EMPLOYMENT TRIBUNALS

Claimant: Ms M Dows-Miller

Respondent: St Nicholas Training Centre for the Montessori Method of Education Ltd (Montessori St Nicholas)

Heard at: Exeter by CVP **On:** 01 and 02 June 2021

Before: Employment Judge Smail

Representation
Claimant: Mr L Harrison, Accountant
Respondent: Mr P Livingston, Counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 6 July 2020, the Claimant claims unfair dismissal. She was employed by the Respondent as an Accreditation Manager between 1 September 2010 and 17 July 2020. She was dismissed ostensibly for redundancy. The dismissal took effect during the first wave of COVID and I have no doubt that the dismissal was unsettling for the Claimant given the timing of it.

THE LAW AND ISSUES

2. The Tribunal has had regard to Section 98 of the Employment Rights Act 1996. By Section 98 (1) it is for the employer to show the reason, or if more than one the principal reason, for the dismissal. A reason relating to redundancy is a potentially fair reason. By Section 98 (4) where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer:
    (a) 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
    (b) shall be determined in accordance with equity and the substantial merits of the case.

3. The guidance given by the EAT in Iceland Frozen Food v Jones [1983] ICR 17 is appropriate. The starting point should always be the words of Section

98 (4) themselves: that in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they, the Employment Tribunal, consider the dismissal to be fair.

4. In judging the reasonableness of the employer's conduct, an Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view whilst another quite reasonably take another.

5. The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss fell within the reasonable band of responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal is outside the band it is unfair.

6. It is important for us to appreciate that the employer enjoys a range of discretion in its decision making and the Tribunal's role is to review the exercise of that discretion intervening only where the employer has acted unreasonably.

7. In redundancy cases, the factors the Tribunal will look at are the basis for selection, consultation and any alternative employment options in assessing whether the dismissal was unfair. In terms of whether the employer shows the reason for dismissal as redundancy: the statutory definition of redundancy will be borne in mind. The relevant part of Section 139 (1) of the Employment Rights Act 1996 is subsection (1)(b) – was the Claimant's dismissal wholly or mainly attributable to the fact that the requirements of the Respondent for employees to carry out work of a particular kind had ceased or diminished or expected to cease or diminish?

FINDINGS OF FACT

8. The proposal to make the Claimant redundant was made by the Chief Executive Officer Ms Leanora Stjepic. The idea seems to have been first raised by Karen Chetwynd, a Strategic Director brought in by the Respondent. The Respondent was under financial pressure. This was confirmed by the Claimant's witness Ms Johns. The Respondent needed to make savings as well as continue to develop its function winning new business. One of the Respondent's functions was at that time to provide accreditation for Montessori courses. The Claimant was the Accreditation Manager working on the Montessori Evaluation and Accreditation Board (MEAB).

9. In 2019, the Respondent resolved to cease using the MEAB scheme and piloted the Montessori Accreditation International scheme (MAI). This was designed to attract educational institutions, known as 'settings', on an international scale adopting accreditation to provide Montessori education. The Claimant herself was Montessori trained and was an early years specialist.

10. In March 2020, the Respondent decided to wind down the MAI pilot by May 2020. It was planning to roll out in the fullness of time an accreditation scheme which would enable educational settings to demonstrate quality

assurance in respect of educational programmes generally - not just Montessori - but wider than that. Such accreditation schemes could be used in this Country, for example, to satisfy Ofsted of the suitability of the teaching programme of any educational establishment.

11. There was brewing, then, an ambitious proposal to extend the schemes beyond Montessori-type education. The proposal from Mrs Stjepic, having consulted her directors, was that this could be done without an accreditation manager. The proposal was that oversight could be provided by Karen Chetwynd and implementation could be outsourced to assessors. It was also the idea that in due course an administrator role or assessor role could be advertised to be provided by independent contractors working part-time, flexibly and according to need. In other words, on a model other than an employment model. The proposal was that there was no need for a full-time Accreditation Manager working on an employed basis, as the Claimant had.

12. The selection pool was proposed to be the Claimant's role itself. The Claimant's role was seen as a potential cost saving. Consultation would be given to the Claimant to see if there was suitable alternative employment for herself. The proposal was a firm proposal that had crystallised by the beginning of April 2020. The Claimant was informed she was at risk of redundancy in a meeting on 6 April 2020. She was sent an at risk letter that same day.

> "Further to today's meeting I am writing to confirm the changes proposed within the company's work on accreditation.
>
> As you know we made the decision to change the existing accreditation scheme MEAB and have been working on what we consider is the best quality assurance framework for the future. As part of the different reiterations we have gone through we have identified that the scheme will not require an accreditation manager in future.
>
> For the reasons set out the company has provisionally concluded that it no longer requires a role of an accreditation manager. Accordingly, the company has identified your role as potentially redundant".

13. A consultation meeting was proposed on 8 April.

14. An internal WhatsApp message exchange dated 7 April 2020 reveals that the proposal to delete the Claimant's role was a firm one, it was not envisaged that that role would be continuing post COVID and on that basis the concept of furlough was said not to be appropriate. In reality, any consultation would have been about the possibility of any alternative work for the Claimant.

Initial acceptance of redundancy

15. The Claimant attended a consultation meeting on 8 April 2020 and at that meeting she accepted she would be made redundant and stated that there was no need for a second consultation meeting. Part of that position may have been sympathy from the Claimant for the health of Ms Stjepic who was known to be unwell. That, however, was not the sole reason for the Claimant's position. The Claimant accepted that her role was redundant. We see from her email of 8 April 2020 that her primary concern at that point was to see what her redundancy package was. In that email she wrote to Ms Stjepic and Ms Chetwynd who had also been present at the meeting.

> "Dear Leanora and Karen
>
> I look forward to receiving notes from our meeting this morning regarding my possible redundancy. In advance of receiving these I would just like to reiterate 2 points which were discussed.
>
> That my package will not be compromised by reducing the notice period by one week because I chose not to waste any more of your time in having another consultation meeting with you next week.
>
> My long service of twelve years working for Montessori St Nicholas will be noted".

16. The only fair way of reading that email is to find that at that point the Claimant was reconciled to the fact of redundancy and was keen to establish the extent of her redundancy package. The events that follow are regrettably messy in terms of the process.

17. Miss Stjepic responded by saying that the notes and the letter outlining the package offered would be sent to her later that day or on 9 April 2020. The Claimant chased these documents, the notes of the meeting and the letter outlining the package on 14 and 15 April.

18. The Claimant received a letter of notification of redundancy giving three months notice some of which would be worked, some of which would not, and containing the financial detail. This was received on 16 April 2020 setting out her redundancy remuneration calculation as being the statutory minimum. The total amounted to some £15,000 or so.

19. Having received the redundancy letter, including the calculations contained in it, the Claimant wrote on 16 April 2020 that she still required the notes of meeting and she queried the redundancy settlement offered, seeking in effect a package greater than the statutory minimum. She did assume, perhaps not unfairly, that this was something capable of negotiation.

<u>Subsequent challenge to redundancy</u>

20. On 17 April 2020, having involved the assistance of an advisor to a greater degree and I believe that was Mr Harrison who represented her in these proceedings who is by trade an Accountant, the Claimant changed her position. She set the scene for a challenge to the redundancy decision and reversed her position on a second consultation meeting, saying she wanted one after all. This of course was after having received the letter terminating her employment. That is one change of position which has complicated matters.

21. The next problem was that Ms Stjepic offered a second consultation meeting in response to the Claimant's request, but very swiftly after that, given that there had been notice of dismissal communicated, decided instead to offer an appeal. It was intended that there would be an appeal heard by Ms Pescatore, the Finance Director, amounting to a full rehearing of the matter. The Respondent believed that this would in effect replicate a second consultation meeting but in the context of the fact that the dismissal letter had already gone out.

22. There followed something of a stalemate, regrettably. The Claimant's position reiterated to me in crystal clear terms today is that she never raised an appeal and she was not, therefore, going to engage with the appeal. That was her position. She was offered a number of appeal meetings. Those meetings may have coincided with a point in time when she was unwell owing to stress resulting from all of this, but rather than seek a postponement of those meetings, the Claimant was crystal clear with me today as she was then, as is clear from the correspondence, she was not going to engage with an appeal process that she had not asked for. Instead she wanted a second consultation meeting, which would have been preferable in her eyes, and stated by her on three occasions in communications.

23. There followed what can only be described as a collapse in the relationship between the Claimant and the Respondent. The Claimant put in a complaint to the Trustees about Ms Pescatore claiming Ms Pescatore had bullied and harassed her in the context of trying to insist on an appeal hearing, questioned the impartiality of Ms Pescatore and sought her removal from the appeal and the withdrawal of the appeal process. The Trustees did not accede to that position, forming the view that there was no basis to intervene to stop Ms Pescatore continuing with what she had done.

24. Insofar as the Claimant was trying to select her internal tribunal for her dispute, that failed, and the process remained on track; there was going to be an appeal. As the Claimant did not engage with the appeal, Ms Pescatore considered the matters on the materials that she had before her and came to an appeal outcome on 7 May 2020. This represents perhaps the best statement on behalf of the Respondent as to the redundancy position and I will quote from the third page of the appeal outcome on the question of redundancy. Ms Pescatore found as follows:

> "Having investigated the situation, I am satisfied that the position with regard to the basis for the redundancy of your role is as follows:
>
> As you know the Montessori Evaluation and Accreditation Board (MEAB) accreditation scheme that you managed was wound down and stopped last year. You were subsequently involved in discussions about a new scheme that it was felt would better suit Montessori St Nicholas' purposes going forward and assisted in the development of the new Montessori Accreditation International (MAI) accreditation scheme.
>
> As you are aware the pilot scheme for MAI began in late 2019. The purpose of the pilot scheme for MAI was to determine the feasibility of operating the new scheme. From around February 2020, the decision was taken to pause the MAI pilot scheme and to gradually wind the MAI scheme down. You have assisted with this process. I am satisfied that there are no plans to operate the MAI Accreditation scheme in the immediate future. The business plan to which you refer in your letter to the Trustees was valid at an earlier point in time and has since been superseded by discussions and planning that began in December 2019 and is ongoing. The business plan has been and is continuing to be redeveloped and it appears that any future scheme would be very different to the MAI and MEAB schemes.
>
> However, planning is at an early stage in respect of any future schemes and although I address this point further below, there are currently no roles envisaged in relation to these schemes that would be suitable alternative roles for you. In any event there are no roles envisaged in the near future in any case".

25. I also will return to alternative roles in a moment. Insofar as that being a statement of the Respondent's case it is in my judgement a clear and accurate position of what the Respondent was proposing.

DISCUSSION AND CONCLUSIONS

The Claimant's challenges

26. There have been some very substantial challenges made by the Claimant and Mr Harrison of the process in this case over the last two days. I will deal with the best of those now.

Ms Chetwynd

27. First of all, they say there was no redundancy situation. This is largely premised upon the role of Ms Chetwynd. Ms Chetwynd had come in part-time at first, director level eventually, full-time with an increase in hours. She was brought in on a strategic basis with view to generating relationships with academic institutions, but part of the role given to her was to supervise the accreditation system. The Claimant has submitted that Ms Chetwynd's increase in hours corresponded in effect to the reduction or deletion of the Claimant's role, and when you look at it on that basis there can be no redundancy situation; what you have in terms of numbers of employees, you have the increased hours of Ms Chetwynd, substituting the Claimant.

28. That is not quite right in my judgment. The increase in Ms Chetwynd's hours was not solely to cover the Claimant's work. Yes, there was some managerial responsibility for accreditation, but Ms Chetwynd did not do the same work as the Claimant. The Respondent does show that this was a genuine redundancy situation in that it proposed the Claimant's role as redundant. Looking at the before and after position as at March, April, May and June 2020, there was a reduction in the demand for employees performing work of a particular kind. Within the statutory language, the dismissal was wholly or mainly attributable to the fact that the requirements of the Respondent for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish. There was no continued role proposed for an Accreditation manager. That particular challenge is unsuccessful.

Selection Pool

29. An important argument for the Claimant was that she should not have been selected alone, she should have been pooled with Ms Chetwynd and with Ms Castellarin who worked fifty percent on accreditation. There should have been an objective scoring system applied to all three and the best qualified two or best qualified one should have come through the redundancy process and on that basis it could be submitted (Mr Harrison has not quite put it that way) that there was at least a one- third, possibly a two-third chance of the Claimant coming through such a process. The argument is attractive intellectually but on the facts of the case in my judgment it does not work. It is not appropriate and would not have been appropriate to pool Ms Chetwynd with the Claimant. Ms Chetwynd was a strategic director on significantly more money with a broader and more strategic role, it would not have made sense to put Ms Chetwynd in the pool. Similarly, on balance, it was not unreasonable for the Respondent not to put Ms Castellarin in the pool. This is always the question: was it unreasonable or was it reasonable, this is not my personal view, it is whether the Respondent's decisions bare scrutiny as reasonable. It was reasonable not to pool Ms Castellarin with the Claimant;

her principal role was as a tutor; fifty percent of her role was seconded to the accreditation team but following these proposals her role was to revert one hundred percent to a tutor role. So, one is not comparing like with like. Ms Castellarin had a different function which meant that if the decision was that they do not need an accreditation manager, it was reasonable not to pool Ms Castellarin in with the Claimant; she would revert to a tutor role.

Contracted out assessors

30. The third challenge relates to the fact that it had been envisaged at the beginning that there was potentially down the line a role for contracted out accreditation assessors, rather like the ones that have been advertised in March 2021, £200 per day, independent contractor. It was explained to me by Ms Stjepic that the advantage, if it is done on that basis, is that engagement is according to need rather than every day. It seemed to me that had this matter been highlighted to a greater degree in the consultation than it was, it might have enabled the Claimant to make representations that she should at least have a part-time role and she should be furloughed in the interim. The consultation did not point to this as being an idea down the line.

31. To be fair to her, however, Ms Pescatore at the appeal did address the matter and I am persuaded that there was no job for the Claimant to do, akin to a part-time accreditation assessor on an employed rather than an independent contractual basis, in March, April, May, June 2020. That was something coming in the distance and it was reasonable not to consider offering her a part-time employed role in lieu of this independent contractor role at the time the redundancy was under consideration.

Furlough

32. That links into the next challenge which is the one of furlough. I have full sympathy with the Claimant about the timing of this decision. It was of course at a time when so many employees were otherwise being furloughed, which holds the position pending the outcome of COVID. The Claimant did raise it in her only consultation meeting. The Respondent will have dealt with this in the same way that it dealt with it in its internal WhatsApp exchanges by stating if the job was not going to be there at the end of COVID, then you have a justification for not furloughing it. The Claimant's employed job was not planned to be there at the end of COVID. It was reasonable for the Respondent not to furlough it.

Second Consultation/Appeal

33. Lastly in terms of the important challenges is the argument that having said you can have a second consultation meeting it was unfair to withdraw that and insist on an appeal. However, the fact was that the letter giving three months' notice had been sent out before the Respondent knew that the Claimant had changed her mind on challenging the redundancy.

34. In my judgment, on balance, it was not unreasonable of the Respondent to offer an appeal with a full review of the matter. The Claimant ought to have engaged with this process without prejudice to her primary position that she should have had a second consultation meeting. Instead she chose not to engage with the appeal process. That was a matter for her. The Respondent

did provide a forum whereby she could raise all the points that she wanted. Ms Pescatore did her best to address all the matters in the outcome.

35. The challenge to Ms Pescatore's status in the process was in my judgment a misguided attempt to derail Ms Pescatore from her function. It was not done on a valid basis. The argument that they should have honoured their position on second consultation is plainly arguable. The Claimant's position is however, undermined by the fact she did waive the second consultation meeting at first. She accepted the redundancy. She was expecting to negotiate a substantial exit package, over the statutory minimum. It is quite obvious that if the Respondent had paid generously above the second statutory minimum we would not be here today. They were entitled to pay only the statutory minimum, however.

36. In summary, accepting this was unfortunate timing for the Claimant early on during the first wave of COVID, and also accepting the unfortunate consequences of the two changes of mind - one by the Claimant (not to accept the redundancy) and the second by the Respondent (not to hold a second consultation meeting, but hear an appeal instead), the Respondent shows that the reason for the Claimant's dismissal was redundancy and the decision to select for redundancy was not unfair, falling within the range of reasonable management decision-making.

Footnote on Holiday Pay

37. As to the holiday pay claim I have reluctantly come to the conclusion that the Respondent is right. That if it terminates the contract under a PILON clause earlier than at the expiry of the full notice then it cannot be said that holidays have accrued beyond the date of the effective date of termination. Reluctantly I accede to the Respondent's submission on that.

Employment Judge Smail
Date: 10 August 2021

Sent to the Parties: 17 August 2021

FOR THE TRIBUNAL OFFICE