EMPLOYMENT TRIBUNALS

Case Reference: 1405375/2020
Claimant: Mr Paul Brace
Respondent: Isle of Wight Distillery Limited
Heard at: Southampton by CVP
On: 10 August 2021
Before: Employment Judge Lowe
Representation
Claimant: Mr P Doughty
Respondent: Mr N Henry

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The respondent did unfairly dismiss the claimant. Accordingly, the complaint of unfair dismissal succeeds.
2. The claim for unlawful deduction of wages succeeds.

REASONS

1. After hearing evidence and receiving helpful submissions from both counsel, the Tribunal reserved judgment. The Tribunal now gives its reasons for the Judgment that has been reached.

Introduction

2. In a claim form presented to the Tribunal on 25 September 2020, the claimant brings the following complaints:
    2.1. Unfair dismissal. This is a statutory complaint brought under the Employment Rights Act 1996.
    2.2. Unlawful deduction of wages in accordance with section 13 Employment Rights Act 1996.

With the agreement of the parties this hearing was conducted by CVP video platform and was a fully digital hearing.

The Tribunal received evidence from the following:
Xavier Baker, Director of the respondent;
Conrad Gauntlett, Managing Director of the respondent;
Alan West, former employee of the respondent;
Daisy-May Perry, former employee of the respondent;
Paul Brace, claimant in these proceedings.

The Tribunal was provided a digital bundle comprising 127 pages. Further witness statements from the Claimant and Respondent have also been provided.

References in this Judgment to the agreed hearing bundle are in the form **[B/page number]** and references to witness statements are in the form **[WS/surname/page number]**.

Summary of the parties' position

The claimant was employed by the respondent from April 2017 until his dismissal on 31 July 2020.

The respondent avers that the claimant's employment was terminated on the grounds of redundancy as its requirements for Production Assistant at that workplace had ceased or diminished, or, were expected to cease or diminish.

The claimant does not accept there was a genuine redundancy situation, and that "the true reason for my dismissal was the breakdown of my relationship with Emma and the ongoing issues that arose from this" [WS/Brace/18].

The respondent avers that they followed a fair redundancy procedure; this is disputed by the claimant.

List of Issues

A list of Issues has been provided to the Tribunal as follows:

Unfair Dismissal (redundancy)

Reason

1. What was the reason for the claimant's dismissal?
2. Was there a redundancy?

Fairness

3. Did the respondent adopt a fair procedure in particular:

   3.1 The composition of the pool for redundancy;
   3.2 The selection of the-claimant for redundancy within that pool;
   3.3 Whether there was sufficient warning of redundancy;
   3.4 Whether there was adequate and sufficient consultation;
   3.5 Whether there was a sufficient search for alternative employment;
   3.6 Considering alternatives to dismissing the claimant including temporary part-time working; continuing furlough including part time working on furlough;
   3.7 Seeking voluntary redundancies.

4. If the respondent did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

Deduction from Wages

5. Did the respondent unlawfully deduct sums from the claimant's wages?
6. If so how much?

Remedy

7. What financial losses has the claimant suffered?

8. Has the claimant taken reasonable steps to replace lost earnings?
9. If not, for what period of loss should the claimant be compensated for?
10. Is there a chance that the claimant's employment would have ended in any event? Should his compensation be reduced as a result?
11. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

Findings of Fact

The respondent is a licensed distillery on the Isle of Wight and produces a range of hand-crafted and slow distilled spirits. The company has two directors: Conrad Guantlett and Xavier Baker and 1 non-executive director, Malcolm McClelland. Decisions are made on a collective basis between the two directors.

The respondent employs approximately 20 members of staff, 8 of whom work in the Production Unit.

Production Unit Roles

Collectively, the staff within the Production Unit were multi-skilled and able to undertake numerous roles within the department as required. The respondent is a small company and there was a very clear team work ethic. Individuals undertook a variety of tasks in accordance with business need, including the directors:

> "If we could divide some orders out… get them all done today. See if we can get Malcolm and Kate..do some". Reply from charity: "I can do some deliveries too" [B/71].
>
> "I will be at the distillery just gone 10…to get the online order sorted out. Let's chat in the morning. Ginnie and I plan to head out. If you are heading out too, that would be useful" [B/74]. The claimant replies "Newport is the main area I have to do. Kate is going to help also so we can all smash it out" [B/75].

The claimant has indicated that his employment was as Head of Production. However, the Statement of Main Terms of Employment detailed at [B/36] outlines that the claimant's job title as a Production Assistant. It further provides a requirement that the claimant perform other duties from time to time, in accordance with business requirements.

The claimant accepted that his title was that of Production Assistant in his evidence and acknowledges that he undertook all production roles, as well as driving and deliveries. He accepted further that his main duties consisted of hand filling bottles of spirits and driving a forklift [B/25]. He was acknowledged to be the "bottling guy".

Relationship between the parties

The claimant and Mr Gauntlett's daughter, Emma, were in a relationship until an acrimonious split in 2018 [WS/Brace/4]. They have 2 children together. Following the separation, the claimant moved into a bungalow owned by Mr Gauntlett, located adjacent to his own home.

Commercial restructuring

During 2019 the respondent was doing well and expanding [WS/Gauntlett/1]. A new bottling plant was ordered in October 2019 and commissioned in August 2020 [WS/CG/1].

The automated bottling machinery would result in capacity being increased from 1,000 per day to 1,000 per hour [B/26][B/107]. All parties accept that the mechanisation of the bottling role represented a significant change. As a direct consequence, there would no longer be a requirement for employees to hand fill bottles [B/107].

There would, however, be a continuing requirement for Production Unit staff:

> "An element of manual activity continued to be required, with the need for neck tags and cellulose caps to be applied, for bottles to be boxed and for boxes to be palleted and stored, by hand" [B/108].

Disciplinary record/process

The respondent's Rules, Disciplinary and grievance procedures as shown in the Employee Handbook detailed at [B/42] onwards.

Of particular relevance to these proceeds is the 'Disciplinary Procedure' outlined at [B/60-61]. The following extracts are noteworthy:

Paragraph 2: *"The purpose of the disciplinary procedure is to outline a recognised and consistent system to deal with any issues of conduct".*

Paragraph 4: *"Before considering a warning or dismissal, steps will be taken by us to establish the facts".*

Paragraph 6: *"If it is necessary for us to take action under the disciplinary procedure you will be issued with a written statement setting out the nature of the conduct….that may result in a disciplinary warning or dismissal".*

"*You will only be issued with a disciplinary warning or dismissed following a formal disciplinary meeting".*

"Throughout the disciplinary procedure you will be given the opportunity to respond to any complaint before any decision on a disciplinary warning or dismissal is taken".

Within the evidence bundle, there are 2 documented matters involving the claimant's conduct:

<u>30 December 2019:</u>

On the above date, a Disciplinary Preliminary Interview took place between the parties. The claimant accepted at this meeting that he was responsible for damage to Emma Gauntlett's car after the Isle of Wight Distillery Christmas party.

Following the meeting, the claimant was issued with a Final Written Warning (of indeterminate length). A letter dated 6 January 2020 from Mr Gauntlett provided a full explanation of the disciplinary process undertaken and the rationale for his decision [B/66-67].

<u>28 April 2020:</u>

A meeting took place between the claimant and both directors, Mr Gauntlet and Mr Baker. The notes are itemised at [B/79]. My findings in respect of this meeting are as follows:

- It was informal in nature, and did not constitute formal disciplinary proceedings in accordance with the Policy as identified above;
- The focus of the meeting was to discuss the running of the unit moving forward under the supervision of Kate Evans. It's purpose was, in my view, twofold: firstly, to reaffirm her authority, and secondly, to make it clear to the claimant that his behaviour at the end of the previous week was not acceptable. The meeting ended on a positive note; the claimant agreeing that he could work under Kate's instruction.
- Staffing numbers or redundancies were not discussed at the meeting. There is no record of this in the notes and both the claimant and Mr Gauntlett confirmed this during their evidence. Mr Gauntlett responded to a question as to whether there was mention of redundancy during this meeting: "not that I can remember".
- The second part of the notes do not relate to the meeting itself. Mr Baker records as an aid memoire two matters: firstly, that on 29 April 2020 Kate reported further issues with the claimant's conduct. Secondly, in the light of that information from Kate, that the directors determined to dismiss the claimant.
- The claimant was not notified about these further allegations, and they were not the subject of formal disciplinary proceedings.

On 6 May 2020, Mr Gauntlett informed the claimant that he would not be returning to work following his period on furlough. In effect, that he was to be dismissed. The meeting took place in the garden of Mr Gaunlett's home.

In the afternoon of the same day, the claimant sent Mr baker the following text message:

> *"Just spoke to Conrad about me not coming bk. All is cool Just wanted to say thanks for been a good boss and understanding. I did enjoy working for you. There's no hard feelings and wish you and company all best in future" [B/81].*

On 7 May 2020, the respondent reversed the decision to dismiss the claimant. The claimant remained on the furlough scheme until his dismissal on 31 July 2020.

Redundancy procedure/process

The respondent avers that there was a genuine and meaningful consultation with the claimant, and that specifically, on 16 June 2020 the claimant was consulted about the respondent's redundancy proposals [B/26]. An Individual Redundancy Consultation Checklist was completed during/shortly after this meeting [B/89].

My findings in relation to this are as follows:

- No advance notification was provided to the claimant in respect of this meeting;
- The meeting took place in a cark park, which I have conclude, was not conducive to meaningful and proper consultation;
- The Individual Redundancy Checklist records the total number of redundancies as *"3"*. This figure is representative of the total number of redundancies applicable to the Production department since March 2020; it did not represent the number of individuals being considered for redundancy as at 16 June 2020. Two staff members had already been dismissed by this stage; this left only one further redundancy to be made;
- The selection criteria is recoded as "n/a". This is erroneous as the respondent has confirmed the criteria was one of disciplinary record;

- Pool scores/reasons is recorded as "n/a". No scoring was undertaken amongst the 4 remaining employees. No pool was created that involved formal consultation with the remaining 3 members of staff within the production unit;
- There was no discussion in relation to further roles or alternatives to employment, such as furlough continuing or flexible working;
- A further consultation was scheduled for 29 June 2020, with a provisional termination date being noted as 31 July 2020. The meeting of 29 June 2020 never took place.

On 1 July 2020, the respondent avers that a second meeting took place between the claimant, Mr Gauntlett and Mr McClelland. Mr Gauntlett recalls that the claimant was very much opposed to redundancy at this meeting – a contrary position to that at the meeting on 16 June 2020.

The claimant avers that this meeting did not take place; rather, that he was simply given the Final Redundancy Notice letter dated 1 July 2020.

I find that there was no formal consultation on this occasion for the following reasons:

- There are no minutes/notes or other documentary evidence in respect of this meeting;
- The final redundancy notice letter [B/93] makes no reference to a second meeting. It refers only to a meeting "14 days ago".

Pooling

There was a team of seven employees in production prior to the Government's lockdown. Of the seven, one resigned, one was dismissed and a further staff member was transferred to a flexible contract in accordance with business need [B/27]. The respondent avers that the remaining four employees constituted a pool from which a selection was made for redundancy [B/27] [B/105].

I find that the respondent fairly defined the selection pool, namely the remaining Production Unit staff. However, the pool was created as a result of discussion between the directors alone. There is no documentation to support the assertion that the three remining Production Unit staff were consulted as part of a redundancy procedure.

Selection criteria

The respondent accepts that the nature of the roles meant there was very little else to use in distinguishing between those in the Production Unit [B/27]. As the claimant had the worst disciplinary record, this was used as the deciding factor in the decision to make him redundant [B/27] [B/108].

I determine that there was no formal recording or consultation of the selection criteria. Again, this was a decision made by the directors in isolation.

Alternative roles

It is accepted that, in July 2020, the claimant did not have the required skills and experience necessary in order to support the new machinery [B/27].

However, there is no evidence that there was a genuine and meaningful attempt to consider alternative roles within the respondent company after the introduction of the new bottling machine. This included: maintaining the claimant in the furlough scheme, flexible working and alternative roles. Temporary members of staff were and continue

to be employed by the respondent subsequent to the claimant's dismissal. Any of these roles could have been undertaken by the claimant.

Appeal hearing

In response to a letter (dated 16 July 2020) from the claimant's solicitors, Roach Pittis, the respondent determined that an appeal hearing should be convened [B/98]. The claimant was invited to attend the hearing, but having received legal advice, chose not to do so [B/100].

The meeting was conducted by a Face2Face Consultant [B/102-109].

Without criticism to the Consultant, the appeal was devoid of hearing from the claimant and only considered the documents itemised at [B/104]. As such, recommendations were based on limited information.

Relevant Law

S94 ERA provides that an employee has the right not to be unfairly dismissed.

It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).

In ***Safeway Stores plc v Burrell [1997] IRLR 200*** the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

a. Whether the employee was dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

The House of Lords in ***Polkey v A E Dayton Services Ltd 1988 ICR 142*** held that "*in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair*

basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation".

Discussion & Decision

Section 98 ERA sets out the relevant approach as to whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) ERA. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

The definition of redundancy in contained within s139(1) ERA. That states that an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish.

The factors set out in ***Safeway Stores plc v Burrell*** have ben considered. It is clear that the claimant was dismissed, so the first element was satisfied. It is also clear that the respondent had determined that in order to expand and develop the business, mechanisation of the bottling process was required to significantly increase production. This meant that the requirement for hand filling of bottles would cease or significantly reduce. The requirement for employees to carry out work of a particular kind had accordingly diminished. The second test was accordingly also satisfied.

In relation to the final point, I am satisfied that the claimant's dismissal was wholly caused by the fact that the respondent determined that, in order to increase production, the requirement for staff to hand fill bottles would, in effect, cease to exit. The timeline reflects this – the claimant was dismissed on 31 July 2020 and the new machinery commissioned in August 2020. Accordingly, I am satisfied that there was a genuine redundancy situation and the claimant was dismissed solely as a result of that.

In relation to s98(4) ERA, the Tribunal has next to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones [1982] IRLR 439*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent.

In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in Polkey in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. Taking each factor in turn, the following conclusions were reached.

Warning and Consultation

Only one meeting took place with the claimant where redundancy was discussed, namely 16 June 2020. As outlined, the meeting on 1 July 2020 amounted to nothing further than the issuing of the Final Redundancy Notice letter.

No advance warning or meaningful consultation was given in relation to the meeting of 16 June 2020, and as a consequence, the claimant was not afforded the opportunity

to challenge the basis of his selection or to put forward suggestions for ways to avoid redundancy.

Fair basis for selection

The respondent made a reasonable determination in relation to the appropriate pool of employees from which selection for redundancy should be made. However, as stated above, this was a decision made between the directors. There was no formal consultation with any other members of staff or inclusion in a redundancy process, rendering it inherently unfair.

As a consequence, the claimant was not informed of the proposed selection criteria or pool. He was not afforded an opportunity, therefore, to challenge the basis for his selection. Rather, once he was selected, the respondent simply informed him that he was to be dismissed.

In relation to the selection criteria used, this was subjective and based solely on the one factor that would specifically negatively impact the claimant, namely disciplinary record. In effect, the claimant was selected for redundancy and the criteria then chosen in order to justify this decision.

Consideration of alternative employment

There were redeployment opportunities for the claimant within the respondent's organisation. Other tasks still had to be completed manually within the Production Unit. Additional staff members were employed by the respondent after the claimant was dismissed, even if this was on a temporary basis. Accordingly, there were steps which the respondent ought reasonably to have taken to avoid or minimise redundancy by redeployment (including utilisation of the furlough scheme) within its own organisation.

Conclusions

Given these findings, the Tribunal concluded that the respondent accordingly acted unreasonably in treating redundancy as a sufficient reason to dismiss the claimant. No reasonable employer would have dismissed the claimant for redundancy in the circumstances. The claimant's dismissal was accordingly unfair.

Unlawful deduction of wages

The claimant makes a claim in the sum of £202.97; this being the difference between contractual pay and furlough pay during the claimant's period of notice.

I note the chronology and salary record contained within the respondent's statement [WS/Gauntlett/4] which states:

> "July 2020 – Brace furloughed and paid 80% of his salary".

I therefore find that the claimant is entitled to the sum as outlined. His claim for unlawful deduction of wages therefore succeeds.

Remedy:

Polkey Assessment

Software 2000 Ltd v Andres [2007] UKEAT 0533/06, paragraph 53 states:

> "*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise".*

I note the following:

The pool consisted of the 4 remaining employees within the Production Unit.

All staff within the unit were multi-skilled, carrying out all tasks within the unit. The respondent accepts that the nature of the roles meant there was very little else to use in distinguishing between those in the Production department [B/27].

The claimant's period of employment was not considerable in length; just over 3 years.

The claimant was the only staff member with a disciplinary record. The specifics of this were serious, namely a Final Written Warning. The length of time since its imposition was only 6 months. This was the only distinguishing feature identified that differentiated the claimant from his colleagues.

I therefore determine that the claimant would, on the balance of probabilities, have been dismissed had a fair procedure been followed. I assess the likelihood of this was significant, namely 75%.

Award:

£382.50 – gross weekly pay; £317.55 net weekly pay

Basic Award:

1 x 3 x £382.50 **Basic award: £1,147.50**

Compensatory award:

<u>Prescribed element</u>:

Loss to 19 July 2021 (date of commencement of employment with Mew the Movers):

Loss of basic salary to 19.07.21 (50 x £317.55)	£15,877.50
Earning in alternative employment	Less £1,726.38

	Sub-total £14,151.12
Polkey reduction – 75%	Less £10,613.34
	Sub-total £3,537.78
ACAS uplift 25%	£884.44
	Sub-total £4,422.22
<u>Non-prescribed element:</u>	
Loss of statutory rights	£300.00
Loss of pension benefit (50 x £45.83)	£2,291.50
	Sub-total £2,591.50
Polkey reduction – 75%	Less £1,943.62
	Sub-total £647.88
ACAS uplift 25%	£161.97
	Sub-total £809.85
Total compensatory award	**£5,232.07**
Total award (basic and compensatory)	**£6,379.57**

Employment Judge Lowe
Date: 10 August 2021

Sent to the Parties: 24 August 2021

FOR THE TRIBUNAL OFFICE