EMPLOYMENT TRIBUNALS

Claimant: Ms J Portchmouth

Respondent: Gardeners Rest Community Society

Heard at: Leeds Employment Tribunal (CVP) **On:** 23 June 2021

Before: Employment Judge K Armstrong

Representation
Claimant: In person
Respondent: Mr A Chaplin (company secretary)

JUDGMENT having been sent to the parties on 24 June 2021 and a request having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

Claims

1. The claimant brings a claim for unfair dismissal. At the time of her claim form she also brought a claim for holiday pay, but this has since been resolved between the parties and is dismissed on withdrawal by the claimant.

Conduct of the hearing

2. This was a remote hearing which took place via CVP due to the ongoing COVID-19 restrictions. There were some connection issues at various points but the parties confirmed that they were able to see and hear proceedings and to participate fully. The claimant's witness, Ms M McCredie could not be seen by video but was able to be heard and could see and hear the proceedings.

Issues for the tribunal to decide

3. The issues for the Tribunal to decide were discussed and agreed at the outset of the hearing. It was agreed that the Tribunal would deal with the issue of liability first, and the question of remedy after giving judgment on liability.

4. There is no dispute that the reason for the claimant's dismissal was redundancy, a potentially fair reason under s.98(3) ERA 1996. The claimant also accepts that there was a genuine redundancy situation i.e. a reduction in the requirement for the type of work that she carried out for the respondent, namely bar work (s.139 ERA 1996).

5. The issue for the tribunal is therefore whether the claimant's dismissal was fair within the meaning of s.98(4) ERA 1996: i.e. whether in the circumstances (including the size and administrative resources of the respondent) the employer acted reasonably or unreasonably in treating the redundancy as a sufficient reason for dismissing the claimant, and this shall be determined in accordance with equity and the substantial merits of the case.

6. Ms Portchmouth takes no issue with the redundancy consultation process. She accepts that she was given notice that the respondent was considering making redundancies and there were no alternatives to redundancy which she wanted to discuss. There is no challenge to the selection criteria in themselves and therefore no issue with consultation as to what those criteria should be.

7. The issue of fairness which I am asked to determine is therefore: were the selection criteria objectively chosen and fairly applied? Applying the relevant case law, the question for me to consider is not whether the claimant's individual scores were accurate but whether the process adopted by the respondent was a fair one, free from mistake, bad faith or bad conduct. The authorities are clear that it is not my role to undertake a re-scoring exercise.

8. The issues which the claimant raises with the scoring process are as follows:

    i. It was undertaken by individuals who did not have a sound knowledge of her skills;
    ii. The scores were arbitrarily low, without objective reasoning, and did not take into account her skills particularly regarding her commitment to the respondent's community ethos;
    iii. She did not have a fair chance to contest the selection, because she was not provided with the scores until the appeal stage, and the scores themselves were not re-considered at the appeal stage.

9. If I determine that the dismissal was procedurally unfair, I then need to consider whether I should reduce the compensatory award to reflect the likelihood that the claimant would have been dismissed in any event.

Evidence

10. I was provided with an agreed bundle of 84 pages, including witness statements from Mr Chaplin, Mr Price and Mr Beckles Wilson on behalf of the respondent; and Ms Portchmouth, Mr Carter, Ms McCredie, Mr Williams, Mr Bailey and Mr Rhodes on behalf of the claimant.

11. Mr Williams, Mr Bailey and Mr Rhodes did not attend the hearing today. Their statements are not signed or verified by a statement of truth therefore the weight I place on them is limited.

12. On 11 June 2021 the claimant also applied to adduce a further witness statement from a Ms Fenn and an email sent on 1 July 2020 from Mr Chaplin to the claimant. The respondent had no objection to these documents being adduced. I was content to admit the evidence into the hearing for consideration as it is relevant evidence and there is no prejudice to the claimant. Ms Fenn did not attend the hearing to give evidence and her statement is also not signed or verified by a statement of truth so again I place limited weight on it.

Findings of Fact

13. The claimant commenced employment with the respondent on 21 April 2017. The respondent is a community benefit society, which operates a pub in Sheffield. The claimant worked as bar staff, originally working 15 hours per week, at minimum wage. The claimant was dismissed by reason of redundancy on 31 October 2020.

14. In around August 2019 the respondent recruited to select a new manager. The claimant and her partner Mr Carter applied but were unsuccessful and Shaun Price was appointed to the role. Around the same time, the work that the claimant had previously been doing with an art therapy class in the pub was discontinued and her number of working hours reduced. She was offered further hours at the weekend to top these up but did not take them on because she had other commitments.

15. Following the onset of the COVID-19 Pandemic, bar staff were all placed on furlough in March 2020. A limited number of staff came back to work from furlough over the summer of 2020 when restrictions eased, but the claimant was not one of those. The restrictions changed again in September 2020 and on 15 September 2020 the claimant was sent an email notifying her that redundancies were being considered. A selection matrix had been produced and was attached to the email. The claimant did not take any issue with the selection criteria or the fact that redundancies were proposed.

16. Nine employees were in the pool for redundancy, all of whom were bar staff, and four redundancies were proposed. It was decided that two other staff members (the pub manager and the social inclusion work supervisor) would be retained and that the two cleaners would be made redundant.

17. On 20 September 2020, Mr Shaun Price (pub manager), Jan Brears (director) and Andy Chaplin (company secretary), met to score all staff against the matrix. The criteria are all relatively subjective criteria such as interaction with customers, interaction with management, work ethic and work rate, knowledge of cellar skills, and loyalty to the business. The only truly objective criterion is length of service, which was given an equal weighting to the other criteria. Each employee was scored against each criterion with a score out of five. Mr Chaplin explained that the scores were reached by consensus between the three individuals scoring. In relation to each criterion they identified a staff member who they felt represented a competent level, which was a ‘three’ and then assessed how the other staff members compared to that benchmark. Staff were not scored by ranking but by their performance against that benchmark. So for example in relation to knowledge of the till operation, all staff received a three.

18. The claimant says that these three individuals did not know her work sufficiently well to be able to score her fairly. I am satisfied having heard the evidence that Mr Price saw the claimant at work on occasion, at least once per week, and that the other board members were 'regulars' at the pub who would have been served by her occasionally, as well as being part of an active management board.

19. On 26 September 2020 the board and Mr Price reviewed the staff requirements and confirmed that they would require five staff for current business levels. On 28 September 2020 the claimant was informed that her role was to be made redundant with one month's notice. She was not informed of her scores against the matrix, or the 'safe score'. There was no meeting or discussion between the claimant and respondent between the risk of redundancy letter and her dismissal.

20. On 30 September 2020 the claimant indicated that she wished to appeal her selection for redundancy. Her employment ended on 31 October 2020. On 2 November 2020 the claimant was told in error that she had previously been sent her scores. On 10 November 2020 the respondent realised that this was in error and sent her the scores and invited her to set out her appeal in writing. The claimant scored 23 out of a possible 55 points. The respondent has not provided any documentary record as to the cut off score or where the claimant ranked among those who were made redundant. Mr Chaplin in his oral evidence told me that he recalls that the claimant attained either the second or third lowest score (out of four who were made redundant).

21. The claimant set out her appeal in detail in writing on 17 November 2020 and a copy of this letter appears in the bundle. In her appeal letter she sets out in detail the basis of her appeal and the challenge to the scores. She set out in detail why she disagreed with each of the scores she had been given. Her appeal was also set out on the same grounds as she brings this claim.

22. On 23 November 2020 the respondent offered all staff who had been made redundant a temporary one-month contract from 1–31 December 2020, with the potential for extension thereafter. The staff would be placed on furlough for that period. The claimant did not respond to this offer. She explains in her evidence that was because her appeal was outstanding and she was expecting to be re-instated with her full period of service intact. She found it hard to answer the question of whether she would have taken the offer of employment had her appeal been dealt with and dismissed before that date.

23. On 1 December 2020, three board members met to consider the claimant's appeal – Janet Ridler, Ian Sewerin and Mark Beckles Wilson. Mr Beckles Wilson gave evidence to the Tribunal. He explained that in the course of that meeting they did not reconsider the claimant's scores, but rather took an overview of the process. They were satisfied that the selection criteria were appropriate, that the individuals scoring the claimant were suitably qualified to do so, the process was fair and there was no discrimination. Therefore they felt that there was no need to reconsider the scores of any individual, and they dismissed the claimant's appeal. Mr Beckles Wilson told me that the panel did not consider the fact that the claimant had not had

an opportunity to challenge her individual scores. They did not consider whether they should contact the claimant by telephone or video and were content that a paper reconsideration was appropriate.

24. The claimant was informed of the outcome of the appeal on 3 December 2020. She did not contact the respondent to request re-employment on the terms previously offered.

Relevant law and conclusions

25. I have set out the issues above and the statutory test that I have to apply. The law regarding individual consultation is as follows: An employer can be expected to follow a fair process when carrying out a redundancy process. The procedure is not set in stone legally but it must overall be fair. The Employment Appeal Tribunal has held that an employer might be expected to: use selection criteria which are were objectively chosen and fairly applied; warn and consult with employees about the redundancies; consult with a union if appropriate; and consider whether any alternative work was available (*Williams v Compare Maxam [1982] ICR 156*).

26. A failure to disclose to an employee the details of her individual assessments may (but will not necessarily always) give rise to a finding that the employer failed in its duty to consult with the employee. In *John Brown Engineering Ltd v Brown and Ors [1997] IRLR 90* the EAT pointed out that a fair redundancy selection process requires that employees have the opportunity to contest their selection, either individually or through their union.

27. When I am considering the application of the selection criteria to the claimant, the case law is clear that the role of the Employment Tribunal is to consider whether the selection criteria were objectively chosen and fairly applied. The question for me to consider is not whether the claimant's individual scores were accurate but whether the process adopted by the respondent was a fair one, free from mistake, bad faith or bad conduct.

28. Turning to the specific issues raised by Ms Portchmouth:

29. Firstly, was the assessment undertaken by individuals who did not have a sound knowledge of her skills? I have to consider whether the individuals who undertook the scoring were fairly appointed, in light of the size and administrative resources of the respondent. The respondent is a community venture, running a pub and employing a relatively small number of staff. The claimant has not put forward any other individuals who she states should have undertaking the scoring exercise in place of the three individuals who scored her. I am satisfied that it was within the range of reasonable options open to a reasonable employer for her to be scored by the pub manager and two board members. Whilst they may not have undertaken in depth regular close oversight or observation of her work, I am satisfied that in view of the nature of her work and how the pub generally was managed, they would have had a reasonable knowledge of her skills and experience, sufficient to enable them to score her appropriately.

30. Secondly, the claimant says that the scores were arbitrarily low, without objective reasoning, and did not take into account her skills particularly

regarding her commitment to the respondent's community ethos. At this point I remind myself of the case law and the principle that I must not step into the shoes of the employer and re-score the employees. The question I must ask myself is whether there is evidence which points to the process being subject to mistake, bad faith or bad conduct. I am satisfied on the evidence I have heard that this is not the case. There is no evidence that these three individuals acted in bad faith in scoring the claimant. She evidently holds a very different view of her skills from that reflected in her scoring. Her view is shared it seems by a number of other board members and customers as I have seen from the witness statements provided on behalf of the claimant. Ms McCredie's evidence was more equivocal and she tended to support the scoring of the panel in that she felt the standard of the claimant's commitment and performance had dipped in recent months. On balance I am satisfied that the scores which were provided were based on a genuine assessment of the claimant. The scores were not unfairly allocated due to mistake, bad faith or bad conduct.

31. Finally, the claimant says that she did not have a fair chance to contest the selection – she was not provided with the scores until the appeal stage, and the scores themselves were not reconsidered at that stage. I am satisfied that this was unreasonable and was unfair to the claimant. As part of a fair redundancy consultation process, an employee can expect to be able to put forward a reasonable challenge to their scores. It is clear from the case law that an employer does not need to provide the scores for all individuals in the pool for selection, or all the evidence on which scores are based, but in order to meet the requirements of fairness an employee should be able to challenge the scores that they have been given before the dismissal is finalised. The claimant was not afforded this opportunity because she was not provided with her scores until after she had been dismissed. I have considered whether this default was remedied by the appeal. However, because the appeal was simply a review of the process, and the appeal officers did not consider the specific challenges to her scores that the claimant raised, she was not given this opportunity.

32. Therefore, I find that the claimant was unfairly dismissed.

33. I then turn to consider the question of the *Polkey* principle. This is the principle established in case law that where an employer follows an unfair procedure, the dismissal itself will be unfair, but the Tribunal must then go on to consider the likelihood that a fair dismissal would have occurred in any event. The compensatory award will then be reduced to reflect any such chance. This may be a percentage reduction or it may be time-limited for example for the additional time it would have taken for a fair procedure to be followed.

34. I am satisfied, having heard the respondent's witnesses being challenged in some detail by the claimant as to her scores, that had she had the opportunity to do that during the redundancy process, it would not have made any difference to the outcome of the redundancy selection exercise. The witnesses were confident in the scores that they had allocated the claimant and the issues that she raises did not make any difference to their views. The claimant was not 'on the cusp' of being safe, as there was at least one employee who scored more highly than her and who was still dismissed. Therefore I am satisfied that her scores would not have been

amended and that even if there had been some minor changes, this would not have changed her selection for redundancy.

35. I am satisfied that the process overall would not have taken any longer as had her scores been provided to the claimant the day after they were allocated i.e. on 21 September 2020, there would still have been seven days for those to be contested by the claimant before the decision to dismiss her which was notified to her on 28 September 2020. Therefore I am satisfied that the compensatory award should be reduced by 100% i.e. to zero.

36. The basic award is not agreed. The claimant received a redundancy payment of £433.13. The claimant claims that her basic award should amount to £590.63, i.e. a further £157.50. The dispute arises out of the calculation of a week's pay. The respondent's calculation is on the basis of 11 hours per week, the average that she worked in the 12 weeks before furlough. The claimant invites me to calculate it on the basis of 15 hours per week, as per her original statement of particulars of employment. I am satisfied that s.221 ERA requires a week's pay in this case to be calculated on the basis of the claimant's contractual pay, because she worked regular hours. However, although the claimant's written particulars of employment state 15 hours per week, from September 2019 until March 2020 she in fact worked 11 hours per week. This was in reality a variation to the contract which was agreed between the parties. She had worked those lower number of hours for six months without working extra hours which were offered. Therefore I find that prior to commencing furlough her contractual hours were 11 per week. Therefore there is no basic award payable over and above the redundancy payment which has already been made.

37. Therefore, I find that the claimant has been unfairly dismissed, and that no award is payable.

Employment Judge **Kate Armstrong**

Date: 9 July 2021