



EMPLOYMENT TRIBUNALS

Claimant: Mr M Rayner
Respondent: ABF The Soldiers' Charity
Heard on: 26th & 27th August 2021
Before: Employment Judge Pritchard

Representation

Claimant: In person
Respondent: Ms S Chan, counsel

RESERVED JUDGMENT

1. The Claimant's claim that he was unfairly dismissed is not well-founded and is accordingly dismissed.
2. The Claimant's claim that he was treated less favourably on the ground that he was a part-time worker is dismissed.

REASONS

1. The Claimant claimed unfair dismissal and less favourable treatment on the ground that he was a part-time worker. The Respondent resisted the claims.
2. The Tribunal heard evidence from the Respondent's witnesses: Martin Rutledge (Chief Executive Officer); Robin Bacon (Chief of Staff at relevant times); and Philip Jones (Chairman of the Respondent's Board of Trustees). The Claimant gave evidence on his own behalf together with Richard Miller (former Regional Director, South-West). The Claimant also placed in evidence the statements of individuals to which the Tribunal had regard; since the evidence of these individuals could not be tested under cross examination, the Tribunal afforded it little weight. The Tribunal was provided with a bundle of documents to which the parties variously referred and further documents were provided during the course of the hearing. At the conclusion of the hearing the parties made oral submissions.

Issues

3. The issues were discussed at a preliminary hearing on 23 April 2020 before Employment Judge Ferguson and set out in her case management order as follows:

Unfair dismissal

- 3.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was redundancy or "some other substantial reason".
- 3.2. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?
- 3.3. If the claimant was unfairly dismissed and the remedy is compensation, if the dismissal was procedurally unfair, 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 / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.

Less favourable treatment of part-time worker (Reg 5 Part-time Workers Regs)

- 3.4. It is not in dispute that the claimant was a part-time worker.
- 3.5. Was the claimant treated less favourably than the respondent treated a comparable full-time worker?
- 3.6. If so, was that treatment on the ground that claimant was a part-time worker?
- 3.7. Was the treatment justified on objective grounds?
4. It had been agreed at the preliminary hearing that the hearing would be on liability only, to include consideration of Polkey. A further hearing would take place to consider remedy should the Claimant succeed in all or any of his claims.

Findings of fact

5. The Respondent is a charitable organisation providing support and benefits to persons who are serving, or who have served, in the British Army. The Respondent employs in the region of 85 individuals, plus contract staff. Its national office is situated in London and it is organised across 11 geographic regions in the UK. In its fundraising efforts, the Respondent relies on volunteers organised by County Committees. The Respondent's senior management largely consists of former army officers. The Respondent's regional offices are provided by the British Army, the location of which might vary within the regions from time to time in accordance with army requirements.

6. In 2009 the Respondent carried out a strategic review (The Next Steps Review) to consider its organisation, structure and functioning. It was thought that the Respondent would have to double its income within the next five years to cater for the needs of those having served in Iraq and Afghanistan. One of the recommendations was as follows:

Full Time RDFs RDFs employed full time will be able to spend more time in co-ordinating the activities of the County Committees and inspire them to new things, and to be in tune with the Positioning and Profile, and to recruit new younger members of County Committees. In 2010 three of the current RDFs (NI, London & NW) retire and therefore it is proposed to replace two of them with full time RDFs. It may be easier to recruit full time RDFs than part-timers. Thereafter RDFs should be replaced by full timers on a rolling basis but no more than three per year.

7. The Claimant, formerly a Colonel in the British Army, commenced employment with the Respondent on 15 May 2011 as a Regional Director Fundraising (RDF) South-East working 21 hours per week, his weekly hours increasing to 28 in November 2012. He was initially based at Shorncliffe Barracks in Kent, thereafter at an office within Chatham Barracks. At the time, the South East region comprised four counties: East Sussex, Kent, Surrey and West Sussex. The job title of Regional Director Fundraising subsequently changed to that of Regional Director.
8. Martin Rutledge commenced employment with the Respondent as CEO in February 2012 having retired from the British Army as a Major General.
9. Following an event in the summer of 2012 at Hurtwood Polo Club, the Claimant and Mr Rutledge held differing opinions as to how to deal with a demand for payment of expenses for the which the Respondent was not responsible. In the event, Mr Rutledge authorised a token payment for reputational reasons.
10. In June 2012, as instructed by his line manager at the time, the Claimant spoke to SL, his part time assistant, whose attendance was variable after she had moved home to the West Midlands. This led to a complaint of harassment against the Claimant by SL. That complaint was considered by the Robin Bacon who found no case to answer. Similarly, on appeal, Mr Rutledge found there was no case for the Claimant to answer. The Claimant was aggrieved, however, when he came across a note written by Mr Rutledge which stated "I could find no adult behaviour", not least because Mr Rutledge had not interviewed the Claimant about the matter.
11. The Respondent continued to review its regional structure. The Respondent's Director of Regions prepared a briefing paper: "The Regions – Thoughts on Future Developments" which was considered by the Trustees in February 2014. Among other things, the briefing paper asked the Trustees to consider evening up the distribution of the counties across the West, the Home Counties and the South East and possibly reducing the regions from three to two.
12. In July 2014 the Director of Regions emailed all the Regional Directors, informing them that he had been asked to conduct a review of regions, and asking for any contributions they wished to make. The Claimant made the point that although he did not want to work full-time, for many weeks of the year he

worked a six-day week and that it was difficult to see how it justified only a part-time Regional Director.

13. In November 2014, the Trustees considered the recommendations contained in the Director of Regions further "Review of the Regions". Among other things, it was recommended that the West and South-West regions should merge in due course, as would the Home Counties and South East regions. In February 2015, plans were further elaborated at a Regional Directors' meeting in Preston. At an annual staff conference in June 2015, it was announced that in the longer term the Home Counties and South East regions could merge to mirror British Army Regional Brigade boundaries.
14. In June 2015, because of a disagreement which had arisen between Claimant and the Committee Chairman for Surrey, the Respondent transferred Surrey from the South-East region to the Home Counties. South-East was now the smallest region with just three counties.
15. In August 2015, the Claimant complained to the Respondent about lack of consultation and the cavalier attitude of his line manager, the Director of Regions. Among other things, the Claimant felt that his observations regarding the review had been ignored. Although he did not meet with the Claimant to discuss his complaint, Martin Rutledge responded to the Claimant's complaints in writing. The Claimant felt Mr Rutledge's responses were high-handed and glib and asked for his complaint to be treated as a grievance to be considered at a meeting. A grievance meeting subsequently took place in November 2015 following which Martin Rutledge informed the Claimant that his grievances were not upheld. Although dissatisfied with the outcome, the Claimant did not appeal. Nevertheless, he wrote further to Martin Rutledge to express his concerns about the way his complaint had been handled. Although Martin Rutledge informed the Claimant that in the absence of an appeal the matter was closed, the Claimant continued to express his dissatisfaction in a series of letters/emails.
16. In 2016, the Claimant was involved in a serious road accident. The evidence before the Tribunal made it clear that, although he had suffered serious injuries, the Claimant managed to continue his duties within a few weeks by working from home, his wife driving when it was necessary to travel.
17. In October 2017, upon the retirement of the Regional Director for the South-West, the West and South-West regions merged to form a new South-West region. Richard Miller became the Regional Director of the new merged region supported by a Fundraising Director.
18. In September 2018, the part-time Regional Director for the Home Counties gave notice of his retirement from 31 March 2019. Robin Bacon prepared a briefing paper suggesting that it would be a good time to merge the Home Counties and South-East regions with a full-time Regional Director based in Aldershot. The combined region would comprise eight counties. The paper included the following:

The Aldershot office

- *EA [Executive Assistant] – no change as already F/T*

- *BLO – no change, continues to cover the new Region as a F/T appointment*

The Chatham office

- *EA – currently a p/t post and would need to be put “at risk” as we would be recruiting for a F/T EA, incorporating an enhanced job description with a greater emphasis on fundraising. The new appointment would be available to the current P/T EA, should he wish to apply for it, with no change in location.*
- *New F/T Fundraising Manager SE to be recruited and in post for March 2019. Could operate out of either office.*

19. In accordance with the proposals, the Claimant was put at risk of redundancy
20. By letter dated 14 November 2018, Robin Bacon informed the Claimant of the proposed restructure and the rationale for it. Robin Bacon thereafter held three consultation meetings with the Claimant. Representations and objections raised by the Claimant during the consultation were discussed with Martin Rutledge and the Director of Regions.
21. The first consultation meeting took place on 21 November 2018. Richard Miller attended this meeting at the Claimant’s behest (the Claimant had wanted Mr Miller to explain how the merged South-West region was operating but the Respondent limited his role to that of companion for the Claimant). The Claimant was informed of the new full-time position and was told he could apply for it. The notes show that the Claimant was informed that the only other currently vacant role was that of specialist fundraiser Trusts Manager role. Among other things, the Claimant questioned the rationale for the restructure. Robin Bacon provided the Claimant with written replies to the queries he had raised.
22. A second consultation meeting took place on 5 December 2018. The Claimant again challenged the business case for the restructure. He also felt that the Respondent wanted to get rid of him because of his previous disagreements with Martin Rutledge. The Claimant referred to matters arising following the event at Hurtwood Polo Club, the allegation made against him by SL, and the complaint he had raised in 2015. The Claimant gave the impression that he would not be interested in applying for the new Regional Director position based in Aldershot because it was not a like for like position. Robin Bacon nevertheless provided the Claimant with a job description for the position following the meeting. The Claimant confirmed in evidence that he was never interested in applying for this position because it would involve a six hour daily commute.
23. The Claimant was provided with notes of the meeting which had been prepared by Ms Reading of the Respondent’s Human Resources department. The Claimant emailed Robin Bacon complaining that the notes were an incomplete and inaccurate record. He stated that he had a fair and comprehensive record available and would produce it as and when necessary; he claimed to be in a position to produce a transcript. Robin Bacon informed the Claimant that he was happy to attach the Claimant’s digitally recorded version of the meeting

notes if he would like to submit it. No such transcript was placed in evidence before the Tribunal.

24. By letter dated 17 December 2018, the Claimant was invited to attend a third consultation meeting. Robin Bacon informed the Claimant that he did not believe that there were any suitable alternative vacancies apart from the Regional Director role based in Aldershot and that one of the potential outcomes of the meeting was termination of employment by reason of redundancy.
25. The third consultation meeting took place on 19 December 2018. The Claimant's representations were considered and discussed. By letter dated 20 December 2018, Robin Bacon informed the Claimant that his employment would terminate by reason of redundancy on 31 March 2019. The Claimant was informed of his right to appeal. The Claimant thereafter attended some duties until January 2019 but was, in effect, otherwise on garden leave until the termination of his employment.
26. By long and detailed letter dated 7 January 2019, the Claimant appealed against his dismissal to Philip Jones. He set out his opposition to the restructure and maintained that there was no business case to support it. He suggested an alternative explanation for his dismissal, namely his former disagreements with Martin Rutledge.
27. In advance of the appeal meeting, Martin Rutledge prepared briefing notes for the panel setting out his account of the incidents referred to by the Claimant together with copies of relevant documents relating to each incident.
28. He also prepared a briefing note in which he referred to:
 - concerns raised by staff about the Claimant's attitude and behaviour;
 - correspondence setting out displeasure shown with the Claimant by a County Committee Chairman;
 - the significant amount of time and legal cost expended on the Claimant's periodic outbursts;
 - the purported generosity he had shown to the Claimant by authorising paid sick leave following the Claimant's road accident.
29. The appeal meeting took place on 11 February 2019 before an appeal panel comprising three Trustees chaired by Philip Jones. The panel heard the Claimant's appeal and took evidence from Martin Rutledge, Robin Bacon and from the Director of Regions. The panel did not uphold the Claimant's appeal. The appeal panel's findings were sent to the Claimant on 19 February 2019. The panel supported the Respondent's business case and overall strategy and that the location of the new Regional Director post in Aldershot was justified given its proximity to the Army's largest national hub of regional support agencies together with the large concentration of regular and reserve army units in the area which was central to the newly merged region. The panel discounted the Claimant's insistence that the decision to make his role redundant was based on animosity between himself and Martin Rutledge.

Applicable law

30. Under section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position he held. Redundancy is a potentially fair reason falling within section 98(2).
31. Section 139(1)(b) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business:
- (i) for employees to carry out work of a particular kind, or
 - (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer
- have ceased or diminished or are expected to cease or diminish.
32. In Murray v Foyle Meats Ltd [1999] ICR 827, Lord Irvine approved of the ruling in Safeway Stores plc v Burrell [1997] ICR 523 and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.
33. There is no requirement for an employer to show an economic justification for the decision to make redundancies; see Polyflor Ltd v Old EAT 0482/02. The Tribunal is entitled only to ask whether the decision to make redundancies is genuine, not whether it was wise; see for example: Hollister v National Farmers Union 1979 ICR 542 CA; James W Cook and Co (Wivenhoe) Ltd v Tipper 1990 ICR 716 CA.
34. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.
35. In Williams v Compair Maxam Ltd [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:
- 35.1. Whether the selection criteria were objectively chosen and fairly applied;
 - 35.2. Whether the employees were given as much warning as possible and consulted about the redundancy;
 - 35.3. Whether, if there was a union, the union's view was sought;
 - 35.4. Whether any alternative work was available.
36. However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have

behaved differently. Instead, it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in Williams v Compair Maxam will not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

37. If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM

Conclusion

Reason for dismissal

38. The thrust of the Claimant's unfair dismissal complaint was that he was dismissed because of animosity between him and Martin Rutledge. The Tribunal reminds itself at this stage of its reasoning that it is for the Respondent to show the reason for the dismissal and that it was for a potentially fair reason.
39. It was difficult to understand the evidence of Martin Rutledge as to why his briefing paper presented to the appeal panel included pejorative and potentially prejudicial comments and observations about the Claimant. Those comments and observations do not appear to be directly related to the Claimant's grounds of appeal. Indeed, the comments and observations tend to suggest an animosity upon which the Claimant relies as evidence of the real reason for his dismissal. Similarly, it is difficult to understand Martin Rutledge's purported generosity in authorising sick pay following the Claimant's car accident; the Claimant's contract shows he was contractually entitled to three months' full pay in any event.
40. However, to focus on that animosity would be to ignore the totality of the evidence.
41. The Respondent was of the view that merging the South-East and Home Counties regions made good sense. The new merged regions would have coterminous boundaries with the Regional Army. Having an office with a Regional Director in Aldershot, where the Army headquarters is located, would allow ease of access to community engagement teams and emulated the organisational structure elsewhere in the Respondent's organisation. It was thought that the restructuring would enable a more focussed effort towards fundraising and events with an ability to deploy resources across the whole region to best effect.
42. It was the Regional Director who was responsible for formulating the proposals. There was no credible evidence to suggest that it was solely Martin Rutledge who was directing or guiding them; indeed, the Strategic Review took place before Martin Rutledge was employed by the Respondent. It was the Board of Trustees that ultimately gave instructions for the restructure to take place.
43. As to the disagreements which arose following the polo club event in 2012, the way in which Martin Rutledge handled SL's complaint of harassment in 2012,

and how he dealt with the Claimant's grievance in 2015, the Tribunal notes that they pre-dated the eventual proposal to put the Claimant at risk of redundancy some considerable margin.

44. On the balance of probabilities, the Tribunal finds that the Respondent has shown the reason for the Claimant's dismissal, namely a diminution in the requirement for a Regional Director working in Chatham. That is a redundancy as defined under section 139 (1)(b)(ii) of the Employment Rights Act 1996.

Fairness of the dismissal

45. The Claimant challenged the fairness of his dismissal alleging that details of the Fundraising Manager role were withheld from him for which, he maintained, he was the perfect fit. He noted that the post-holder "*could operate out of either office*" which he took to indicate that the postholder could have worked from the Chatham office which he would have been prepared to do.

46. In evidence, Mr Rutledge stated that although the post-holder could operate out of either office, he or she would in fact be based in Aldershot and would not be appointed until the new Regional Director was in place so that the Respondent could ensure their skill sets were complementary. Mr Rutledge also made it clear that the person appointed to that position would need to be a professional fundraiser with appropriate qualifications.

47. Mr Bacon explained to the Tribunal that the Respondent was looking for a civilian skill set with experience in Trust Bids which he assumed, without exploring further, the Claimant did not possess. Mr Bacon also told the Tribunal that the Claimant had made it clear during consultation that he was not interested in a full-time role.

48. Clearly, it would have been more thorough for Mr Bacon to have explored with the Claimant what specific skills and qualifications he held before assuming he would be unsuitable for the Fundraising Manager role. However, the evidence suggests that the Claimant showed no interest in the role even though he knew about it. This is supported by the fact that he did not raise it as a point of appeal. Regardless, the appeal panel considered it; the appeal notes include the following:

The panel noted that Mr Rayner had not been offered nor had he enquired about the possibility of filling a potential new more junior position, that of full-time fundraising manager in the South East. The panel noted that this role had not yet been finalised nor advertised as it is pending selection of the new Regional Director SE); and the panel noted that Mr Rayner stated that he would be most unlikely to apply for it in any event.

49. In the Tribunal's view, it was not outside the band of reasonableness for Robin Bacon to have assumed that the fundraising role was not suitable alternative employment for the Claimant. Despite the bald assertion he now makes that he would have been the perfect fit, the Claimant appeared to show no interest in the role at the time or demonstrate to Mr Bacon the skills and qualifications required for such a specialist role which might suggest such interest. In any event, it appears that the position was not vacant at the time because the new Regional Director had yet to be appointed.

50. The Tribunal has carefully considered the redundancy procedure followed by the Respondent but there is nothing to suggest that it fell outside the band of reasonableness such as to render the Claimant's dismissal unfair. In particular, contrary to the Claimant's contention, consultation carried out by Robin Bacon amounted to far more than imparting a decision already made. Although the restructure proposal had been decided upon, a business decision the Respondent was entitled to make, possible mitigation of its effect on the Claimant was reasonably discussed.

51. The Claimant was not unfairly dismissed.

Less favourable treatment on grounds of being a part-time worker

52. The Claimant alleges that by making him redundant, the Respondent treated him less favourably than full-time Regional Directors in the West and South-West regions. He adduced very little evidence, in particular relating to his comparators, to support the allegation. Even had the Claimant adduced such evidence, his claim would fail. The Claimant was not dismissed on the ground that he was a part-time worker but because the Respondent no longer required a Regional Director working in Chatham and the Claimant was (understandably) not interested in the new role which would require travelling to and from Aldershot.

53. For the reasons set out above, the Claimant's claims are dismissed.

Note

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 3 September 2021