work of a particular kind had ceased or diminished and the dismissal of the Claimant was caused mainly by the state of affairs. Whilst cost was a factor in the decision to outsource the finance function there is also clearly a second reason which is that the turnover of the organisation had increased with its membership, and the management were concerned that there were risks associated with having one person solely responsible for all work relating to finance.

34. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair. In a case of dismissal for redundancy this involves a consideration of the redundancy process and specifically whether there was a fair process involving (i) warning and consultation (ii) a fair basis for selection, (iii) considerion of alternative employment and (iv) an opportunity to appeal (*Polkey v A E Dayton Services [1987] IRLR 503*).

35. In this case the fairness of the criteria is not in dispute nor is the opportunity to appeal. What is disputed is whether there was a full and meaningful consultation and whether there were attempts to find alternative employment. Consultation should involve (i) consultation when the proposals are still at a formative stage (ii) adequate information on which to respond (ii) adequate time in which to respond (ii) conscientious consideration of the response to consultation.

36. I find that the respondent had decided to outsource its finance function and as a result had decided to make the claimant redundant. I conclude from the evidence that the consultation was initiated after the decision to make him redundant had been taken and was in fact an exercise undertaken to protect itself from criticism and not genuine or meaningful. The respondent's refusal to provide costings of the Price Bailey solution indicate that the respondent did not want to deal with a substantive challenge to its plan, and despite the email from Mr Wright of 8 April 2021, Mr Moloney gave only the most cursory, if any, consideration to the claimant's counter proposals. I conclude that there was not a conscientious consideration of the claimant's response at any stage of the process including at the appeal stage.

37. The claimant focused in his responses to the consultation largely on what he considered to be defects in the Price Bailey proposal rather than on alternatives to his redundancy. The respondent was entitled to make a decision as to the outsourcing of its finance function on reasons other than cost and I do not criticise it for that, but for the respondent to say throughout the process that a decision on redundancy had not been made but then fail to engage with the claimant in any meaningful way on what an alternative may be, leads me to conclude that the respondent did not engage in consultation with an open mind or a mind that could be influenced.

38. I conclude that the respondent failed to consider suitable alternative employment and this is further evidence that the consultation process was a consultation in name and not in substance. Mr Wright said on 2 April at the first consultation meeting that there were no suitable alternative vacancies. He did not set out what work had been done to reach that conclusion. In oral evidence he was unable to give any information about the work that had been undertaken other than to say that the respondent did not have vacancies at that time. There was no discussion with the claimant as to what might have been acceptable to him as an alternative, whether that be part time work, retraining, or focusing on the non-financial aspects of the work that he had taken on over the course of his employment. There was no discussion about the future plans of the respondent, which on the respondent's own admission was a growing association, and whether this meant that new and potentially suitable vacancies were imminent.

39. I conclude therefore that the claimant's dismissal was unfair as a fair procedure was not followed.

40. I must now go on to consider if the Claimant would still have been dismissed if a fair procedure had been followed? *(Polkey v AE Dayton House of Lords, 1988 ICR 142, Andrew Software 2000).* If I find that dismissal would have taken place I must consider whether, for that reason, there should be any deduction to the compensation claimed. The claimant's position is that there should be no deduction because it is not possible to determine whether he would have been dismissed in any event. This is because there is no evidence of consideration of his proposals and no work was carried out in looking for alternative employment. The respondent simply stated (in pleadings and at the hearing) that dismissal would have taken place anyway and there should be no deduction. No evidence was offered and I therefore make no deduction on a *Polkey* basis.

41. Ms Ismail confirmed that the claimant was not seeking an order for re-instatement or re-engagement. She also confirmed that the claimant did not receive any welfare benefits as a result of his dismissal and so I conclude that there is no need to consider recoupment.

42. The claimant submitted a schedule of loss for a sum totaling £14,333.38 but not including figures for future loss. Ms Zakrzewska told the tribunal that the parties had reached agreement on quantum. The respondent had offered to pay the sum of £14,333.38 in compensation and the claimant had agreed to accept that offer. In light of that agreement I see no reason to consider the matter further and order that the respondent pay the claimant the sum of £14,333.38 within 28 days of receiving the judgment.

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Employment Judge

Date: …29 April 2021…….

Judgment sent to the parties on

7 May 21

For the Tribunal office