



EMPLOYMENT TRIBUNALS

Claimant: Mr P Skinner

Respondent: Acorn Laser Limited

Heard at: via CVP and
Newcastle Civil Court and Tribunal Centre

On: 13th, 18th May 2021

Before: Employment Judge Pitt

Representation

Claimant: Ms H Hogben, Counsel

Respondent: Mr Warren-James, Solicitor

RESERVED JUDGMENT

1. The claimant's claim for Unfair Dismissal is well-founded.
2. The claim for redundancy pay is dismissed upon withdrawal by the claimant.

REASONS

1. The claimant, who was born on 15th June 1972, was employed by the respondent between 15th November 2011 – 31st October 2020. He was employed as a sheet metal worker. He makes a claim for unfair dismissal, namely that his selection for redundancy was unfair and that his redundancy payment was incorrect.
2. The claimant was represented by Miss Hogben, the respondent by Mr Warren James. I had before me witness statements and heard evidence from Mr B Leavesley, Production Manager for the respondent; Mr G Deanus, Managing Director of the respondent, the claimant. The parties had produced a bundle of documents which included the claimant's contracts of employment, a skills matrix relating to the

claimant and information in relation to meetings and an appeal. During the course of the hearing, the respondents also produced a document that set out the basis upon which the scores were attributed.

3. The respondent is a small engineering company employing some 35 employees. The claimant was employed originally in November 2011. During this period of time, the claimant, in addition to his role as a metalworker, also carried out duties as a Team Leader. On 17th September 2017, he resigned from the company to assist his wife in her business. He returned to the respondent's employ on 5th March 2018 in the same position to which he had been previously employed, save that he was no longer a Team Leader. A preliminary point arose concerning the claimant's continuity of employment. He had been absent from the company for over five months. The claimant's case was he had a gentleman's agreement with Mr Deanus that his continuity of employment would be preserved. This is not reflected in the contract of employment, which he signed upon his return to the company in 2018. The information in relation to the gentleman's agreement was not contained within the claimant witness statement. The preliminary point was whether this evidence could be advanced. It may be relevant to the issue of how much redundancy pay the claimant was entitled to claim. I indicated to the parties I was unsure whether, in law, such an agreement was enforceable. (See **Collinson v BBC 1998 IRLR 238**.) In this case, the Employment Appeal Tribunal confirmed that continuity of employment is a statutory concept, you either have it, or you do not, parties cannot bestow continuity or remove continuity. As a result of my indication and after consultation, Ms Hogben, on behalf of the claimant, withdrew the claim for redundancy pay.

The Facts

4. The claimant does not challenge the need for redundancy, but it is clear from the evidence of Mr Leavesley the respondent was going through a period of contraction. His evidence was that incoming sales up to August 2020 were 50% of those prior to the Covid 19 pandemic. The respondent had taken advantage of the Government's Furlough Scheme (GFS), and the claimant was one of those who had been furloughed.
5. On 2nd September 2020 the respondent notified its employees the GFS was due to end October 2020. the respondent notified Mr Skinner and others they were at risk of redundancy because of the ending of GFS. The letter indicated approximately ten members of staff would be made redundant; it set out the procedure which would be followed to make the selection for redundancy. It was anticipated any redundancies would take effect on 31st October with the end of the GFS.

6. On 3rd September 2020, the claimant had a one-to-one meeting with Mr Leavesley. The claimant recorded this meeting. I have seen a transcript prepared by the claimant, which has not been challenged. The meeting appears to have been amicable. Mr Leavesley was explaining why the company was in the position it was in. He spoke about a skill matrix indicating that different types of employees would be in a different skill pool. That for example, welders would be in one semi-skilled, skilled in another and painters in another. The notes produced by Mr Leavesley simply show the claimant had nothing to add.
7. The respondent had placed different types of work into pools. The claimant fell within the pool for metalworkers. The skills matrix was broken down into six distinct areas, which included the operation of particular machines, such as the press brake and types of welding. The last skill is related to 'lead customer knowledge'. There are five customers noted, Easibathe, Millfield, Thorn, Tofco and Enclosures. The claimant scored at the top of the scoring for the latter two but lower in the first three. What is not clear from the matrix is the weighting that was given to different areas of the business. The evidence of Mr Leavesley was that the Easibathe, the Acrastyle, and Techflow accounts were the principal customers of the respondent. That is to say, and those accounts contributed the greatest percentage to the respondent's turnover. It was the intention of the respondent to ensure that its skill set was focused on these three accounts going forward. The document produced by the respondent setting out the basis upon which the scores were made the scoring had four levels, 1,8,12,15. 1 being an employee with 'Introductory Level of Understanding' and 15 being 'Process Expert.' The claimant was unaware of the matrix until after his dismissal and did not know how the scoring was applied until the document was produced for the Tribunal. Even though I have not seen the scores of the other employees and based on the evidence of the claimant, which was not challenged, I am satisfied that the claimant's score was higher than others who were not made redundant.
8. Having gone through the selection procedure and completed the scoring for each employee, Mr Leavesley then considered the skill set of each employee in relation to each customer. In particular, he focused on the customers referred to above. He proposed an employee named Bren would be retained because of his knowledge of Acrastyle. In relation to Easibathe, Mr Leavesley proposed retaining two employees Andrejs and Tomasz, because of their knowledge. He further proposed an employee named Ant would be retained because he was the only employee who could carry out coded welding, which was required for Techflow products.
9. Mr Leavesley also considered he needed to maintain a team leader. He decided an employee named Piotr, who was the team leader at the time, should maintain his position. He did not consider the claimant for this role, although the claimant had undertaken this role for some time prior to him leaving the previous year.

10. By letter dated 10th September 2020 the claimant was informed he was at risk of redundancy. The letter specifically reads, 'the selection was made by grouping people with similar skills into pools then selecting people from the pools based on an assessment of individual skills and experience.' The claimant was invited to a meeting to discuss the provisional selection, including any proposals he may have to avoid his redundancy.
11. A consultation meeting took place with the claimant on 14th September 2020. During the meeting, Mr Leavesley explained the use of pools and the key accounts Easibathe Acrastyle and Millfield. The claimant had not seen the skills matrix or any weighting which would be applied to the matrix, including the assessment of experience in relation to the accounts.
12. The claimant was informed on 18th September that he would be made redundant. His last day would be 31st October and he was informed of his right to appeal.
13. Following the decision to dismiss and formal notification of this, the claimant received the selection matrix, which is in the bundle. He formally appealed the decision to dismiss on the basis that his skill level was high and he had a wide range of experience throughout the business.
14. An appeal hearing was arranged for 13th October 2020, which was chaired by Mr Deanus. At this hearing, the claimant had a copy of the skills matrix. His appeal was based on the fact that people with lower skill levels should have been made redundant. The hearing was adjourned and reconvened on 21st October 2020. At this hearing, Mr Deanus indicated that whilst Mr Skinner had a high skill level, the company needed to match skills to the orders which were pending or likely to be received. This meant that employees were selected on the basis of a particular area of skill and product experience. As the claimant had less experience of Easibathe and Acrastyle and Techflow, he was selected for redundancy.

The issues

- 15.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.
- 15.2 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:
 - 15.2.1 The respondent adequately warned and consulted the claimant;

- 15.2.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;
- 15.2.3 The respondent took reasonable steps to find the claimant suitable alternative employment;
- 15.2.4 Dismissal was within the range of reasonable responses.

The Law

- 16 Section 98 Employment Rights Act 1996, The Act, sets out how a tribunal should determine the fairness of a dismissal. Once an employer has established the reason for dismissal, the decision as to whether or not a dismissal is fair or unfair is set out in section 98 (4):

depends on whether in the circumstances(including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and a substantial merits of the case

- 17 In determining whether a redundancy dismissal is fair, I had regard to Williams v Compare Maxam Ltd 1982 IRLR 83, which sets out the basic principles upon which a redundancy dismissal should be determined. They are: to Establish a pool of employees; establish the criteria for selection from the pool unfair application of the selection criteria, individual consultation or warning.
- 18 AE Drayton v Polkey gives further guidance and also establishes the principle that whilst a fair procedure is an integral part of any dismissal process, a Tribunal may reduce compensation where a fair procedure would not have resulted in a different outcome.

Submissions

- 19 On behalf of the claimant, it was submitted that the skills matrix should be as objective and measurable as possible and is based on fact and not personal opinion. Any weighting to be applied to a matrix should be included in any discussions. The selection criteria were not disclosed to the claimant until after his dismissal. There was no information as to the weighting given, in particular the importance of the Acrastyle and Easibathe customers. Nor was its importance made clear to the claimant. The claimant also maintained he should have been considered for the Team Leader role and possible part-time work. The appeal didn't remedy any issues with the dismissal in particular.
- 20 On behalf of the respondent, it was submitted the claimant accepts there was a redundancy situation. the claimant was a highly regarded member of staff. There may have been shortcomings in the procedure. Clearly, it wasn't a perfect procedure, but that it was remedied by the appeal was held by Mr Deanus.

Discussion And Conclusions

- 21 It is conceded by the claimant that there was reason for the respondent to go through a redundancy process. This may amount to a fair reason for dismissal pursuant to Section 98 of The Act.
- 22 There can be no criticism of their decision to make any employees redundant in the current climate. Nor can they be criticised for wanting to ensure the employees retained had appropriate skills to match with the customers with whom the respondent had orders pending and anticipated orders from. I have therefore concentrated on the procedure adopted by the respondent to make their decision.

Consultation

- 23 The respondent announced the potential redundancies on 3rd September 2020. Although each member of the workforce, including the claimant, was spoken to individually from the transcript I have seen there was little consultation. It was mooted by Mr Leavesley that the claimant might want to consider part-time working, which the claimant said would be fine 'for him.' There was discussion regarding the pools, but this was simply to say the workforce would be grouped according to the type of work they carried out. There is a reference to a skills matrix but no discussion as to what skills the matrix might include. In particular, there might be an emphasis on particular customers and skills relevant to them. It is disappointing to note that Mr Leavesley did not have nor I did not see a written record of these meetings. The notes of the meetings are brief; in relation to the claimant, it simply read, 'PS had nothing to add'. This becomes relevant when going on to consider part-time working as suitable alternative employment.

The Selection Pools

- 24 It was reasonable for the respondent to carry out an assessment of its workload going forward. It was also reasonable for it to conclude it required certain skills to match particular customers. The conclusion to use pools by skill area was also reasonable. For example, it created a pool for the metalworkers and in another pool, painters.

The Selection Criteria

- 25 The selection criteria which appear in the bundle set out what appear to be objective and measurable criteria. Having considered the scoring, which sets out five levels of experience, this also has the appearance of a reasonable scoring system; however, the claimant never saw the matrix, so he was unaware of the skill set or the scoring system until after his dismissal. Perhaps the greatest issue with the matrix which I have seen is it does not include reference to

Acrastyle, Techflow or the requirement to have a team leader and the skills needed to carry out that role.

Application Of The Selection Criteria

- 26 Whilst the claimant does not challenge the majority of the scores, he does challenge the scoring in relation to the lead customer knowledge section. As already noted, the claimant was unaware the respondent was going to place emphasis on those who have experienced with particular customers. Nor was he aware the respondent was looking to maintain the position of team leader for which he considered himself a candidate.
- 27 Whilst on the face of it, the application of the scores to the matrix appears reasonable; I concluded it was not for the following reasons: (i) it was not clear experience of certain customers carry greater weight. (ii) It was not clear the respondent intended to maintain the team leader role. (ii)The matrix did not include reference to Acrastyle of Techflow.
- 28 Whilst I do not accept the claimant's assertion that selection was predetermined, on the evidence, I have heard the decision was based on those with experience of certain customers. Having carried out the scoring of each employee, it is clear Mr Leavesley then considered which employees he needed to service the major customers. In effect, the matrix was irrelevant. The respondent was always going to select those employees with the skills required for certain products.
- 29 The skills matrix which I have seen in the bundle shows the claimant as a skilled operative. However, it would seem that the decision to select him for redundancy was made on the basis other employees had more experience in certain customer products. I note the claimant scored highly in relation to Tofco and Enclosures, but only a middle score for Easibathe. In addition, there is no score here for the Acrastyle product. If the claimant had seen this skills matrix prior to any of the consultation hearings, he might have been able to challenge the scoring, and if Acrastyle were raised, he could have made comments about it. What is clear is the claimant did not and could not know that the selection process was highly influenced by the level of experience in relation to the major customers.
- 30 Whilst the witness statement of Mr Leavesley gives the impression that he was the person carrying out the selection procedure, during the course of cross-examination, it became clear he did not, in fact, make the decision. Rather it was Mr Deanus' decision. His evidence was that the initial assessment was carried out by him, but 'the final decision was Graham's.'
- 31 I concluded, therefore, that the application of the matrix and the selection procedure was flawed in the following ways; (i)the respondent did not consult on the selection criteria, which in a small

business may be reasonable, (ii) it also failed to inform employees what the criteria were or how the scoring worked.

32 I also concluded that, in fact, Mr Leavelsy did not make the decision on selection alone. He discussed the matter with Mr Deanus, and a consensus was reached about who was to be selected.

Suitable Alternative Employment

33 Although raised at the initial consultation meeting, it would seem by Mr Leavesley; this option was not considered further. In light of the claimant's comment that he would consider it as an alternative to losing his job at an early stage, this is a further flaw. It also highlights why notes are so important in dealing with employees.

The Appeal

34 I am invited to say that the appeal rectified any shortcomings in the original decision making process. I do not agree. It is apparent from the evidence of Mr Leavesley that Mr Deanus was the person in charge of the process and therefore, he cannot be an independent and objective appeal manager.

Was the Dismissal Fair

35 I have to bear in mind in making my decision the size and resources of the company. The respondent is a small company. I have to therefore consider whether the processes they used to select for redundancy were ones that a reasonable employer might use. I note that although they do not have access to an in-house human resource personnel department, it does have access to advice to the auspices of 'Make UK', which is an organisation for the Manufacturing Industry.

36 The respondent did attempt to carry out a fair procedure, but in light of the flaws I have identified, it failed to get even the basics of a fair redundancy correct. I concluded that the dismissal was unfair

Polkey

37 I am invited to consider the position if the respondent had carried out a fair procedure. Specifically, that the respondent would still have dismissed the claimant. A fair procedure would consist of proper consultation on the matrix and the scoring system, in particular informing the employees and the claimant the emphasis to be put on particular customers. In relation to the Team Leader role, it would be reasonable for the respondent to open this role up to competition between the claimant and his colleague Piotr. This may have been carried out by a formal interview or additional criteria in the skills matrix. Finally, a reasonable procedure would include consideration of part-time working.

There was evidence before me as to the claimant's ability to carry out the Team Leader role because of his previous experience, and there was also a suggestion by Mr Leavesely that part-time working may be available. I concluded a fair procedure would have made not have made a difference. In fact, there seems to be evidence suggesting the claimant may have retained his position. I reject the Polkey argument.

38 Accordingly, claimants complaint of unfair dismissal is well founded and succeeds.

Employment Judge AE Pitt

Date 23rd July 2021