EMPLOYMENT TRIBUNALS

Claimant: Miss K Rhodes

Respondent: Merlin Archery Limited

FINAL HEARING

Heard at: Midlands (East) (by CVP) **On:** 28-29 April 2021

Before: Employment Judge Camp

Appearances
For the claimant: Mrs J Hind, USDAW Area Organiser
For the respondent: Mr B Jones, Managing Director

REASONS

1. This is the written version of the reasons given at the hearing for the decision that the claimant was not unfairly dismissed.

2. This is an unfair redundancy dismissal case arising out of the pandemic and, in particular, the first lockdown.

3. The claimant was employed by the respondent from 11 May 2016 until 24 March 2020 as a shop assistant at the respondent's shop in Loughborough. She presented her claim form on 22 June 2020. Her sole claim is unfair dismissal.

4. At the start of the hearing it was conceded on the claimant's behalf that the principal reason for dismissal was indeed redundancy, which is, of course, a potentially fair reason under section 98 of the Employment Rights Act 1996 ("ERA").

5. Also at the start of the hearing, in light of the claimant's concession, it was agreed that the issues we would deal with in the first part of the hearing were:

    5.1 whether the dismissal was fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, under ERA section 98(4);

5.2 if the dismissal was procedurally unfair and the remedy is compensation only, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? [the "Polkey" issue – see Polkey v AE Dayton Services Ltd [1987] UKHL 8; see also paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825].

6. My decision on those issues, in summary, is that:

6.1 although it would have been better and fairer had there been more time between the first and second stages of the respondent's consultation with the claimant, looking at the whole of the dismissal process, including the appeal, the dismissal was fair in accordance with ERA section 98(4);

6.2 had I decided that the lack of time between the two consultation stages made the dismissal unfair, allowing more time would not have made a difference to the outcome and would, at most, have lengthened the claimant's employment by no more than a couple of days.

7. I should add that if the claim had succeeded, and had I decided there was a significant chance that further consultation would have made a difference to the outcome, there would be big questions around how long the claimant's employment would then have continued, given that there was a second round of redundancies in June 2020. The respondent is currently embarking on a third round of redundancies.

8. As to the law relating to the fairness of dismissals in accordance with ERA section 98(4), my starting point is the well-known passage from the decision of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test applies in all circumstances, to both procedural and substantive questions, and applies as much in redundancy cases as in other cases.

9. Hand in hand with the fact that the band of reasonable responses test applies is the fact that I may not substitute my view as to what should have been done for that of the reasonable employer. Nevertheless (see Newbound v Thames Water Utilities Limited [2015] EWCA Civ 677): the band of reasonable responses test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the Tribunal's consideration simply to be a matter of procedural box-ticking.

10. I have also considered and taken into account Williams v Compair Maxam [1982] ICR 156. Although, "*the question* [I] *have to decide is whether the dismissal of the* [claimant] *in this case lay within the range of conduct which a reasonable employer could have adopted*", a reasonable employer will usually, when making redundancies: warn; consult; use objective rather than purely subjective redundancy selection criteria; seek to see whether, instead of dismissing for redundancy, alternative employment should be offered.

11. None of the relevant facts is substantially in dispute. I heard live witness evidence from Mr Jones, the respondent's Managing Director, and from Mrs Jones, who deals with the respondent's HR, and from the claimant herself. I was also referred to a signed statement from the respondent's Finance Manager, Mr Breward, explaining the state of the respondent's finances in the first part of 2020. Although Mr Breward did not give oral evidence, the claimant is in no position to attack the factual accuracy of the contents of his statement. As I understand it, she does not do so in any event. In addition, the gist of Mr Breward's evidence was given orally by Mr Jones and was not challenged.

12. Mr Jones took all the relevant decisions in relation to the claimant's redundancy. He did so in consultation with the respondent's external HR advisors. There is no suggestion, and it was not put to Mr Jones, that he had anything against the claimant – any motive to treat her unfairly – or that he consciously or unconsciously made the decisions he made about her future for any reason other than what he saw as the best interests of the business. It was also not put to him that he acted in bad faith in any respect or that any part of his oral or written evidence was untrue. In addition, I can see no contradiction between any of the documentary evidence and Mr Jones's witness evidence. In short, I accept his evidence as true and accurate, having no reason to do otherwise.

13. The respondent is a nearly fifty year old, highly specialist, archery equipment business. It is a fairly small family business. Its main premises are in Loughborough, where it: has a shop selling equipment; manufactures bows, arrows and accessories; has a warehouse team, dealing with online sales; has a member of staff dealing with sales via eBay. It also has an activity centre, which has been and remains closed since the first lockdown. In addition, it has a shop in County Durham.

14. At the time the respondent presented its response form, it employed around thirty people in total. The parts of the business that are potentially relevant to the claimant's claim are the shop in Loughborough in which she worked and the warehouse / online sales team. The claimant is not alleging that as an alternative to redundancy she could have worked in any other part of the business.

15. Before 2020, the respondent had never made anyone redundant in its history. Mr Jones was proud of that fact and was resistant in principle to making redundancies. However, early 2020 had been disappointing financially for the respondent. It was operating on an overdraft, it had no cash reserves and in March it had a substantial VAT liability to pay. Even if there had been no lockdown it might well have ended up dismissing the claimant for redundancy.

16. In the week before the first lockdown (which everyone will recall was announced on 23 March 2020 and came in the following day), the respondent's management foresaw that a lockdown was highly likely and that when it happened – and non-essential shops were forced to close – this would precipitate something of a financial crisis for the respondent. They – Mr Jones in particular – thought redundancies were probably going to be needed. Having taken advice, they began a redundancy consultation process.

17. In the Loughborough shop where the claimant worked there were eight permanent staff, including the claimant herself. As I understand it: all of them were potentially at risk of redundancy; apart from one member of staff who was off sick, everyone affected other than the claimant was working in the shop on 18 March 2020. On that day, there was a meeting where they were told they were at risk of redundancy. Mr Jones wanted to tell the claimant face to face, so decided it was better to tell her the following day – the 19th – when she would next be in work, rather than telephoning her.

18. On 19 March 2020, there was, then, an individual consultation meeting between the claimant and Mr and Mrs Jones. In this respect, the claimant was more favourably treated than the staff who had been told on 18 March 2020, in that they had had a collective meeting. She was told she was at risk; she was told about the financial position of the respondent; she was told what the redundancy scoring criteria would be. In short, she was given all the information the respondent could reasonably be expected to give her at that time.

19. Also on 19 March 2020, there were individual consultation meetings with other 'at risk' staff. These were the only individual consultation meetings they had.

20. The claimant's second consultation meeting – also an individual meeting – was on 20 March 2020, little more than twenty-four hours after the first. Despite the short notice, she had had an opportunity to speak with her trade union representative. She was invited by Mr Jones to raise any particular concerns or issues she had with what the respondent was proposing and did so, raising two specific matters.

21. The first of those matters was that she did not want Mrs Jones to be involved in her redundancy scoring because, as the two of them did not work together, she felt that Mrs Jones was insufficiently knowledgeable about her abilities. The second was that she objected to absence / attendance being part of the respondent's redundancy selection scoring system. Mr Jones accepted both concerns and addressed them. Mrs Jones was replaced as the person who, with Mr Jones, would do the redundancy scoring by a senior member of staff who worked closely with the claimant called Mr Halford. Attendance was removed as a criterion for redundancy selection.

22. At the time, the claimant was entirely satisfied with how the respondent had accommodated her concerns and she raised no other issues in relation to what the respondent was proposing.

23. One of the claimant's principal complaints in these proceedings is that there was not enough time between the first and second meetings. To an extent I agree with her. The respondent was apparently advised that it only needed to have a single meeting with at risk members of staff and when Mr Jones decided to have two meetings, he felt he was 'going the extra mile' in terms of procedure. I find the advice that Mr Jones was given surprising in this respect. It is certainly not advice I would give if I wanted to ensure that the employer I was advising was following a procedure that would definitely withstand scrutiny in the Employment Tribunal. Even where it is objectively obvious that redundancies are going to be

necessary, being put at risk of redundancy comes as a huge shock to people. The news takes time to digest. Although I entirely accept that the respondent needed to act quickly to preserve its financial position, I think the claimant really ought to have been given, at least, the weekend of 21 and 22 March 2020 to think it over before having her second meeting.

24. However, I see nothing to criticise in the contents of the meetings themselves. It clearly was meaningful consultation, in that Mr Jones listened to what the claimant had to say and changed things in light of what she said.

25. The position after the consultation meeting of 20 March 2020 was that the claimant:

    25.1 knew there were likely to be redundancies;

    25.2 knew who, if anyone, would be made redundant would be decided on the basis of a redundancy selection scoring system the respondent had prepared in conjunction with their HR advisors;

    25.3 knew what that redundancy selection scoring system would be, namely the system that had been discussed with her and that had been altered at her request.

26. When lockdown came in on 24 March 2020 the respondent's shops and activity centre had to close. Manufacturing could only safely operate at ten percent of capacity. The need for cost savings was immediate and urgent. Subject to the possibility of furloughing staff, which I will come on to, redundancies became inevitable.

27. Mr Jones and Mr Halford did the redundancy scoring on 24 March 2020. They did it together rather than separately. It would have been better, and fairer, if they had done it independently and then compared scores; but for them to do it in in the way in which they did it was not unreasonable, given the size of the respondent's business. Mr Jones, the Managing Director, took the main role and Mr Halford a secondary role, albeit Mr Halford provided substantial information, based on his extensive of knowledge of individual employees, including, in particular, the claimant.

28. The selection criteria the respondent used were detailed, transparent and, in my view, unobjectionable. It was well within the band of reasonable responses for the respondent to use them. Three criticisms of them in particular have been made.

    28.1 The first is that one criterion was length of service. Although length of service is not usually used these days, because of concerns about indirect age discrimination, there is no prohibition on using it. It was, again, not outside the band of reasonable responses for the respondent to do so; to give a few additional points to those with longer service.

28.2 In addition, the claimant objects to the fact that points were deducted in the scoring system used for those who had improvement notices or verbal warnings, even if they had expired for the purposes of the respondent's disciplinary procedure. The claimant lost some points as she had an expired improvement note. I do not think that was remotely unreasonable. The respondent was entitled to reward those with completely clean disciplinary records. The fact that a warning has expired for the purposes of the disciplinary procedure does not mean it has to be treated as irrelevant for all other purposes.

28.3 The third of the claimant's criticisms is that one of the criteria adopted by the respondent had an element of subjectivity to it. I agree that employers should as a general rule strive for objectivity in their decision-making and, as part of that, should endeavour to avoid using entirely subjective redundancy selection criteria. But in most redundancy situations involving employees like the claimant, whose job consists of doing something without a precisely measurable output, it is impossible to adopt fair redundancy criteria that are sensible and purely objective. In the claimant's case, the only entirely objective criteria would have been things like the amount of sickness absence or punctuality. Choosing between two shop assistants using just those kinds of criteria could lead, for example, to the one who was by far the worst shop assistant, but who was never sick and always on time, being kept on at the expense of the one who was a superb shop assistant who was occasionally late and off sick. In this kind of retail environment, there has to be an element of subjectivity in any redundancy selection process in order for a fair assessment of the abilities of the at risk employees to be made.

29. Of the eight potentially affected Loughborough shop staff, two, including the claimant, were selected for redundancy on the basis of their scores. The claimant's score was the seventh lowest out of eight. She was told she was selected for redundancy and her dismissal for redundancy was confirmed in a letter dated 24 March 2020. For one reason or another, she did not receive it for several weeks, which is unfortunate, but does not make what would otherwise be fair unfair.

30. At the same time, the respondent also made redundant one person in the warehouse / online sales team and furloughed two people in the shop.

31. The claimant appealed against her dismissal by an email of 24 April 2020. The appeal was dealt with by Mr Jones. There seems to be some criticism of the respondent, understandably so, for having the same decision-maker as for the appeal as the original decision. The ACAS Code suggests there should be different decision-makers if possible. However, given the size of the respondent's business, and the fact that there was no one in its hierarchy equal to or above Mr Jones, that he was the sole director, and that he and Mrs Jones were the owners of the respondent, I accept that it was reasonable for him both to make the original decision and to deal with the appeal. In practice, the appeal could only have been dealt with by someone different if Mr Jones had brought in an external consultant, or something like that, which would have cost the

respondent money it did not have, in circumstances where the whole point of making redundancies was to make cost savings. The alternative to not having Mr Jones deal with the appeal would have been not to have an appeal at all.

32. The appeal meeting was via Skype, on 4 May 2020. No significant criticisms are made of the way it was conducted. The claimant was given an opportunity to raise any and every point she wanted to. Mr Jones went through all her points with her. He wrote to her on 11 May 2020, confirming his decision to reject the appeal. His letter is fairly long and detailed, it is clear, it explains his rationale in a comprehensible way, and it addresses everything the claimant raised.

33. Apart from the points I have already dealt with and the point about the shortness of the gap between the first and second meetings, which I shall address shortly, why does the claimant argue that this was an unfair dismissal?

34. First, she says that her score was too low in two categories. A valid point made during the appeal by Mr Jones was that even if she had improved her score in those two categories to the extent she says she should have done, she would still have come seventh in the redundancy scoring process. In any event, Mr Jones has explained his reasoning to me, and he explained it to the claimant at the time, and, once again, I cannot say that his decision was outside the band of reasonable responses. Without, I think, wanting or needing to go into a lot of detail in relation to this, the differences between what he and the claimant are saying in relation to those two categories are not profound, and there is no question of the respondent having made an obvious mistake. It boils down to the claimant, on a partly but not wholly subjective assessment, simply not being able, as it were, to 'tick' enough 'boxes' to get the points she feels she deserved.

35. The second point the claimant makes is a suggestion that she could have been allowed to work in the warehouse as an alternative to redundancy. She points to social media posts by the respondent in April 2020, talking about "*record*" postal orders and making positive comments about the respondent's online offering.

36. However, Mr Jones's evidence is that, in fact, the respondent did not have enough work for those already employed in the warehouse, even taking into account the one redundancy in there that was made. The social media posts were, understandably, talking-up the company, as part of a marketing strategy. Record postal orders did not mean a huge number of postal orders. Anyway, the claimant lacked the skills to be able to do the specialist roles in the warehouse that were essential. None of that evidence from Mr Jones was contradicted in cross-examination and I accept it. In the circumstances, for the respondent not to offer the claimant alternative work in the warehouse was a reasonable decision that the respondent was entitled to make.

37. Thirdly – and this is one of the central planks of the claimant's case – it is suggested that as an alternative for redundancy she should have been furloughed, i.e. that it was unreasonable – outside of the band of reasonable responses – for the respondent not to furlough her. I reject that suggestion.

38. The claimant's main job was to collect items from stock and bring them to the customer-facing part of the shop, to save the time of the respondent's specialist sales personnel. Like everyone else, she did other tasks as well, but she could not do tasks in the shop or in the warehouse that required specialist and technical knowledge. In Mr Jones's view, her role was no longer there, at least in the medium term. He did not think that for a short period, because of lockdown, there wouldn't be enough for her to do, but that when lockdown ended things would quickly bounce back.

39. The purpose of the furlough scheme was not to keep people in employment come what may, it was and is principally to tide employers over while they suffer a temporary, reversible reduction in business because of the pandemic. For example, an employer might have been unable to operate at full capacity, and so have needed fewer staff, but as soon as it was able to open fully would need more staff again, and so could furlough some staff with a view to bringing them back as an alternative to firing them and later re-hiring them or someone else.

40. The respondent was not in that position in relation to the claimant. When the respondent reopened there was no plan to bring her back, nor to hire someone else in her place, because her job would not be there. Furloughing her would not have saved her job. She would not have returned to work and would still have been made redundant. All that would be different would be that the Government would be paying her wages for a period of time. It would almost have been an abuse of the scheme to furlough the claimant in those circumstances.

41. Further, I do not accept in principle that furlough is an alternative to redundancy akin to suitable alternative employment. If an employee is reasonably considered to be redundant by the employer, the employer is not, in my view, obliged to take up the unique opportunity presented by the furlough scheme, even though I understand why employees would want employers to do exactly that. It is an option the employer has, but employers will not be acting unreasonably if they take a decision to make redundancies which they consider to be in the best interests of the business.

42. Moreover, as Mr Jones explained, the respondent's cashflow situation meant that putting the employees who were made redundant on furlough instead, which would have involved the respondent paying their wages up-front on an ongoing basis and later reclaiming them through the furlough scheme, was not a viable option in practice.

43. Mr Jones was not anti-furlough. As already mentioned, he did furlough some staff. The reason those who were furloughed were furloughed whereas the claimant was made redundant was that the respondent expected them to have jobs to return to when it reopened properly.

44. Hindsight cannot, of course, make an otherwise unfair dismissal fair. However, in this case it does suggest that Mr Jones's assessment of what was likely to happen, in terms of whether there would be a job for the claimant to come back to post-lockdown, was reasonable, in as much as he has been proved right. The respondent has not reopened with anyone in the claimant's role. In busy periods

at around the start of 2020 it was operating with eleven members of staff. It now operates with just four. Although she did not know it, the claimant's position in early March 2020 was precarious and the respondent is still in a worse position than it was then. In other words, the claimant's job has not existed since March 2020 and there is no foreseeable prospect of the respondent needing to employ someone to do that job.

45. The claimant's best point is that there was not enough time between the two consultation meetings. Whether this makes the dismissal unfair is a very finely balanced issue. I have already made the point that – outside of one or two very particular industries – nobody expects to be made redundant; that being put at risk of redundancy comes as a shock; and that people need time to take it in. Similarly, my experience is that although everyone knows that someone has to come bottom in a redundancy scoring exercise, rarely if ever does anyone think that person is going to be them. Being threatened with redundancy and made redundant often affects people profoundly. Having more than the 24 hours the claimant had between her two consultation meetings would normally be necessary for fairness; certainly so in relation to a large employer.

46. In the respondent's favour, though:

    46.1 it is a small employer;

    46.2 the consultation process was unimpeachable apart from its speed;

    46.3 the claimant was given an opportunity to appeal; and did appeal; and in the course of the appeal was able to raise any point she wanted to raise, including every point she would have raised had she been given more time between the two consultation meetings;

    46.4 at the time when the appeal took place, it was still open to Mr Jones – had he been so minded – to re-engage the and then furlough her. Unlike in many redundancy situations, then, it would not have been too late in practice to reverse a hasty, erroneous decision. The impression I have formed of Mr Jones is that he is a fair minded man and that he was at least as willing to consider what the claimant had to say to him during the appeal as he would have been to consider what she would have said to him at the second consultation meeting had it been held several days after the first consultation meeting instead of on the next day.

47. Taking all of that into account, I think this is one of those cases where the appeal effectively 'cures' the defects in the original dismissal process. To put it another way, the process overall, including the appeal, was a fair one, producing a fair dismissal in accordance with ERA section 98(4).

48. Even if I am wrong about that, if the claimant had been given the weekend between the two consultation meetings, and had she raised at her second consultation meeting (which, in this scenario, would have been on Monday, 23 March 2020) all of the things she subsequently raised as part of her appeal, there is no significant chance that it would have altered the outcome. Mr Jones

had already thought about things carefully. I do not think he had, prior to the appeal, neglected to take into account any of the matters the claimant raised. He had certainly, for example, considered furlough as a possibility and made a rational decision about who to furlough and who not to. This was not a case of Mr Jones misunderstanding or not knowing something about the claimant and her abilities that might have made a difference to his decision, or anything like that. There is no good reason to think that if the second consultation meeting had been on the 23rd instead of on 20 March 2020 his response to the claimant's points and his overall decision would have been any different from the response and decision he gave in May 2020 on appeal.

49. At the start of these reasons I said that it might have made a day or two's difference to the timing of dismissal had there been a more reasonable gap between the first and second consultation meetings. I made this comment solely on the basis that it might not have been practicable to have the second consultation meeting on 23 March 2020 and that, even if this was practicable, Mr Jones and Mr Halford might not have been able to make a final decision on redundancies on 24 March 2020 if the meeting with the claimant had only taken place on the 23rd. Conceivably, the claimant's employment might have continued to 25 or 26 March 2020, but no longer than that.

50. I am afraid that in all those circumstances: the claimant's claim for unfair dismissal fails and is dismissed; and even had it succeeded, any compensation would have been minimal.

Employment Judge Camp

20 July 2021

Sent to the parties on:

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For the Tribunal Office:

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