EMPLOYMENT TRIBUNALS

Claimant: Mr M Boyle

Respondent: The Birmingham and Midland Institute

Heard at: Birmingham Employment Tribunal (by CVP)

On: 19 August 2021

Before: Employment Judge Mark Butler

Representation
Claimant: In person (with Ms J Boyle, the claimant's sister in attendance)

Respondent: Did not attend and was not represented
Response not entered (Rule 21 applies)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

JUDGMENT

1. It is the judgment of the Tribunal that the complaint of unfair dismissal and a redundancy payment is well-founded and succeeds.

2. The respondent is ordered to pay the claimant £12,330.30 (subject to the Recoupment Regulations as detailed below)

3. The calculation of the award is at Annex 1.

4. Recoupment applies, and in this regard I refer the parties to Annex 2.

5. For the purpose of the Recoupment Regulations therefore:

   a. The monetary award is £12,330.30.
   b. The prescribed element is £10,711.26.
   c. The period to which the prescribed element relates is 30 September 2020 until 29 June 2021.
   d. The amount by which the monetary award exceeds the prescribed element is £1,619.04.

Oral judgment in this case was handed down at the hearing on 19 August 2021. The respondent, through Mr James Fletcher, made a request for written reasons by email on 01 September 2021. These are the written reasons that reflect the oral reasons that were handed down on 19 August 2021, following that request

REASONS

Introduction

6. The claims in this case arise following the presentation of a claim form on 22 November 2020, which followed early conciliation with ACAS from 01 November 2020 until 19 November 2020. The claimant brought claims for a redundancy payment and for unfair dismissal.

7. A notice of claim was sent to the respondent by letter dated 14 December 2020. This provided that the date for entering a response, should they want to defend the claim as brought, was 11 January 2021. It was made clear that if a response form was not submitted by that date then a judgment may be issued against the respondent.

8. In the notice of claim, the parties were made aware that the claim had been listed to be heard on 19 August and 20 August 2021. A series of directions were contained in that notice, in order to ensure that the case was ready to be heard on those dates.

9. No response form was presented to the tribunal by the respondent. And this remains the case.

10. On 24 June 2021, the tribunal wrote to the parties to confirm that no response from the respondent had been received. In that letter it stated:

> You did not present a response to the claim.
>
> Under rule 21 of the above Rules, because you have not entered a response, a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case.

11. On 24 June 2021, in light of no response being presented, Employment Judge Jones reduced the time estimate in this case to one day, with the case to be hard on 19 August 2021 only.

12. Although no response had been presented by the respondent, this case was not considered suitable for a Rule 21 Judgment to be entered.

13. Email attachments that were sent to the tribunal by the claimant as the evidence on which he sought to rely, were sent by post to the respondent on 24 June 2021.

14. The respondent did not attend at this hearing.

15. The claimant provided me with 5 documents, which ran to 5 pages. This included his particulars of terms of employment, the letter he received to terminate his employment, a redundancy notice, a letter detailing his redundancy payment and a pay slip.

16. The claimant gave evidence on his behalf. Although he did not produce a witness statement, the claimant was allowed to give his evidence orally at this hearing. The evidence that the claimant gave went unchallenged. No evidence was presented on behalf of the respondent.

List of Issues

17. Was the claimant unfairly dismissed? The claimant in his claim form does not dispute that he was dismissed by reason of redundancy.

18. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

    a. The respondent adequately warned and consulted the claimant;
    b. The respondent adopted a reasonable selection decision, including its approach to a selection pool;
    c. The respondent took reasonable steps to find the claimant suitable alternative employment;
    d. Dismissal was within the range of reasonable responses

Closing Submissions

19. I heard oral closing submissions by the claimant, who was assisted in making his closing submissions by Ms Boyle. I do not repeat these in full hear, but they have been taken into account in reaching this decision. In short, the claimant submitted that first he did not consider this to be a redundancy situation, as Mr Parsons was still there and now filling the role that he previously did. And secondly, there was no process followed, that there was no consideration of alternative roles, there were no meetings at all, and that he was just simply informed that he was being made redundant.

The Law

Unfair dismissal

20. The burden of proof in establishing that there was a potentially fair reason rests with the employer. A dismissal by reason of redundancy is a potentially fair reason (s.98(1)(b) ERA 1996)

21. If the employer does not satisfy the tribunal that there is a potentially fair reason for the dismissal, then the dismissal will be deemed unfair. Where the employer has satisfied the tribunal as to the potentially fair reason on which it relies, according to s.98(4) of ERA, '…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.

22. The statutory definition of redundancy is at 139(1)(b) of the Employment Rights Act 1996, which provides as follows:

> "(b) the fact that the requirements of that 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."

23. The approach to be adopted when considering whether a dismissal was by reason of redundancy was set down in **Safeway Stores v Burrell [1997] IRLR 200**, and upheld in **Murray v Foyle Meats [2000] 1 AC 51**. There are essentially 3 steps for the tribunal to consider:

    (i) Was the employee dismissed?
    (ii) Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished?
    (iii) If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

Duty to consult

24. **Williams v Compair Maxam [1982] ICR 156** is the seminal case when considering the duty to consult in redundancy situations. In this case it general principles were developed, which, in general, reasonable employers should in accordance with, if circumstances permit:

    a. The employer will seek to give as much warning as possible of impending redundancies;
    b. Whether or not an agreement as to the criteria to be adopted has been agreed with a trade union or employees, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
    c. The employer should seek to ensure that the selection is made fairly in accordance with these criteria.
    d. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

25. A useful summary of the law was provided in **Mugford v Midland Bank [1997] ICR 399**, at para 406-407:

"(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

26. The requirements of fair consultation in the employment context are summarised in **R v British Coal ex p. Price [1994] IRLR 72** at para 24:

> "fair consultation means
>
> (a) Consultation when the proposals are still at a formative stage.
> (b) Adequate information on which to respond.
> (c) Adequate time in which to respond.
> (d) Conscientious consideration by an authority of the response to consultation."

Choice of selection pool

27. The EAT provided guidance as to the approach to be adopted when considering the choice of selection pool by the employer, in **Fulcrum Pharma (Europe) v Bonassera UKEAT/0198/10**:

> "The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it, where the employer has genuinely applied his mind to the problem (citing with approval Taymech Ltd v Ryan [1994] UKEAT/663/94).
>
> The pool should include all those employees carrying out work of that particular kind, but may be widened to include other employees such as those whose jobs are similar to or interchangeable with those employees."

28. The band of reasonable responses test applies to the choice of selection criteria. It is not for the tribunal to substitute the selection criteria that it would have used in the circumstances, but only to interfere if the selection criteria adopted are such that no reasonable employer could have adopted them in the way in which the employer did (see **Earl of Bradford v Jowett no.2 [1978] IRLR 16**).

Test of fairness

29. In **Langston v Cranfield University [1998] IRLR 172**, EAT, the Appeal Tribunal considered that the principles of law relating to unfair redundancy dismissals were 'encapsulated' in the words of Lord Bridge in Polkey. In the EAT's view, it was therefore 'implicit' that unless the parties had agreed otherwise, an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, whether or not each of these issues was specifically raised before the employment tribunal. Thus, it was incumbent upon the tribunal to consider each issue, in much the same way as it would consider each of the three elements of the test in **British Home Stores Ltd v Burchell [1980] ICR 303**, EAT, in a case of dismissal for misconduct. While the burden of proof under S.98(4) ERA was neutral, the EAT considered that an employer could normally be expected to lead some evidence as to the steps it had taken to select an employee for redundancy, consult with him or her (and his or her union, if applicable), and to seek alternative employment for him or her. Furthermore, an employment tribunal could normally be expected to refer to these three issues on the facts of the particular case in explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy

30. The range of reasonable responses test applies to both the decision to dismiss and the procedure by which the decision to dismiss is reached.

Findings of fact

I make the following findings of fact based on the balance of probability from the evidence I have read, seen, and heard. I do not make findings in relation to all matters in dispute but only on matters that I consider relevant to deciding on the issues currently before me. The majority of these findings have been made on the basis of the claimant's unchallenged evidence in this case.

31. The claimant started his employment with the respondent on 18 May 1981.

32. All employees of the respondent, including the claimant were sent a redundancy notice on or around 01 July 2019. This informed them that they would all be made redundant as from 01 July 2019. This informed the claimant that he would be entitled to 12 weeks redundancy period, although what this is referring to is notice period. For ease, I include the full text of the letter:

Redundancy Notice

Dear Mr Boyle,

It is with deep regret that I have to advise you that because the institute is presently insolvent, and that after the most diligent explorations of all possible avenues, it has proved impossible to solve this problem.

Therefore, it is necessary for us to make all staff redundant as from the 1st July, 2019

The terms of your redundancy are dependant on the length of time you have been employed by the BMI, and in your case, your redundancy period is 12 weeks.

If you continue to come to work during your redundancy period, you will continue to be entitled to be paid. Any money due to you will be paid as soon as the institute is in a position to fulfil its obligations to you.

With kind regards,
Yours sincerely,

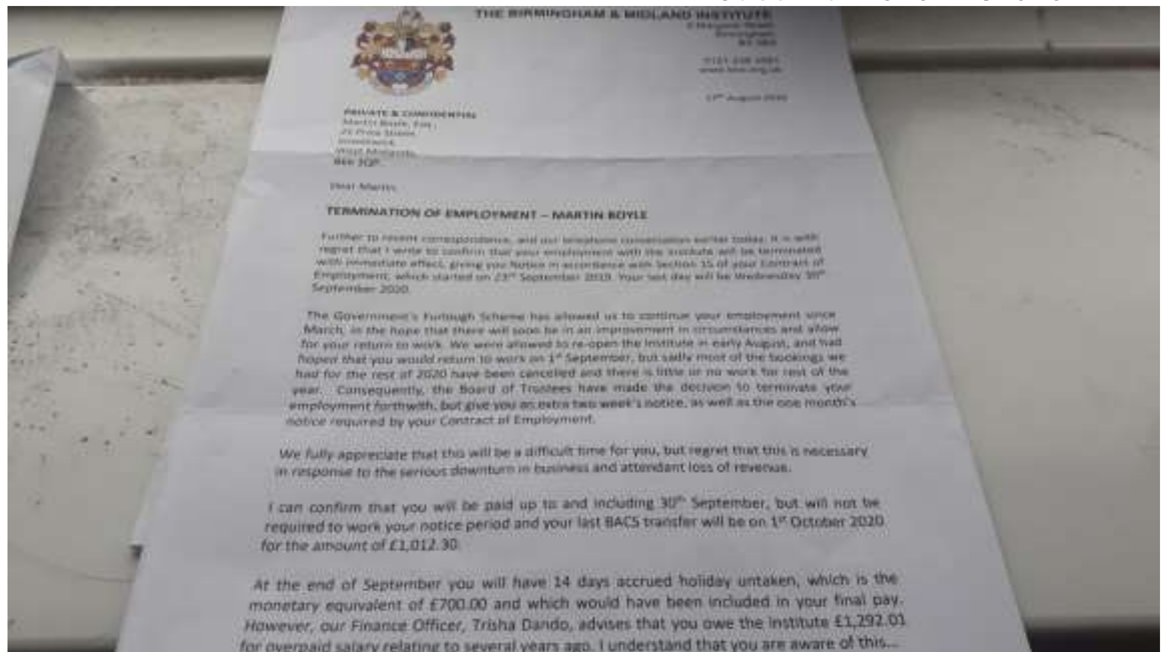
JUNIOR VICE PRESIDENT

33. On 01 July 2019, the claimant was asked, and signed, a new contract. This was doing the same work, but with fewer hours. The claimant's role at this point had not been made redundant. He continued to work despite the contents of the letter of 01 July 2019.

34. The claimant continued to work for the respondent from 01 July 2019 up until March 2020, at which point he was put onto furlough. There was no break in his continuous employment during this time.

35. Between March 2020 and 17 August 2020 there were no meetings or consultation between the claimant and the respondent. There was no mention to the claimant of upcoming redundancies. There was no discussion of alternatives to redundancies, including reducing days. There has been no discussion of selection pools, selection criteria and why the claimant's role was being selected for redundancy.

36. On 17 August 2020, the claimant was sent a letter informing him that his contract was being terminated. This informed the claimant that notice was being calculated using the start date of the contract he signed in July 2019, that being 23 September 2019. This letter explains some of the context behind the reason to dismiss the claimant. In particular it notes that the respondent had hoped that the claimant would be able to return to work om 01 September 2020, but that for the rest of 2020 bookings had been cancelled and there was little or no work available for the rest of the year. There is reference to this being necessary in response to the serious downturn in business and attendant loss of revenue. Again, I include the entirety of this document for convenience:



THE BIRMINGHAM & MIDLAND INSTITUTE

[illegible]

17th August 2020

PRIVATE & CONFIDENTIAL
Martin Boyle, Esq.
[illegible]
West Midlands
[illegible]

Dear Martin

TERMINATION OF EMPLOYMENT – MARTIN BOYLE

Further to recent correspondence, and our telephone conversation earlier today, it is with regret that I write to confirm that your employment with the Institute will be terminated with immediate effect, giving you Notice in accordance with Section 15 of your Contract of Employment, which started on 23rd September 2019. Your last day will be Wednesday 30th September 2020.

The Government's Furlough Scheme has allowed us to continue your employment since March, in the hope that there will soon be in an improvement in circumstances and allow for your return to work. We were allowed to re-open the Institute in early August, and had hoped that you would return to work on 1st September, but sadly most of the bookings we had for the rest of 2020 have been cancelled and there is little or no work for rest of the year. Consequently, the Board of Trustees have made the decision to terminate your employment forthwith, but give you an extra two week's notice, as well as the one month's notice required by your Contract of Employment.

We fully appreciate that this will be a difficult time for you, but regret that this is necessary in response to the serious downturn in business and attendant loss of revenue.

I can confirm that you will be paid up to and including 30th September, but will not be required to work your notice period and your last BACS transfer will be on 1st October 2020 for the amount of £1,012.30

At the end of September you will have 14 days accrued holiday untaken, which is the monetary equivalent of £700.00 and which would have been included in your final pay. However, our Finance Officer, Trisha Dando, advises that you owe the Institute £1,292.01 for overpaid salary relating to several years ago. I understand that you are aware of this...

37. The letter of the 17 August 2020 was the first occasion that the claimant knew that his contract was being terminated. No discussion concerning the decision to terminate his contract took place between the claimant and the respondent following the claimant having received this letter.

38. The claimant's contract was terminated with effect from 30 September 2020.

39. The claimant was not afforded a right of appeal.

40. On 26 January 2021, the Board of Trustees of the Respondent confirmed that a redundancy payment amounting to £8,222.50 was being made to the claimant. The claimant received this payment.

41. Following the termination of his employment, the claimant accepts that he has not done much to find work. However, since January 2021 he has been placed on the books with different agencies. He has undertaken some agency staff work over the past 3 months.

42. The claimant has been seeking full time work, using job searches. And he has tried to find work in the hospitality sector. However, he lacks confidence in himself.

43. Through agency work the claimant has earned around £2,000 for the months of June and July 2021.

44. Following the claimant's termination, the role previously filled by the claimant continues to be active. The respondent still organizes conferences. And the role that the claimant was in previously is now filled by an individual by the name of Mr Parsons, who was a colleague of the claimant. Although Mr Parsons role is wider than that preciously occupied by the claimant.

45. There are other roles available with the respondent which the claimant could have been considered for and could have filled.

Conclusions

46. The claimant had continuous service with the respondent from 18 May 1981 until 30 September 2020.

47. The burden rests on the respondent in establishing that a potentially fair reason for the dismissal of the claimant exists, and in this case that the claimant was dismissed by reason of redundancy. Although the claimant gave evidence at this hearing that he considered that his position had not been made redundant and that Mr Parsons was continuing to complete the work that he had done previously, I am mindful that this was not the case that the claimant originally brought. In his claim form, the claimant accepts that he had been dismissed by reason of redundancy. On that basis I conclude that the claimant was never bringing his claim on the basis that he was dismissed for any other reason than redundancy, and that he had conceded this point by the way he pleaded his case. The claim brought was clearly about the fairness of dismissal, once a decision had been reached to dismiss him by reason of redundancy. In these circumstances, and considering the claimant's evidence that Mr Parson's was filling a broader role than that previously filled by the claimant, that the claimant was aware of redundancies in July 2019 and that the claimant had received a redundancy payment, I am satisfied that this was a dismissal by reason of redundancy. In these circumstances the claimant is entitled to a redundancy payment. And the decision in relation to the unfair dismissal complaint was made based on the fairness of the decision to dismiss the claimant by reason of redundancy.

48. The procedural steps, as identified by the case law and statute noted above, are, save in exceptional cases, fundamental aspects of the reasonable response of an employer.

49. There was no evidence of the respondent having done any of the following things, amongst other matters, before this tribunal:

    e. warning the claimant of impending redundancy
    f. consulting with the claimant on the criteria to be used in selecting for redundancy
    g. providing the claimant information on the selection pool and how that was determined
    h. providing information of the scores awarded to employees at risk of redundancy, including the claimant. And enabling the claimant to discuss the scoring, and challenge where appropriate.
    i. Discussing with the claimant alternative employment.

50. There was no evidence before the tribunal that consultation with the claimant was not possible, or that it would have been an utterly futile exercise in the particular circumstances of this case.

51. Consultation, where possible, is important before and during a redundancy process. In short, there has been no consultation in this case. And this is

in circumstances where the respondent must have been aware of its predicament for some time in respect of bookings, as referenced in its letter of 17 August 2020.

52. Although not giving the right of appeal alone would not lead me to the conclusion that dismissal of the claimant was unfair, it compounds the unfairness of the process and procedure adopted in this case.

53. With all this in mind, this tribunal concludes that the consultation process when considered as a whole does not fall within the band of reasonable responses, because of those limitations just identified. The respondent's failure to consult with the claimant was an unreasonable response by the employer in all the circumstances of the case. The claimant in these circumstances was unfairly dismissed. His claim for unfair dismissal therefore succeeds.

54. The claim for redundancy payment is in effect encapsulated by the basic award, awarded under the claimant's successful unfair dismissal claim. There is therefore no separate award made for this part of the claimant's claim.

55. No Polkey reductions are made, given that there was no evidence brought in respect of this and no submissions made in support of such a reduction.

56. Given the transferable skills that the claimant has through his work, and given the nature and level of the work that the claimant was involved in, and taking into account the pandemic, I concluded that I would have expected the claimant to have been able to secure work at a similar level and salary within 9 months of his dismissal. As a consequence, his compensation has been limited to the period covering 9 months from his date of termination.

57. The respondent made a redundancy payment of £8,222.50 on 26 January 2021. This has been credited for by a deduction to the basic award, to ensure that the claimant does not double recover in this judgment.

58. The claimant is awarded £12,330.30; however this is subject to the Recoupment Regulations, as detailed below (see annex 2). The calculation of this award is contained in Annex 1 to this judgment.

Employment Judge **Mark Butler**

Date__10 September 2021___

<u>Notes</u>
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

<u>Public access to employment tribunal decisions</u>
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.

ANNEX 1 CALCULATION

Effective Date of Termination (EDT) 30 September 2020

Age at date of termination 56

Completed years of service 39

Years' service over the age of 41: 15

Net weekly pay: £274.65

Gross weekly pay: £339.70

Redundancy pay already received: £8,222.50

Expected date claimant to find equivalent new job: 9 months from EDT, 29 June 2021

Basic Award/Redundancy Payment

15 (years' service over age of 41) x 1.5 x £339.70) + 5 (years' service aged 22-41, capped at 20 years) x 1 x 339.70 - £8,222.50 (redundancy payment received)

A: Basic Award £1,119.04

Compensatory Award

Past Net Loss of Earnings, limited to 9 months from the EDT

9 x £1190.14

B: Past Loss Earnings £10.711.26

Future loss of earnings

No award for future loss of earnings was made

C: Future loss of earnings: £0

D: Loss of statutory rights: £500

TOTAL AWARD (A + B + C + D) £12,330.30

In my oral judgment, due to a simple oversight, I omitted to express that there would

be an award for loss of statutory rights. This has now been included

ANNEX 2 RECOUPMENT

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, Universal Credit and Income Support

The Tribunal has awarded compensation to the Claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions (DWP) has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment and Support Allowance, Universal Credit or Income Support which it paid to the Claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the Respondent usually within 21 days after the Tribunal's judgment is sent to the parties.

The Tribunal's judgment states the total monetary award made to the Claimant and an amount called the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the Respondent to the claimant immediately.

When the DWP sends the Recoupment Notice, the Respondent must pay the amount specified in the Notice by the Department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Department informs the Respondent that it does not intend to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the claimant.

The Claimant will receive a copy of the Recoupment Notice from the DWP. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the Claimant and the DWP.