# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Erhan Osman

**Respondent:** ARC Cleaning Ltd

**Heard at:** London South **On: 28 June 2021**

**Before:** Employment Judge Khalil (sitting alone)

**Appearances**

For the claimant: in person, assisted by Ms Watson
For the respondent: Mr Jackson, Counsel

# JUDGMENT WITH REASONS

The claimant's claim for unfair dismissal contrary to S.94/98 Employment Rights Act 1996 is well founded and succeeds.

The claimant's claim for unfair dismissal contrary so S. 99 Employment Rights Act 1996 is not well founded and fails.

The claimant's claim for unfair dismissal contrary to Regulation 20 Maternity and Parental Leave Regulations 1999 is not well founded and fails.

**The parties were encouraged to resolve remedy privately in the next 28 days. If the parties are unable to do so, the parties are to write to the Tribunal requesting a Remedy Hearing with a time estimate.**

**Reasons**

Claims, appearances and documents

1. This was a claim for unfair dismissal under s.98 ERA and under S.99 ERA and/or under the Maternity and Parental leave regulations 1999 regulation 20 in relation to the claimant's selection for redundancy.

2. The claimant also asserted a holiday pay clam which was conceded by the respondent in the sum of £845.

3. The claimant was assisted by his partner, Ms Watson a lay representative and the respondent appeared by counsel, Mr Jackson.

4. The Tribunal received a pdf bundle in 4 parts comprising of 168 pages. The Tribunal heard from the claimant and Mr Nilesh Patel, Director for the respondent.

5. The Tribunal substituted ARC Cleaning Ltd as the correct respondent in these proceedings, being the employing legal entity.

6. The claimant had objected to service of an amended witness statement from Mr Patel on or around 22 June 2021 which was alleged to be in response to the claimant's witness statement. Following discussion, including if the claimant was seeking more time or a postponement, the claimant confirmed there was no prejudice and he was ready to proceed. The Tribunal admitted the amended witness statement as it was in the overriding objective to do so. With little or no prejudice to the claimant it was fair and just to proceed.

7. The Tribunal was also directed to read the written submissions of both parties before commencing the evidence which it did do.

8. It was also agreed at the outset that whilst there was an assertion that the dismissal or selection for redundancy was because of time off for dependants, there was no other detriment relied upon.

Relevant findings of fact

9. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

10. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

11. The claimant was employed by the respondent from July 2017 until his dismissal on 11 May 2020.

12. The respondent is a dry cleaning business operating in Dulwich. The Director of the respondent, Mr Patel, also owns a separate dry-cleaning business in Beckenham but that business is an unincorporated business.

13. At the Dulwich business, in addition to Mr Patel (the Director) there were 5 other employees: Mr Kenan Tuzen (tailor), Mr Omar Chaudary (presser), Mr Anup Vyas (Mr Patel's brother-in-law, general assistant but not a spotter) the claimant and Mr Patel's daughter, Ms Riyana Patel (administration).

14. The claimant undertook a variety of roles at the dry cleaning business except he was not trained in doing tailoring or pressing. He agreed this required training. He did however have specialist skills in spotting – a process whereby before dry-cleaning, stains are removed from a garment by the application of chemicals. He was engaged for 22.5 hours per week. His gross wage was £975 per month (page 153).

15. In March 2020, following the announcement of a lockdown in the UK, the claimant was furloughed.

16. The Tribunal took judicial notice of the general impact on a dry cleaning business in the light of a government instruction to work from home.

17. In consequence of the lockdown, the respondent's business suffered financially. The Tribunal accepted the respondent's accountant's assessment of the financial impact between 2 February 2020 and 30 April 2020 compared with the same period for 2019. The drop in turnover was £16, 639 (a drop of 36%) (page 75). These figures matched those showing in relation to sales (for the VAT returns) on pages 77 and 79.

18. The accountants' letter was dated 30 April 2020 but Mr Patel said in evidence it was not received until the 6 or 7 May 2020.

19. Mr Patel also said there was a meeting with all staff on a date in April 2020 when he warned the staff that there were likely to be redundancies because of the financial position. He could not recollect a date, save that it took place in the beginning of April 2020. In the letter dated 10 June 2020, he set out the attendees but did not refer to the claimant. This was a strange omission if indeed the claimant was in attendance. There was no follow up message, note or letter and no corroborating testimony from anyone else about this meeting. The Tribunal found there was no meeting warning of an impending redundancy; alternatively, if there was, the claimant was not in attendance.

20. On 2 May 2020, the claimant sent a message to Mr Patel referring to a conversation about the claimant working on Wednesdays and Fridays. The claimant had also, on 30 April 2020, referred to his partner's health, that she was bleeding heavily and hadn't moved from her bed and his need to provide care (pages 61-62) and thus could not work on Friday 1 May 2020.

21. On 3 May 2020, a WhatsApp message was sent by Mr Patel. He indicated that in the following week, the claimant would work Monday, Wednesday and Thursday) (and a Saturday in Beckenham) (page 63).

22. The claimant reported further difficulties in relation to his partner and her children because of her health. She was still bleeding and had required hospitalisation. In particular, the claimant said in a message that his partner was not long out of hospital and was still bleeding a lot and was constantly collapsing. The Tribunal found that the claimant was taking action which was

necessary to provide assistance on an occasion when a dependant had fallen ill and was seeking time off for Friday 1 and Monday 4 May 2020.

23. In response, Mr Patel suggested the claimant took the week off as annual leave. These messages were on pages 64-65.

24. On 3 May 2020, Mr Patel also asked the claimant to meet with him on 12 May 2020 (page 62). This was re-scheduled for 11 May 2020. Mr Patel said in oral testimony this was to discuss on-going arrangements for time off. However, when he got his accountant's letter on 6 or 7 May 2020 setting out the significant fall in revenue and providing a recommendation to reduce staff overheads, the nature of the meeting changed.

25. The Tribunal accepted Mr Patel's evidence in this regard. Mr Patel knew at least from 30 April 2020 about the claimant's partner's health concerns and was still making arrangements for the claimant to work on 3 days on 3 May 2020, in the following week. It was not the claimant's request to have a week off, this was suggested by Mr Patel, so there was no motivating 'botheration' of the claimant asking for a number of days off. The Tribunal found that it would be natural and reasonable to assess the claimant's on-going needs and/or expectations especially in the light of the prevailing business circumstances. It was also notable that the request for a meeting had initially been requested with the claimant – the message said I wish to have a meeting with you and upon the claimant's request, was moved to 11 May 2020, being the earliest date Mr Patel said he could do. The meeting on 11 May 2020, as it happened, was with the other staff too.

26. The meeting of 11 May 2020 did take place at which meeting the claimant was essentially told he was being made redundant. There was no forewarning of this. There was no consultation about a proposal to do so. This meeting was recorded, covertly, the transcript was in the bundle at pages 96-97.

27. At this meeting it was explained that Mr Kuzen's hours would be reduced, Mr Chaudary would come in as and when needed, Mr Vyas would go down to 20 hours and the claimant would be made redundant. Mr Patel said he would be increasing his own time/hours (which in evidence he said was all unpaid). Mr Patel also cited the claimant's higher wage bill as a reason for selecting the claimant. Mr Patel also referred, confusingly in the Tribunal's view, to the inability to reduce the claimant to part time hours as part time hours were 20 hours a week.

28. A follow up letter was sent to the claimant on the same day. This was at page 95. There was no right of appeal.

29. The claimant sought to challenge his redundancy by a letter dated 4 June 2020 (page 110). He had also asserted continuity of employment from March 2012 in his email of 23 May 2020 (page 99).

30. The respondent replied to the claimant on 10 June 2020 in relation to the substantive issue of why he was made redundant and ultimately agreed to pay

the claimant redundancy pay and notice pay based on 8 years continuous service (page 108 and paragraph 12 of Mr Patel's witness statement). The claimant had sought to obtain confirmation from his previous employers about his previous service as he could not find documentation to confirm his previous employment start date but it was met with resistance as it could have amounted to fraud. The Tribunal did not find this was a case where the claimant was asking someone to invent a period of employment, rather contractual documentation to support it which he no longer had.

31. Subsequent to the claimant's redundancy, Mr Vyas was made redundant on 30 September 2020. His P.45 confirmed this (168). The claimant asserted he had since been seen in the respondent's business but there was no or insufficient evidence that he was, notwithstanding his termination, still employed by the respondent. Mr Patel had explained he was seeking to establish his own business and would still spend time with the respondent to grow his business. He was also Mr Patel's brother in law. Ms Riyana Patel, Mr Patel's daughter who was also employed to do administration work, was also made redundant. Her P.45 was at page 165 with a termination date of 31 July 2020.

Applicable law

32. Under S.98 (2) of the ERA a respondent needs to have a potentially fair reason for dismissal. Redundancy is a potentially fair reason. It is defined in S.139 ERA. In this case, it is the diminution or cessation in the requirements of the employer for employees to carry out work of a particular kind.

33. Under S.98 (4), the respondent needs to act reasonably in treating the reason relied upon as a sufficient reason to dismiss the employee.

34. Under S.99 ERA, it will be automatically unfair to dismiss an employee for a reason which relates to requesting time off under S.57A (time off for dependants).

35. Under the Maternity and Parental Leave Regulations 1999, Regulation 20 (2) and (3) if the reason for selection for redundancy was because an employee took or sought to take time off for dependants leave, the dismissal will be automatically unfair.

36. Under *Williams v Compair Maxam 1982 IRLR 83* a fair dismissal for redundancy will usually require early warning, consultation with the union (if appropriate), fair selection criteria, fair selection in accordance with the criteria and consideration of alternative employment.

37. In *Sainsburys Supermarkets Ltd v Hitt 2002 EWCA Civ 1588* it was established that the range of reasonable responses applies to procedure as well as the substantive decision to dismiss.

Conclusions and analysis

38. The Tribunal was satisfied that there was a genuine redundancy situation within the meaning of S.139 ERA. The accounts and accountants' letter established the financial impact of the lockdown at the time of the redundancy. This was ongoing and prevailing. The situation was worsening rather than stabilising. There was a significant impact on Mr Patel, the Director too.

39. There was an issue which warranted investigation in relation to whether the claimant's time off for dependants was the reason why the claimant was made redundant or selected for redundancy. The proximity and suddenness of the claimant's redundancy to the requests for time off on 1 and 4 May 2020 and the stated expectation (of working 3 days in the following week) on 3 May 2020, provided a sufficient basis to shift the burden of proof to the respondent.

40. However, based on the findings reached earlier, in particular that the respondent knew the claimant had sought time off on Friday 1 May 2020 and was still offering 3 days of work, the Tribunal was satisfied that the respondent was not making the claimant redundant because of the request or selecting him for redundancy for that reason. Before concluding this, the Tribunal also took in to consideration that the claimant and Mr Patel had worked together for approximately 3 years without any stated difficulty or clash whether related to time off or otherwise. There was no evidence in any document or in the pleaded case to the contrary and even in response to Tribunal enquiry. It would thus be wholly inconsistent for the respondent to behave adversely for this reason.

41. However, when the Tribunal analysed the procedure followed and reasonableness having regard to S.98 (4) and the *Williams* guidelines, the respondent's approach was woefully inadequate. Even allowing for the respondent's business being small and the dramatic effect of the Covid-related lockdown, this was not a business declaring insolvency or the cessation of trade. Indeed the business was kept afloat and other staff members were not made redundant until later in the year. There was no reason why some consultation could not have followed with proper formal forewarning of possible redundancy.

42. More substantively, there was no meaningful consultation at which possible options of a pay cut or reduced hours were contemplated or why this was not feasible. The Tribunal concluded Mr Patel had not applied his mind to such options.

43. More pertinently, the Tribunal concluded that Mr Patel did not at all (or genuinely) apply his mind to the possibility of pooling Mr Vyas in to a pool of at least 2. Mr Patel's witness statement, even as amended, did not address this as a consideration at all. Neither did the respondent's written submissions. Neither was it pleaded. The position in relation to why Mr Tuzan and Mr Choudary were not in scope was identified and was, within the range of reasonable responses, in the Tribunal's conclusion. However, in relation to Mr Vyas, his role/responsibilities were also such that Mr Patel could have assumed them and, crucially, Mr Patel said in oral testimony in response to Tribunal questioning, that he knew at the time of the claimant's redundancy, that Mr Vyas was intending to leave the business and start up his own business and

that ultimately he brought forward his redundancy to 30 September 2020. This begged the question why further consultation could not have taken place with the claimant and Mr Vyas with this in mind as an alternative. It was the obvious starting point.

44. Further, whilst the financial or mathematical savings expectations might have offered an answer to the respondent's approach, which was open to the respondent to factor in, (because of the claimant's higher wage), because the respondent did not apply its mind to other considerations or options having regard to the findings and conclusions above, it was not open to the respondent to rely on this factor.

45. The failure to consider in scope, Mr Vyas, was not within the range of reasonable responses.

46. The Tribunal concluded that the reason the respondent did not do so was tainted by Mr Vyas being Mr Patel's brother in law.

47. In pursuance of the foregoing the dismissal was procedurally and substantively unfair.

48. The Tribunal did not have sufficient evidence to consider whether any alternative employment at Mr Patel's sole trader business in Beckenham (Belmont Cleaners) existed, or could have been contemplated. There were no more than casual references to staff engaged or employed there. It is possible that the two businesses were associated employers under S.231 ERA – ARC Cleaning Ltd being a company under the control of Mr Patel (the other business) but the Tribunal stopped short of concluding this. It was, in any event, within the range of reasonable responses to consider the 2 businesses separately for selection purposes despite occasional labour assistance provided. It was unincorporated and operates distinctly from the respondent with, in the main, separate staff. There is no spotting activity/function there too and there was generally little evidence about its operations.

49. However in relation to what might have happened, the Tribunal concluded that there was a 100% chance the claimant would have been made redundant by 30 September 2020, when Mr Vyas was made redundant. The claimant did have spotting training and experience but so did Mr Patel. That the claimant was able to be dispensed with in May 2020 meant there was no basis upon which it could be said he would have been retained at the end of September 2020. Despite a changing position on lockdown, by then, the Tribunal took account of the even greater drop in quarter 2 sales for 2020 compared with 2019.

50. A consultation period of 2 weeks ought to have taken place before the claimant's redundancy dismissal was confirmed.

51. Thereafter, until the 30 September 2020, there was a 50 % chance that the claimant would have been retained at 20 hours. The Tribunal assesses this at 50% and not higher having regard to the leaving intentions of Mr Vyas but also because there would be a need to reduce the claimant's hours or pay too.

52. There is also the possibility that the claimant would need to give credit for redundancy pay or notice pay received over and beyond the claimant' entitlement. The Tribunal did not have sufficient evidence to decide whether or not the claimant's continuous employment under TUPE or otherwise was continuous from 2012.

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**Employment Judge Khalil**

**07 July 2021**