



EMPLOYMENT TRIBUNALS

Claimant: Mr J-P Moussy

Respondent: Pret a Manger (Europe) Limited

Heard at: London Central (Remotely by CVP)
On: 4 August 2021

Before: Employment Judge Heath

Representation

Claimant: Mr O Holloway

Respondent: In person

JUDGMENT

1. The claim for unfair dismissal is not well-founded and is dismissed.
2. The claimant's claim for a redundancy payment is not well-founded and is dismissed.

REASONS

Introduction

1. By an ET1 presented on 30 December 2020 the claimant claimed that he had been unfairly dismissed and claimed for a redundancy payment.

The issues

2. The respondent had prepared prior to the hearing a draft list of issues which appeared to the tribunal fairly to set out the issues in the case. I went through them with the claimant and he agreed that these would be the issues I would have to determine. They were as follows: -
 - a. Has the Respondent shown the reason, or principal reason, for the Claimant's dismissal? The Respondent avers that the reason for the Claimant's dismissal was some other substantial reason, namely a refusal to agree to a reduction in hours.
 - b. If so, is that reason a potentially fair reason pursuant to Section 98(1)(b)

of the ERA?

- c. Did the Respondent act reasonably in treating the reason found to be the reason for dismissal as a sufficient reason for dismissing the Claimant, having regard to all the circumstances (including the size and administrative resources of the Respondent)?
- d. If so, was the Claimant's dismissal fair having regards to equity and the substantial merits of the case and within the range of reasonable responses? In particular:
 - i. Did the dismissal fall within the range of responses of a reasonable employer?
 - ii. Did the Respondent follow a procedure that was within the range of responses of a reasonable employer?
- e. If the dismissal is found to be unfair, would the Claimant have been dismissed in any event even if a generally fair procedure had been followed and, if so, should any compensation awarded to the Claimant be reduced accordingly and by what amount?
- f. If the dismissal is found to be unfair, does the Tribunal consider that any conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award by virtue of s.122(2) ERA and by what amount?
- g. If the dismissal is found to be unfair, was the dismissal to any extent caused or contributed to by any action of the Claimant such that the Tribunal should reduce the amount of the compensatory award pursuant to s.123(6) ERA and by what amount?
- h. If the dismissal is found to be unfair, has the Claimant taken due steps to mitigate his loss?
- i. Is the Claimant entitled to a redundancy payment?

Procedure

3. I was provided a 270-page bundle and during the hearing was supplied an old pro forma Team Member contract. Additionally, the claimant provided a witness statement and gave evidence, a witness statement from Mr Mboko Namatsouma was produced by the claimant, but he was not called to give evidence, and the respondents called Ms Bondos and Mr Campbell to give evidence having provided witness statements.

The facts

4. The respondent is a well-known chain of food retailers with over 400 outlets in the UK. The claimant worked for the respondent since 2012, latterly as a Kitchen Leader working night shifts in the respondent's shop in Heathrow terminal 4. He lived in the Elephant and Castle/Peckham area of south London.
5. It was a term of the claimant's contract of employment that he worked a full-time 35-hour week with working hours of 10 PM to 6 AM.
6. The coronavirus pandemic has had a devastating effect on the retail and hospitality sectors as well as many other sectors of the economy. Following the first "lockdown" the respondent closed all of its shops overnight and furloughed

many of its staff.

7. As a response to the pandemic and the way it affected its organisation, the respondent proposed a restructure. On 6 July 2020 the respondent held a briefing for all Operations and General Managers in which proposals for the restructure were outlined. Various proposals were put forward, including job reductions and changes to terms and conditions and benefits. There was a proposal to reduce full-time contract hours from 35 to 28 hours per week. One of the central rationales for the proposed reduction in working hours was to save jobs. The briefing also set out a process for implementing the restructure, which included communicating the proposals to staff, providing for the election of staff representatives, and the seeking of staff views about the proposals.
8. The restructure, if implemented, would lead to redundancies of some staff and changes in contractual terms for many of the remaining staff. The General Managers of each shop would be responsible for running the restructure process in their shops.
9. Before the pandemic the respondent had intended to open a new shop in Heathrow Terminal 2 in March 2020. Despite the pandemic the respondent continued with this plan. The shop in Terminal 2 was to be populated with staff from other shops. The claimant's manager put forward the claimant for transfer and I accept that he would have discussed that with the claimant.
10. The claimant's manager at the Terminal 4 shop held an initial at risk a meeting with the claimant on around 7 July 2020. The bare bones of the restructure proposals would have been explained to him, including the change from 35 to 28 hours working week.
11. A period of collective consultation started shortly afterwards. There were collective consultation meetings on the 15, 27 July and 3 and 6 August 2020. Letters were sent to all staff following each consultation meeting, effectively minuting the meetings. In the first consultation meeting it was made clear to staff that their views were being sought about the proposals and that they were encouraged to provide feedback to their employee representatives who would feed them to General Managers. The reduction in contracted hours was discussed at this meeting.
12. At the 27 July 2020 meeting, held with employee representatives, the rationale for proposed changes was explained as being to reduce costs and save more jobs from being made redundant. It was explained that it would be a condition of continued employment that all team members sign the updated contract of employment, that all existing contracts would come to an end and that all team members would be offered a new contract of employment. It was made clear that if a team member did not wish to sign the updated contract then they would be given notice of termination and their employment would come to an end. It was further explained that a refusal to sign a new contract would be the reason for the termination of their employment not redundancy, and that there would therefore be no entitlement to any redundancy payment.
13. At the 27 July 2020 meeting feedback that had been received on proposed changes was considered. It was recorded in the letter following the meeting that feedback had been received about the reduction in hours from 35 to 28 which was clearly a key concern for staff members. It was explained that this measure was proposed in order to save jobs and it was explained that if hours were increased to 30 hours per week that would still mean the loss of several hundred more jobs. A commitment to reviewing full-time contract hours in April 2021 was articulated as was an intention to increase hours as quickly as possible in line with sales. The respondent said that it was committed to getting people back to a

35-hour contract in April 2021 or as soon as possible thereafter.

14. At the third and fourth meetings, again held with employee representatives, it was clarified that the proposed termination and rehiring on new terms would not affect staff members' continuity of employment. Again, it was explained that the contracts of those who refused to accept the new terms would be terminated and the reason for termination of the employment would be this refusal, rather than for redundancy, and that there would be no entitlement to a redundancy payment. Again, it was stressed that the reason for making changes to terms and conditions of employment was to minimise job losses and protect the future of the business.
15. In terms of the redundancy process, criteria for selection were agreed which centred on flexibility, disciplinary record, qualifications and experience.
16. On 20 July 2020 the claimant had a 1-1 consultation meeting with Ms Bondos, the manager of the Terminal 2 shop. The claimant said that he would not consider a change to his hours, both in terms of reducing from 35 to 28, and in terms of his start and finish times. The claimant did not raise any issue about having this meeting with Ms Bondos, the Terminal 2 manager, rather than the Terminal 4 manager.
17. On 23 July 2020 the redundancy scoring matrix was completed for staff. There was an error in scoring the flexibility criterion, though this was an error which had no impact on the overall scoring. There were no proposed reductions for Kitchen Leaders in either of the shops at Terminal 2 or Terminal 4.
18. On 27 July 2020 the proposed new contract was shared with staff.
19. Given the claimant's position on not accepting the new contractual terms, he was invited by Ms Bondos on 6 August 2020 to a meeting to discuss potential termination. The invitation letter set out that one of the options available to the respondent if no agreement were reached about proposed changes to his contract was the termination of his employment on notice for some other substantial reason. The meeting was to take place on 10 August 2020 by Zoom videoconference.
20. At the meeting with Ms Bondos on 10 August 2020 the claimant raised the issue of his transfer to Terminal 2, saying that he had only found out about it on the respondent's intranet. I find that he had been made aware of it by his Terminal 4 manager, he had a mobility clause in his contract, and also the transfer would have made no difference to the outcome that was to follow.
21. The claimant stated clearly that he would not accept changes in hours, saying that his travel costs were £64 per week. It was explained to him that he might be able to pick up extra shifts, but this was not guaranteed. No other solution was put forward by the claimant. Ms Bondos deliberated, called the claimant back into the meeting and confirmed with him once again that he did not wish to change his contractual terms. Ms Bondos therefore confirmed the termination of the claimant's employment on notice to take effect on 5 October 2020. She explained to him that he would not be entitled to a redundancy payment.
22. By letter of 10 August 2020 the claimant's dismissal was confirmed. It was explained that as he had not agreed to the proposed changes, his employment was terminated with effect from 5 October 2020. He would not be required to work during his notice period and would remain on furlough. He was given a right to appeal against the decision to terminate his employment.
23. On 14 August 2020 the claimant indicated his intention to appeal. On 18 August

2020 the claimant was invited to an appeal meeting to take place on 20 August 2020. The appeal officer was Mr Campbell, the General Manager at the respondent's Terminal 5 shop. The invitation letter mistakenly refers to the claimant's dismissal as having been by reason of redundancy. This was clearly in error, as the minutes of the meeting that led to his dismissal and the letter which confirmed it clearly refer to the reason for dismissal as being the claimant's refusal to agree new terms of employment.

24. At his appeal on 20 August 2020 the claimant explained that four changes to his contractual terms had been proposed, and that he agreed to three of them. However, he would not accept changes to his hours. It was clear from the minutes of the meeting that he understood the rationale of the restructure and the process by which it was affected. It was explained to the claimant that it would be impossible to transfer to a different shop during the restructure as this would present significant logistical difficulties. However, after the meeting on 25 August 2020 on 3 September 2020 he was sent a list of vacancies, which included a night shift kitchen leader role in the Berkeley Square shop. The claimant did not apply for any of these vacancies.
25. After the appeal meeting on the 20 August 2020, Mr Campbell spoke to human resources and to the claimant's former manager to try to see if there was any way of retaining the claimant. However, it was abundantly clear that the claimant would not entertain anything less than 35 hours.
26. On 3 September 2020 Mr Campbell emailed the claimant the outcome letter of the appeal hearing. Mr Campbell did not uphold the claimant's appeal. In his letter Mr Campbell explained that the principal reason for making changes to terms and conditions of employment was to reduce costs to enable the respondent to minimise the number of jobs lost. He further explained that the decision as to whether to sign a new contract was entirely with the claimant; however, the consequence of his refusal to sign would mean the end of his employment. It was explained that the claimant that there was still a need for his position within the business and, therefore, he was not redundant. Mr Campbell gave the claimant yet another opportunity to reconsider his decision. He said that if he now wanted to accept terms and conditions, the claimant should let Mr Campbell know by 7 September 2020. The claimant did not indicate a change of position by this date.
27. Out of 4,443 staff members presented with proposed changes to their contracts of employment, all but six accepted.

The law

28. It is for the respondent to prove the reason for dismissal, and that such reason is a potentially fair one under section 98(2) ERA.
29. Whether the dismissal is fair or unfair depends on whether in the circumstances (including the size and administrative resources the employer's undertaking) the employer acted reasonably or unreasonably in treating the reason as sufficient reason for dismissing the employee, and is to be determined in accordance with the with equity and the substantial merits of the case.
30. When the reason for dismissal is for some other substantial reason relating to a business restructure:-
 - a. The employer needs to show (and not merely assert) some sound, good business reason for the reorganisation. It is not for me to substitute my own view as to what constitutes a sound, good business reason, but for the respondent to show that it reasonably considered that it had a sound

reason (*Hollister v National Farmers' Union* [1979] IRLR 542, *Kerry Foods Ltd v Lynch* [2005] IRLR 680, *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386).

- b. The fact that a large percentage of the workforce has accepted contractual changes is a material factor which the tribunal can take account of in assessing whether the dismissal fell within the band of reasonable responses (*Sandford & Parkin v Newcastle upon Tyne Hospitals NHS Foundation Trust* UKEAT/0324/12/DM).
- c. The employer must take account of the employee's interests.

Conclusions

Reason for dismissal/redundancy payment

31. The reason for the dismissal was the claimant's refusal to accept proposed changes to his contract of employment. Notwithstanding an error in the letter inviting him to his appeal hearing, all the evidence strongly points towards this as being the reason for the dismissal. At numerous points in the restructure process it was made clear to staff that changes to their contract of employment, in particular to their working hours, were necessary in order to avoid large-scale redundancies. On several occasions staff were told that failure to agree to these contractual changes would lead to the termination of their employment. The claimant was not identified as being potentially redundant during the operation of the redundancy criteria, indeed his role was still needed (whether he was in Terminal 2 or Terminal 4). I see no reason to go behind the substantial contemporaneous documentation and the respondent's witnesses' evidence to me which all pointed to the failure to accept contractual change as being the reason for the claimant's dismissal.
32. As the claimant was not dismissed by reason of redundancy, he is not entitled to a redundancy payment, and I dismiss this part of his claim.

Fairness

33. In considering fairness, I accept the evidence of Ms Bondos and Mr Campbell and the contents of the documentary evidence, not least the three letters following the consultation meetings, that the restructure was a genuine attempt to respond to the unprecedented circumstances created by the pandemic. All this evidence strongly points to the conclusion that the respondent genuinely and reasonably considered that contractual change, particularly reduction in contractual hours, was a sound means of pursuing the laudable aim of avoiding large-scale redundancies. 99.9% of the workforce went along with change, which in itself is supportive of the soundness of the respondent's business reasons for restructure.
34. In considering whether the respondent acted reasonably or unreasonably, it is not for me to substitute my own opinion but to assess whether the respondent's actions fell within a range of reasonable responses.
35. The respondent could have sought to have imposed contractual change on its workforce, but instead it chose to consult. No doubt part of the reason for this was that it was implementing redundancies side-by-side with restructuring terms and conditions. Nonetheless the process, on the face of it, looked a transparent and reasonable one, with the election of employee representatives, with several meetings to explain the rationale for the restructure and the process by which it would be implemented, and with opportunities given to the workforce to feedback their views and concerns.

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36. The claimant himself was consulted individually, was told that his services were valued within the respondent organisation, was given explanations of the rationale for the restructure and was told in no uncertain terms that his failure to agree to contractual change would lead to his dismissal without a redundancy payment. It was also made clear to him that it was hoped that contractual change would be temporary and that ours would be built up in line with increased sales.
37. The claimant says that it was unfair for the employer not to honour the terms of his contract. However, in difficult circumstances such as the respondent found itself in, it is open to an employer to negotiate change, or even impose it under the threat of dismissal. Again, the fact that 99.9% of the workforce agreed to contractual change is clear indication of the fairness of the respondent's approach both in substance and process. Again, contractual change was introduced for genuine and reasonable aims in order to reduce redundancies in response to what can only to be described as a catastrophe for the retail/hospitality sector.
38. In all the circumstances I consider that the claimant was not unfairly dismissed. Given these findings I do not need to go on to consider subsidiary questions of reduction of compensation to reflect chances of dismissal if a fair procedure had been adopted, or reduction of compensation by reason of contributory fault.

Employment Judge **Heath**

8 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

.09/08/2021.

FOR THE TRIBUNAL OFFICE