



EMPLOYMENT TRIBUNALS

Claimant: Ms V. Carroll (C)

Respondent: Celtic Hairdressing Ltd. (R)

HELD BY: CVP **ON:** 16-17TH August 2021

BEFORE: Employment Judge T. Vincent Ryan
Ms W. Morgan
Mr. B. Roberts

REPRESENTATION:

Claimant: Ms Carroll represented herself

Respondent: Mr. M. Howson, Senior Litigation Consultant

JUDGMENT having been sent to the parties on 19th August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided (the judgment having been unanimous):

REASONS

1. **The Issues:** The claimant is pursuing claims that she was unfairly dismissed by reason of redundancy and that she was subjected to direct sex discrimination; she has withdrawn all other claims and they have been/ are dismissed (including an equal pay claim and a part-time worker detriment claim). The issues in relation to the outstanding claims of Unfair Dismissal and direct Sex Discrimination to be addressed and resolved were set out by Employment Judge Howden-Evans in her minutes of the preliminary hearing held on 18th March 2021 (as were now irrelevant issues in respect of withdrawn and dismissed claims); they reflect the applicable law and the factual issues at stake. The parties agreed that the summary remains accurate in respect of the only two claims that are to be determined.

2. The Facts:

- 2.1. R owns and manages a hairdressing franchise; its directors are Mr & Mrs Sullivan; at the material time, at least, they were hands-on managers attending the salon daily. A few staff members had keys to open the Salon in the mornings for convenience but principally this was LW's role; he also cashed up and locked the Salon at the end of the business day. LW also assisted in ordering stock for use by technicians (not stylists). LW was in a trusted role and since 2019 it has been understood by both him and the directors that he would be buying the business and taking it over in due course; this would probably have been completed already had it not been for the disruption caused by the Covid 19 pandemic. LW was a full-time employee, and he was, in all but public designation, the salon manager. Client complaints about colouring and staff queries would be referred to him and he would sometimes sit in on recruitment interviews. Staff appraisals, matters of discipline and hiring/firing were the prerogative of Mr and Mrs Sullivan.
- 2.2. Pre-covid R employed and/or commissioned ten stylists (working downstairs in the Salon) and three colour technicians (working upstairs in the Salon - LW, C, and ED) with assistants who worked between the floors of the salon. Mondays – Wednesdays of each week were relatively quiet days and the week got busier on Thursdays, with peak business being on Fridays and Saturdays of each week.
- 2.3. Of the three Colour Technicians, C and ED are both women and LW is a man.
- 2.4. Stylists and Technicians were paid a basic wage plus commission which means that Fridays and Saturdays were the most popular days for staff to work.
- 2.5. R used an outside advice provider for HR advice and assistance (Face2 Face).
- 2.6. C was employed by R from 23rd November 2017 as a Colour Technician until dismissal by reason of redundancy on 1st November 2020. C had been on maternity leave from 25th May 2019 – 22nd February 2020. C was member GMB; GMB advised and assisted her in relation to these issues at work and represented her at her eventual grievance appeal. C generally worked on Fridays and Saturdays each week when she was able to arrange childcare, which she generally did. There was no evidence before the Tribunal that C ever made enquiries about the availability of childcare on any other days.
- 2.7. ED was on Maternity Leave at about the same time as C, returning to work (as a Colour Technician) approximately one month before her.

- 2.8. The national Covid 19 lockdown was announced on 23rd March 2020 and in consequence R closed the Salon. The staff were put on furlough. The Salon re-opened in July 2020 with social distancing and restrictions.
- 2.9. In anticipation of re-opening on 14th July 2020 R asked customers, regulars and those who had their appointments cancelled during lockdown, who they wanted attending upon them on their return to the Salon for their next appointment; R asked for this information by return. Using its customers' responses R compiled a schedule which is at p326 of the hearing bundle (to which all page references refer unless otherwise stated). This shows the following customer preferences in numbers of responses in relation to Colour Technicians: LW had 105 preferential returnees and ED 41, but C had none. Nine customers said that they had no preference. On that basis alone R invited ED and LW back to work immediately that the Salon re-opened; C remained on furlough. These were commercial decisions based on client preferences and the needs of the business which had to recover from the extended closure. There were no other criteria than the need to re-open as soon as possible and the clients' preferred Technician for the work they booked/re-booked.
- 2.10. C raised a grievance on 6th August 2020; all her grievance issues were conscientiously addressed both at the grievance and subsequent appeal hearings. C makes no claim or allegation of detrimental treatment in respect of R's handling of her grievance and appeal. That process appears to us to have been dealt with in textbook style, and so we find.
- 2.11. By October 2020 it was clear to R that it could only support viable jobs as the Job Retention Scheme was to change and furlough terms were to require bigger financial contributions from employers. By this time all staff hours had changed because of staggered opening, closing, and appointments times so that R could comply with social distancing restrictions and ensure comfort and provide re-assurance to clients. The overall change in hours of business was by half an hour. Some staff members changed their regular days off, some worked different days on a regular basis. The effect on business overall was a reduction from ten operating stylists at any time to five, and from three colour technicians to two on Fridays-Saturdays, seven chairs to four, six customers to four in the Salon at any one time. There was then only space for two technicians, and Assistants working between floors.
- 2.12. Whereas only two technicians could be accommodated and were required on Fridays and Saturdays all three of them, (LW, C, ED) asked to be allowed work both days as they were their preferred and most profitable days.
- 2.13. R gave all three technicians the option of working on different days. They all refused to give up working on Fridays and Saturdays. LW and ED were the clients' preferred technicians. As a further option R offered C reception duties, on a temporary basis pending resumption of a full service, with her pay based on her average earning receipts as a technician rather

than the lower rate applicable for receptionists. For C's own reasons she refused to work as a receptionist; it was not her chosen career path and she considered it to be a demotion and therefore beneath her calling. The offer of reception duties (at pay commensurate with her earnings as a technician) was proposed on the basis that more clients wanted to be seen by ED and LW, Rs had been closed for months, R's income was reduced when open from pre-lockdown levels, and R had to maximise income and hope for profit. Its requirement for colour technicians had reduced from three to two. That was R's rationale behind commencing a redundancy process when all suitable alternatives had been exhausted as above.

- 2.14. R took professional advice and decided upon a redundancy procedure; it devised selection criteria. The criteria were Service, Disciplinary record, punctuality or Lateness, client retention & reference to R's tracker, and a skills assessment. There were thus five objective criteria and one subjective criterion marked by a senior and experienced member of staff, who did the marking for all three technicians. We found no evidence of bias or favouritism in the subjective marking or any inaccuracy in the objective marking; there was none.
- 2.15. Consultation: Consultation meetings including C were held on 10th October, 14th October, and 16th October 2020. Through this process R notified C of the risk of dismissal by reason of redundancy, explained its rationale, discussed alternative proposed hours and days of work and duties, after the assessment and marking against selection criteria C was shown the marking; she was given an opportunity to address and question the assessment and markings. R considered C's representations and provided answer and explanations to C's issues and questions. C was allowed to see the markings of the other two technicians. C was allowed to and did appeal against her selection for redundancy (unsuccessfully). R dealt with the appeal conscientiously and reasonably without discrimination or bias.
- 2.16. The effective date of termination of C's employment was 1st November 2020; she was dismissed by reason of redundancy.

3. The Law:

3.1. **Sex Discrimination:** s. 13 Equality Act (EqA) prohibits discrimination at work in respect of listed protected characteristics, including sex. In this context Direct Sex discrimination is where an employer treats an employee less favourably than it treats or would treat others (comparators, either actual or hypothetical) because of sex. A comparator is one who is comparable with a claimant in all relevant respects except sex. The operative word is "because"; for discrimination to be established that must be the reason for the differential treatment.

3.2. **Unfair Dismissal:**

- 3.2.1. s. 94 Employment Rights Act 1996 (ERA) provides employees with the right not to be unfairly dismissed.
- 3.2.2. S.98 ERA lists potentially fair reasons for dismissal which includes redundancy.
- 3.2.3. Redundancy is defined in s.139 ERA, which for our purposes provides that such a situation includes where the requirements of a business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.
- 3.2.4. It is for a respondent to prove a redundancy situation existed and then for a tribunal to determine whether the respondent has acted fairly and reasonably in all the circumstances in treating that reason as sufficient reason to dismiss.
- 3.2.5. In a potential redundancy situation case law has set guidance for the fair and reasonable handling of it. In general, without prejudice to the statutory wording of the above sections of ERA, a fair redundancy dismissal would usually include:
 - 3.2.5.1. Adequate and clear advance notice of the risk of redundancy;
 - 3.2.5.2. Meaningful consultation about the reasons for the risk, the process to be adopted, alternatives to dismissal, the potential outcomes and their financial, and any social, implications;
 - 3.2.5.3. Consideration of alternatives to redundancy including suitable alternative employment;
 - 3.2.5.4. Clear, and fair, (as objective as reasonably possible) selection criteria or some such fair method of selection should be used.
 - 3.2.5.5. A fair and reasonable procedure should be adopted generally and all the respondent's actions should fall within the range of reasonable responses to the situation of a reasonable employer.
 - 3.2.5.6. It is not for the Tribunal to substitute what it would have done had it been the employer; it must judge the fairness of what has been done.
 - 3.2.5.7. It follows from the above that any decision during the process must not also amount to, say, direct sex discrimination.

4. Application of law to facts:

4.1. Sex Discrimination:

4.1.1. Post lockdown return to work: LW was to all intents and purposes the Manager and prospective buyer of R's business, with longer service and bigger clientele than C. In all relevant respects he was more experienced than C. He worked a full-time contract. He is not an ideal comparator as his situation was very different to that of the claimant in relevant and significant ways. Even if we constructed a hypothetical male whose situation, bar sex, was comparable however R's rationale was always the business' interests (commercial considerations in meeting the demands of clients while maximising income), with due regard to the interests of staff members; ultimately R retained the technicians who attracted the greatest number of returning clients and who they said they wanted most to see. C was treated less favourably than both LW and CD when she was not called back to work but that was not related to sex. She was treated less favourably than her male and female colleague for transparent commercial reasons; in this case and in the light of our findings that is a non-discriminatory reason.

4.1.2. Dismissal: as above. R followed a fair and transparent process and decided on C's redundancy in the best interests of the business for commercial reasons when she would not, or felt that she could not, accept the alternatives offered to her. Dismissal is unfavourable and being selected for redundancy was less favourable than the treatment of LW (and ED) but the reason for that differential treatment was not sex.

4.2. Unfair Dismissal:

4.2.1. R recognised a reduction in the requirement for Colour Technicians owing to reduced capacity, in both the sense that there were fewer customers, and that fewer staff could be accommodated in the workplace owing to changes brought on by Covid-related restrictions; the business shrank. On Fridays and Saturdays there was effectively a forced reduction in the number of clients that could be attended to from six to four. That is a redundancy situation – a reduction in the requirement of R for employees to carry out colouring work.

4.2.2. **Notification & consultation:** The process ran throughout October and was not rushed. C was made aware of the process and reasons for it in good time with ample opportunity to address issues, which she did actively.

4.2.3. **Process:** the procedure was transparent and mostly objective save for the skill assessment. All the marking was fair. For the subjective element the same marker was used for each of the technicians. C's marks were increased on appeal. Even if the subjective marking was wholly discounted for each of the technicians it would make no difference to the eventual outcome. Ultimately it came down to customers' preference and therefore the business need. That was a commercial consideration, reasonably considered.

4.2.4. **Alternatives:** R offered the claimant the opportunity to remain in employment working different days or performing different duties on reception. This followed R's attempts to secure workable comprises from all those affected. R genuinely attempted to avoid any redundancy. R could have decided differently if ED/LW were prepared to sacrifice income, but they had no obligation to do so and they were under the same pressures as C, who likewise did not want to voluntarily give up her preferred working days. R was faced with a competition between three people for two roles and chose in the interests of the business (which is in the interests of all working there, not just the directors).

4.2.5. In conclusion R faced a redundancy situation and acted fairly and reasonably in all the circumstances in dismissing C for that reason; its actions fell within the band of reasonable responses as described above.

4.3. All claims fail.

Employment Judge T V Ryan

Date: 29.09.21

REASONS SENT TO THE PARTIES ON 30 September 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche