



EMPLOYMENT TRIBUNALS

Claimant: Mr D Owen
Respondent: MG Motor UK Ltd
Heard at: Birmingham Employment Tribunal (by CVP)
On: 06 and 07 September 2021
Before: Employment Judge Mark Butler

Representation

Claimant: In person
Respondent: Ms A Greenley (Counsel)

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

The claimant's claim of unfair dismissal fails and is dismissed.

REASONS

The claimant made a request for written reasons after oral reasons were handed down at the hearing. These are those written reasons.

Introduction

1. The claim in this case arises following the presentation of a claim form on 16 September 2020. The claimant brought a claim that his dismissal by reason of redundancy was an unfair dismissal.
2. There was initially a slight confusion with respect the bundle of evidence. I had received a bundle in advance of the hearing that ran to 227 pages. And this appeared to be the bundle that the claimant had in front of him. However, Ms Greenley explained that there was a second version of the bundle that ran to 460 pages which had been emailed to the claimant (it was effectively the 227 page bundle, with documents attached to the back). The email that was sent to the claimant with this bundle attached was located. And my clerk managed to find the

expanded bundle for me. The majority of the documents that were in the expanded bundle and not the 227 page bundle related to remedy. The claimant had the opportunity to read over pages 228-460 whilst I was reading in to the case. And Ms Greenley was reminded that if referring to any of the documents at pp.228-460 that she would need to take the claimant to the page and to give him a little time to read these documents again before he answered any questions on them. I was satisfied that the hearing could proceed in these circumstances.

3. The bundle that was used in this case therefore ran to 460 pages. The parties were made aware that in reading in to the case I would only be reading documents referred to in the witness statements. And that if either party wanted me to read any additional documents then I would need to be taken to them in the course of the evidence.
4. For the respondent I heard evidence from Ms Carter, Mr France and Mr Garside. Whilst I heard evidence from the claimant.
 - a. Ms Carter, throughout the redundancy process, was the head of Human Resources ('HR') and Legal Affairs of the respondent. Ms Carter provided HR support during the redundancy process.
 - b. Mr France, throughout the redundancy process, was the Head of Aftersales of the Respondent. Mr France played a role in deciding on the selection criteria to be used, and was involved in the scoring of the selection matrix.
 - c. Mr Garside, throughout the redundancy process, was the Head of Engineering of the respondent. Mr Garside was the appeal manager, who considered the claimant's appeal against the decision to dismiss him by reason of redundancy.
5. Sadly, since the completion of the redundancy process, but before this hearing, Mr Gregorious had passed away. Mr Gregorious played an important role in deciding on the selection criteria, in the scoring of the criteria, and in the consultation meetings with the claimant.
6. The claimant gave evidence in this case, and called no further witnesses.
7. I thank all of those who gave evidence before this tribunal for the manner in which evidence was given. It can often be difficult
8. And further I thank both the claimant and Ms Greenley for the manner in which they have presented their respective cases. It is not always easy to present a case over a video hearing.

The issues

9. It was not disputed by the claimant that he was dismissed by reason of redundancy. The outstanding question for the tribunal was whether the dismissal was reasonable pursuant to s. 98(4) ERA, 1996?
10. In particular, did the respondent:
 - a. warn and consult employees including Mr Owen?
 - b. adopt a fair basis on which to select for redundancy including adopting objective selection criteria and applying that criteria fairly?
 - c. consider suitable alternative employment?

Closing submissions

11. I was assisted by written and oral submissions made on behalf of the respondent, as well as oral submissions made by the claimant. These closing submissions were considered and taken into account when reaching this decision.

Law

12. Ms Greenley helpfully set out the legal position in her written submissions. The law that I was directed to was considered and taken into account. This included giving consideration to the following cases:

- a. *Williams and others v Compair Maxam Ltd* [1982] IRLR 83
- b. *Polkey v A E Dayton Services Ltd* [1987] IRLR 503
- c. *Earl of Bradford v Jowett (No. 2)* [1978] IRLR 16
- d. *British Aerospace Plc v Green and others* [1995] IRLR 433
- e. *Bascetta v Santander* [2010] EWCA Civ 351
- f. *Nicholls v Rockwell Automation Ltd* UKEAT/0540/11 and UKEAT/0541/11
- g. *Dabson v Cover & Sons Ltd* UKEAT/0374/10
- h. *Boulton and Paul Ltd v Arnold* UKEAT/341/93
- i. *Northgate HR Ltd v Mercy* [2008] IRLR 222
- j. *Mitchells of Lancaster (Brewers) Ltd v Tattersall* UKEAT/0605/11
- k. *Swinburne & Jackson LLP v Simpson* UKEAT/0551/12
- l. *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72
- m. *Vokes Limited v Bear* [1973] IRLR 363
- n. *Quinton Hazell Ltd v WC Earl* [1976] IRLR 296
- o. *Stacey v Babcock Power Limited (Construction Division)* [1986] IRLR 3

13. However, I consider it important to emphasise some of the important principles that this tribunal applies when considering claims of unfair redundancy dismissals.

14. It is through section 94 of the Employment Rights Act 1996 ('ERA 1996') where we find the statutory expression that an employee has the right not to be unfairly dismissed by their employer.

15. ERA 1996 lays down a number of reasons that are considered to be potentially fair reasons for dismissal which includes redundancy (see s.98(2) ERA 1996). The burden of proof in respect of the reason for the dismissal in ordinary unfair dismissal claims rests on the respondent.

16. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If the respondent satisfies the tribunal that there is a potentially fair reason, then the general test of fairness in s.98(4) of ERA 1996 will apply. This states that "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".

17. It is important that in carrying out the exercise of determining fairness the Tribunal must not substitute its own decision for that of the employer.

18. The Employment Appeal Tribunal ('EAT') in the case of *Williams and ors v*

Compair Maxam Ltd [1982] IRLR 83, laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals, when asking whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'. The factors suggested by the EAT in *Compare Maxam* that a reasonable employer might be expected to consider were:

- whether the selection criteria were objectively chosen and fairly applied;
- whether employees were warned and consulted about the redundancy ;
- whether, if there was a union, the union's view was sought; and
- whether any alternative work was available.

19. In order to be reasonable, the redundancy selection criteria should, as far as possible, be both objective and capable of independent verification. This means that the criteria should be measurable, rather than just being based on personal opinion.
20. In *Dabson v Cover & Sons Ltd* UKEAT/0374/10, the EAT expressed that "close scrutiny is inappropriate" in relation to marking and scores, unless there are exceptional circumstances such as bias or obvious mistakes.
21. The overriding test to be applied by the Tribunal is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

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. Where there is reference to certain aspects of the evidence that have assisted me in making our findings of fact this is not indicative that no other evidence has been considered. My findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why I made the findings that we did.

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 us.

22. The respondent is the UK subsidiary of an international car manufacturer, which operates globally.
23. The claimant was employed by the respondent as a Regional Operations Manager (ROM) from 24 March 2017. He was dismissed by reason of redundancy with effect from 25 June 2020. The claimant did not challenge this being the reason behind his dismissal.
24. On 21 May 2020, or at least by 03 June 2020, a decision was made to reduce the number of ROMs from 6 to 4 (see pp.60-62)
25. All six ROMs were put at risk of redundancy by an announcement made on 08 June 2020 (p.64)
26. The claimant was sent a letter, dated 08 June 2020, confirming that his position was at risk of redundancy. This letter included a draft schedule of payments, the purpose of which was to give an indication of the award the claimant would be due if he were to be made redundant. A copy of the respondent's redundancy policy was also sent with this letter. Although I note that the claimant cannot recall receiving the policy, it was not a definite rejection of such. And further, the Microsoft Teams invite at p.72 indicates that these documents were sent. These

together suggest that it was more likely than not that these documents were both sent with the letter of 08 June 2020.

- 27. The claimant attended his first one-to-one consultation meeting with Mr Gregorious on 09 June 2020. Ms Carter was in attendance as note taker. In this meeting it was explained to the claimant why there was a need for redundancies, that there was no time limit being placed on consultation, but that as many consultation meetings would be held as needed, that the new ROM job (of which there were 4) would be suitable alternative employment for the current ROMs and that the respondent would continue to search for alternative employment. The claimant was asked to send an updated CV. The claimant was invited to share any ideas he had in terms of alternative employment. The claimant identified dealer development as a potential. This suggestion made by the claimant was considered by the respondent. However, it was not considered a possible alternative as no such vacancies existed at the time. (notes at pp.114-116).
- 28. The claimant sent to the respondent an updated CV as requested.
- 29. Ms Carter shared some previous examples of selection matrices with Mr Gregorious and Mr France, to assist them in deciding what criteria to use in the ROM selection. Mr Gregorious drafted the first version of the ROM selection matrix (p.82). Mr France considered the ROM selection matrix that had been sent to him by Mr Gregorious, and was satisfied that the criteria selected adequately reflected the requirements for the ROM role. Although when it came to applying the matrix the criterion of job performance was split into three separate criteria.
- 30. The respondent adopted the following criteria against which the ROMs would be assessed:

Knowledge, against the requirements of the Job description
Skills, against the requirements of the Job description
Breadth and depth of relevant experience, against the requirements of the Job Description
Versatility, in terms of ability/willingness to perform different functions/duties
Relevant qualifications/training, against the requirements of the Job Description
Job performance, Performance Score 2020 (Sales & Marketing)
Job performance, Performance Score 2020 (Aftersales & Parts)
Performance review Score 2019
Teamwork, willingness to work with people and support team
Attendance
Timekeeping
Disciplinary record

- 31. The criteria selected are all measurable, appropriate to the job role and

reasonable in all the circumstances. They accorded with the respondent's redundancy policy, something that was accepted by the claimant.

32. Mr Gregorious and Mr France worked together to complete the matrices. (see Francis WS para 19, p.83 and p.84). This ensured that the assessment was across all aspects of the ROM role.
33. The respondent, through Mr Gregorious and Mr France, populated scores for each ROM using statistical evidence where this was available, and using objective data where statistics were not.
34. The claimant attended a second one to one consultation meeting with Mr Gregorious. Ms Carter was in attendance as note taker. At this meeting the selection criteria was explained to the claimant, along with how each would be scored. Although the claimant explained in evidence that Mr Gregorious had IT issues and therefore could not show the claimant his screen as part of Mr Gregorious's explanation of the criteria, this does not appear to fit with the fact that this meeting was held by Teams, rather than Mr Gregorious physically being in the same room as the claimant and showing him his screen. Although I am conscious that that may just be semantics and it was the sharing function of Teams that was being referred to in the claimant's evidence rather than the physically showing of a screen. However, even if the issue was with the sharing function in Teams, the claimant's comments, which the claimant accepts he made, about taking into account 2 regions he was looking after in 2018 and 2019 when considering and assessing the criterion performance, suggests that the selection criteria and method of scoring were explained to the claimant properly in this meeting (pp117-118). And even had the claimant not been shown Mr Gregorious's screen (either physically or through the Teams sharing function), he still had the criteria explained to him to a standard that enabled him to engage with a discussion whereby he was asking for circumstances particular to him to be taken into account during the scoring process.
35. Although the respondent did not follow its own procedures in relation to performance appraisal in 2019, appraisal of the claimant was completed by Mr Gregorious using objective statistical data. The 2019 performance data at p.133 and the relevant KPIs were used to generate the score that was then taken into the selection matrix after moderation. The performance appraisal form itself is at pp.97-100. In reaching this conclusion I also note that Ms Carter's paragraph 31 was unchallenged by the claimant in cross examination, in which she states that she was presented with the performance appraisal of the claimant in 2019, which in turn was used to calculate the claimant's bonus. The claimant confirmed that he had been paid a bonus that year. This all leads me to the conclusion, that although the process in terms of communication was lacking, the claimant was still appraised in terms of his performance in 2019 and this was against objective statistical data.
36. As there were two ROMs with short service, who would not have a 2019 performance appraisal against which to score and with this being a criterion in the selection matrix, the respondent decided to give those two employees the average score of the other four ROMs for this criterion.
37. The claimant attended a third one to one consultation meeting on 18 June 2020. At this meeting the claimant was given the outcome of the selection matrix that was completed by Mr Gregorious and Mr France (p.129). The claimant had a total score of 217.5, which placed him outside of the top 4 candidates for the new ROM roles, resulting in him not being offered one of the four available roles. The claimant questioned the performance review score, and indicated that he considered the criteria to be subjective (pp.121-122).

38. The claimant attended a fourth one-to-one meeting on 23 June 2020. The claimant queried some of the scores given to him. However, when offered the opportunity by Mr Gregorious to go through the criteria line by line, the claimant declined this opportunity by stating words to the effect that '*it's just wasting all our time*'.
39. The claimant attended a final consultation meeting on 25 June 2020. At this meeting, it was confirmed that the claimant's role was being made redundant and that the respondent had not been able to identify any alternative work for him. The claimant was informed that his employment would terminate on 25 June 2020, and he would be paid payment in lieu of notice ('PILON'). The claimant was given the right of appeal. This was all confirmed by letter dated 25 June 2020 (p.106).
40. The claimant appealed the decision to dismiss him by reason of redundancy, by email dated 30 June 2020 (pp.110-111). Mr Garside and Mr Nelson, both of whom had had no involvement in the redundancy exercise were appointed as appeal officers.
41. The claimant attended a Redundancy Appeal Meeting on 06 July 2020. The claimant was accompanied by Mr Matthew Hunt. The lead manager was Mr Garside. Mr Nelson took notes at this meeting.
42. As part of the appeal investigation, Mr Garside interviewed Mr France, Mr Gregorious and Ms Carter. In these meetings, he questioned the individuals on matters raised by the claimant. He also reviewed the data to ensure that they had been correctly transcribed into the scoring matrix.
43. Mr Nelson emailed Ms Carter on 13 July 2020 to enquire about the claimant's 2018 appraisal score to verify that he had been scored a 4.3 that year. Ms Carter replied by informing Mr Nelson that her records showed that the claimant had scored 3.6 (p.159)
44. The appeal outcome was communicated to the claimant by letter dated 15 July 2020. The decision was to uphold the decision to terminate the claimant's contract by reason of redundancy. The letter expressed the reasons behind why the decision was upheld (see p.196):
 - Scoring has been carried out fairly with no evidence of manipulation of data
 - Every effort has been made to use all relevant information for each ROM- including assessment of qualifications, experience, skills and knowledge
 - Lots of tangible data has been used to determine the rating of each ROM and that the criteria used are acceptable for the scoring process.
 - Albeit that the performance appraisal process for 2019 was not carried out in line with HR procedures, our finding is that this was the same for all ROMs – so there is no disadvantage evident for any of the ROMs assessed due to lack of adherence to procedures.
 - The point you raised about the performance appraisal being written on the 20/06/2020 is not the case, it was simply the date at which the performance appraisal was converted into a PDF file.
 - For the 2019 Performance appraisal, we have investigated the claimed drop from 4.3 to 3.0. The document with 4.3 scoring was a draft before the company wide levelling exercise was completed and the official score recorded for that year was 3.6. The drop from 3.6 to 3.0 can be appropriately explained with numerical data for sales and aftersales performance
 - 2020 ratings are backed up correctly with objective data for Q1 performance in Sales and Aftersales – 4 tangible measures used, 2 for Sales and 2 for Aftersales

Conclusion

45. The respondent dismissed the claimant for the potentially fair reason of redundancy. The claimant accepted that this was the reason behind his dismissal

and did not challenge this.

46. I reminded myself throughout reaching this decision that when determining the question of reasonableness for the purposes of an unfair dismissal claim, *Williams v Compare Maxam* stressed that it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead the Tribunal must ask whether '*the dismissal lay within the range of conduct which a reasonable employer could have adopted*'. With that in mind, and considering the findings of fact that I have made I reach the following conclusions.
47. There is no finding of bias or obvious mistake in this case. In short, there is no evidence to support such a finding. The comments made by Mr France which the claimant took me to fall short of establishing anything close to bias.
48. The respondent adopted fair selection criteria. It is objective and capable of being determined, for the most part, using statistical data (I note that the specific data referred to is expressed on ROM selection matrices in comments box, for the claimant's scoring see p.129). And where statistical data was not possible, the scores were measurable against other data such as the claimant's CV. Taking a step back and looking at the picture as a whole, the tribunal is satisfied that the respondent gave careful consideration to what criteria should be used, that these were fair criteria for the selection process and they were fairly applied to all those at risk of redundancy. The selection criteria in these circumstances falls within the band of reasonable responses.
49. The respondent undertook a reasonable consultation in the circumstances. The respondent communicated to the claimant the reasons behind a need for redundancies and what this all meant. Further, the selection criteria and how scoring would take place was communicated to the claimant and explained. The claimant was given the opportunity to query the selection criteria, but chose not to, other than to make it known that he wanted his involvement in two other regions to be taken into account when considering his job performance. Again, the consultation with the claimant falls within the band of reasonable responses.
50. The respondent turned its attention to suitable alternative employment. Unfortunately, the only alternative role available against which the claimant could be considered was the newly designed ROM role. No other alternative employment was identified for the claimant within the business. A failure in this respect is not something raised by the claimant during these proceedings, but in any event, I am satisfied that the respondent did search for alternative roles, considered the claimant against the one suitable role it identified, gave consideration to a role that was suggested by the claimant, but ultimately there were no alternative roles for the claimant to be placed into.
51. The claimant was afforded the right to appeal the decision, and this gave rise to a rigorous appeal process by two independent appeal managers. The appeal confirmed the decision to dismiss the claimant.
52. The decision to dismiss by reason of redundancy, the selection criteria and method of scoring, the consultation, the approach to alternative employment, and the process as a whole- in this tribunal's decision all fall within the band of reasonable responses.
53. The dismissal in these circumstances was fair insofar as the legal position is concerned. And on that basis the claimant's claim for unfair redundancy dismissal fails and is dismissed.

Employment Judge **Mark Butler**

Date __27 September 2021__

JUDGMENT SENT TO THE PARTIES ON 27/09/2021

Notes

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.

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