EMPLOYMENT TRIBUNALS

Heard at: Plymouth (by video) **On:** 6 August 2021

Claimant: Mrs Lorraine Carroll

Respondent: The British Red Cross Society Limited

Before: Employment Judge Fowell

Ms S Maidment

Mr H Launder

Representation:

Claimant: Mrs N Hunt (lay representative)

Respondent: Mr T Goodwin, instructed by Bates Wells Solicitors

JUDGMENT

1. The claimant's dismissal was unfair.
2. The complaint of discrimination on grounds of disability is upheld.
3. The remedy hearing will go ahead on 14 October 2021.

REASONS

Introduction

1. Mrs Carroll worked for the Red Cross as an Assistant Retail Manager in their store in Southway, Plymouth until it closed on 31 December 2019. She complains of unfair dismissal and discrimination arising from a disability – her arthritis. The Red Cross accepts that this was a disability and that they were aware of it at the time. The two complaints here are of unfair dismissal and that her redundancy was also discrimination arising from her disability.

2. The right not to be unfairly dismissed is set out in section 94 Employment Rights Act 1996 (ERA). By section 98, the employer has first to show a fair reason for the dismissal, in this case redundancy.

3. When someone's place of work closes down and they lose their job, that is always a redundancy. Section 139 makes this clear. So there is no need or point in considering why it closed. That is a decision for the employer to make. A good deal of the evidence provided in this case centred around the business case for closure, but that is not something we can or should assess. That principle was established by the Court of Appeal in **James W Cook & Co (Wivenhoe) Ltd v Tipper** *[1990] IRLR 386*, *[1990] ICR 716*, which held that as a matter of law it was not open to a tribunal to investigate the commercial and economic reasons prompting such a closure.

4. The only question therefore is whether, in those circumstances, the Red Cross acted reasonably in dismissing her, and according the section 98(4) that "shall be determined in accordance with equity and the substantial merits of the case".

5. We therefore need to consider whether a fair procedure was followed and, in particular, whether Mrs Carroll should have been offered an alternative role as Assistant Store Manager at the nearby Furniture and Electrical Store in Plymstock. Much of the focus of this hearing was about when that vacancy became available and why it was not offered. According to the Grounds of Resistance the vacancy arose on her last day, 31 December 2019, but they now say that the recruitment exercise started later on.

6. It is well established that a fair dismissal involves considering whether there are any such alternatives. Mr Goodwin has reminded us that the duty on the employer is *to make reasonable efforts* to find alternative employment for a redundant employee, per Kilner Brown J in **British United Shoe Machinery Co Ltd v Clarke [1977] IRLR 297, EAT**.

7. The only other employee in the store was the manager, Ms Debra McVicar. She did get an alternative vacancy, at another clothing store in Plymstock. This is near to but different from the Furniture and Electrical store.

8. As to the disability claim, the test under section 15 Equality Act is whether she suffered unfavourable treatment (in particular the failure to offer her this alternative vacancy) "because of something arising in consequence" of her disability. The main effect of her condition relied on is her time off work. Her evidence was that she did have a number of days off work with her arthritis, as follows. In 2018 she was off from 29 March to 29 April and 10 July to 9 August – two periods of about a month each. Then in 2019 she was absent from 4 to 12 January, 24 January to 7 February, 21 June to 7 July, 24 July to 13 August and 27 August to 25 September, so there were four absences of a week or two and then a further month off in late summer. The Red Cross say that this was not a consideration at all.

Procedure and evidence

9. In addressing these issues we heard evidence from Mrs Carroll and Ms McVicar. There was also a statement from her representative, Ms Naomi Hunt, who worked as a volunteer in the Southway store, but this dealt exclusively with the business reasons for closure, and so we did need to hear from her.

10. On behalf of Red Cross the main witness was Mr Ryan Jackson, the Area Manager, who handled the redundancy, but he was unwilling or unable to attend. He has now left the Red Cross and it is said that he is suffering from mental health problems as a result of this redundancy exercise. No medical evidence has been provided, and without hearing from him it is of course difficult to assess the position, but we have to decide matters on the evidence available to us.

11. We heard briefly from Mr Howard Bowles, a more senior manager, whose statement set out the business case for closure. Given our conclusion that this was not something for us to decide, his evidence was limited to the timing of decision to make redundancies and his involvement with the process. There was also a bundle of 177 pages. Having considered this evidence and the submissions on each side, we make the following findings.

Findings of Fact

12. Before embarking on that exercise we will comment briefly on the witness evidence. No criticism was made of the evidence of Ms McVicar or Mr Bowles, but Mr Goodwin did suggest that Mrs Carroll's evidence was not reliable, and that she had been willing to exaggerate. Mrs Carroll mentioned for example that Ms McVicar was never sick, to indicate that she herself was not kept on because of her sickness record, when in fact Ms McVicar had had several periods of absence for bereavement and operations in the last year or two, and had a further operation pending in the New Year. Mrs Carroll also stated that she was not allowed to record her consultation meetings, although she never asked to do so. And, she claimed, the consultation document setting out the business case for closure made no sense, although she accepted that she did understand it. None of these points struck us as particularly significant. The witness statement appears to have been prepared for her, and not checked with as much care as it might have been. But:

    a. Ms McVicar had had no sickness absence for the previous 14 years, and Mrs Carroll readily accepted the later absences when the point was raised with her;

    b. the consultation document was mainly criticised for its management jargon, which is understandable; and

    c. the issue about recording seems a mistake. Ms McVicar did record her meeting with consent, and again this is a point which may well have been

drafted for her.

13. In her oral evidence Mrs Carroll was not in any way stubborn or argumentative on these points or others, and accepted many of the points put to her. We certainly see no proper basis to prefer Mr Jackson's account where they conflict, in his absence, unless supported by contemporaneous documentation.

Unfair dismissal

14. The decision to close the Southway store was made in the spring of 2019, when Mr Bowles decided not to renew the lease when it fell due in March 2020. In fact he decided that the store would close even sooner, at the end of December, rather than carry on to the very end. It was not mentioned to the staff at the time, and Mr Bowles left the handling of the redundancies to Mr Jackson. There were, in the course of that redundancy exercise, proposals aimed at keeping the store open but these were not passed on to Mr Bowles and so we conclude that the decision to close was effectively already taken, even if the door was open to a change of mind if trading improved. That does not of itself render the dismissal unfair, but it does mean that the only real issue to discuss from then on was whether there were any suitable alternative vacancies.

15. The first Mrs Carroll knew about the store closing was in a call from Mr Jackson on 11 October and there was a follow up letter to confirm that she was at risk of redundancy. They met for the first consultation meeting on 18 October and he explained the rationale behind the closure. She was asked to let him have any proposals for avoiding redundancy by 4 November. A handwritten note made by him at the time recorded that it might be possible for her to have 7 hours a week in a city centre store, though that may be simply an idea he had to follow up.

16. Mrs Carroll put forward suggestions ahead of the next meeting about opening hours, about trying renegotiate the rent and other steps to increase business. They then met a second time to discuss them on 26 November. He gave her his reasons why this would not be viable. He then confirmed to her in writing that the store would be closing at the end of the year and that her job would then go, unless there were any alternative vacancies. They then met again on 6 December to consider those alternatives.

17. According to Mr Jackson's witness statement they had a further "informal" meeting on 29 November to go over this in advance. Mrs Carroll says that they only ever had two meetings, but he did make a note at the time that he had spoken to her about suitable vacancies in her area but there were none available. It may therefore be that this conversation has slipped her mind; it cannot have been a very long one.

18. When they met again on 6 December the position was little different. No record was made by Mr Jackson of any alternatives that they discussed, and his

statement gives the impression that such discussion as there was about redeployment took place at the earlier meeting. In his absence and without any minutes of that meeting we prefer Mrs Carroll's recollection. That was that he made a passing reference to a vacant Manager's post in Bude, adding that that was too far away. We agree - it is at least an hour and a half's drive each way – which makes it more likely that it was never put forward by him as a serious proposal. In the course of that meeting he took a call from someone and then came back to Mrs Carroll to tell her that it was about the possibility of hours in city centre, but that was no longer available. There was a mention of work in Services, i.e. in the Red Cross's medical work, but it does not seem that this was an actual proposal. Mrs Carroll was not keen, and was not sure in her evidence to us whether this was about a job in Plymouth or not.

19. According to his statement he then told her that if he could have looked to redeploy her to the Plymstock Furniture and Electric Store but that vacancy had now been filled. She says that this was never mentioned. On this, and for the reasons already given, we prefer her view. There is no record of this being mentioned. We note too that the ET3 gives a rather different impression. According to the Grounds of Resistance:

> "21. There had been a vacancy at the store in late summer, prior to the Claimant being placed at risk of redundancy and prior to Mr Jackson being aware that she would be placed at risk. However, the vacancy had been filled prior to the redundancy situation arising. The Claimant made it clear that in any event this would not be a suitable option for her." …
>
> "29. The Respondent investigated the possibility of alternative employment for the Claimant. The Claimant refused an offer of alternative employment and indicated that she was not interested in working at the Respondent's Plymstock F&E store. She also refused other proposals. …
>
> "36. It was the Respondent's understanding from a previous discussion with the Claimant that she did not consider working at the Plymstock F&E store a suitable option for her. For this reason, it did not offer her the assistant manager role when it became vacant on 31 December 2019.

20. So, the main point relied on above was that she had already ruled it out. Whereas at this hearing the main point relied on was that there was not really a vacancy at all until later. We note too the statement that this earlier conversation apparently took place in the summer, and before there was any question of redundancy (at least as far as Mrs Carroll knew). That is rather different from the claimed conversation on 27 November or 6 December 2019, when Mr Jackson says that he mentioned that there had been a vacancy there which had now been filled.

21. Mr Jackson's witness statement did not claim that there had been such a conversation in the summer, and even if there had been that would be a poor explanation for the failure to mention it when Mrs Carroll was facing the imminent

loss of her job. This explanation in the ET3 appears therefore a poot attempt, not then pursued, to explain the later failure to offer the alternative in Plymstock when it did come up. It is certainly not the case that Mrs Carroll refused offers that would have saved her job.

22. After that meeting he wrote again to confirm her dismissal. Then on 20 December 2019 she emailed him to ask whether she could volunteer in the Plymstock clothes store, and whether this might be affected if she brought a tribunal claim. He replied that day to reassure her that that would not be a problem.

23. By then Mrs Carroll was aware that her friend Debra McVicar was to be the manager at that store. That was discussed and agreed with Ms McVicar in her consultation meetings with Mr Jackson. They had both decided to accompany each other to their meetings, in the absence of any other work colleague, but this was refused by the company. The right to be accompanied at such hearings does not apply to redundancy consultations, and we find no unfairness in that approach.

24. It appears from the witness statement of Mr Jackson that the Assistant Manager post at Plymstock fell vacant in late December 2019. No documentary evidence was presented by the Red Cross. It is surprising that there was no resignation letter or dismissal letter, or any records at all, relating to the previous incumbent. So, it remains unclear exactly how or when that happened, but it is admitted that there was a vacancy at the date of termination. Some records have been produced to show that the recruitment for a replacement did not start until later, but the key point, it seems to us, is that Mr Jackson knew about it before Mrs Carroll's employment ended. Mr Jackson's explanation was simply that he did not offer it to her as she had so recently ruled it out, about which we have already made our findings.

25. An employer not only has an obligation to consider suitable alternative employment, and also has a considerable incentive in that it would have saved a redundancy payment of over £2000. The failure to mention it appears to us to have been a significant oversight, and must in the circumstances have been deliberate.

26. Mrs Carroll found out about it when she saw a Facebook post about the new Assistant Manager there on 10 February. There was a series of messages from Ms McVicar to Mrs Carroll that day, commenting on the appointment as follows:

> "Will have to find out when the old asm [Assistant Store Manager] left xxx"
>
> "If that job was a vacancy it should have been offered to you xx"
>
> "Just got off the phone from di, manager at Plympton, she said Ryan took the new manager in the furniture shop as a temp for six months as she was Ryan's friend, when the Southway shop was closing he extended her contract for a further two months, hoping I would leave and she could take in as manager there after I had

took redundancy, hello I didn't go and he has, but maybe that's why it wasn't offered to Lorraine ???? xx"

27. These are not points that Mr Jackson addressed in his evidence. It is aimed at the manager's post, not the assistant manager, but there is a surprising lack of witness or documentary evidence to explain this appointment or the timeline of decisions in relation to this Furniture and Electrical store. Hence, we find that there was a suitable alternative vacancy, it ought to have been offered to Mrs Carroll, and the failure to do so renders the dismissal unfair.

28. It is clear from the above exchanges, and the fact that Mrs Carroll started volunteering in the Plymstock area, that she would have accepted any such offer, despite her earlier misgivings, and so no reduction is made to the compensation to reflect that risk. She was not asked about the chance that she might have refused it.

Disability discrimination

29. We have to go on to consider whether this failure, and the subsequent dismissal, was because of her history of absences, and so discrimination arising from her disability.

30. There is also a particular provision at paragraph 136 dealing with the burden of proof:

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

31. The first stage involves considering the evidence from each side, not just from the claimant, but here there was very little direct evidence from the respondent on the question of whether the decision not to offer Mrs Carroll redeployment was because of her arthritis or health generally. There is just Mr Jackson's witness statement which states that this played no part.

32. This provision applies to all discrimination complaints. In a case of direct sex discrimination, for example, the tribunal may be considering a case where a female claimant has been badly treated. It is well established that that is not enough. "Something more" is required: **Madarassy v Nomura International plc [2007] IRLR 246, CA.**

33. In this case we are not just considering whether the persons sex or other protected characteristic is connected with the bad treatment, we are considering whether the effect of the disability, i.e. her absence record was the reason for the treatment in question. In the first example, the starting point is that there is no obvious

connection between a person's sex and the way they are treated. But a poor absence record is a concern for employers, and hence they have procedures to deal with it, and so there is from the outset a potential connection. If anything more is required, it seems to us that the positive duty on the employer to make reasonable efforts to locate alternative employment supplies the answer. At the 11th hour, if not before, Mr Jackson must have become aware of a vacancy which would have saved Mrs Carroll her job and saved the Red Cross the redundancy payment. Yet he did nothing about it. In those circumstances, on the basis of those facts, it seems to us that the burden has to shift to the respondent.

34. To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was "in no sense whatsoever" on the grounds of her health or absences: per **Barton v Investec Securities Ltd**. [2003] ICR 1205, approved by the Court of Appeal in **Igen v Wong**, [2005] ICR 931. Further, the expectation in those guidelines is that "cogent evidence" is required.

35. In the context of this case that means in no sense whatsoever because of her absences. No such evidence has been presented, simply Mr Carroll's assertion that it played no part in his decision. But we have not accepted his claim that he did raise this vacancy earlier, or his explanation for not doing so. He does not put forward a positive reason. Indeed his witness statement at paragraph 41 states

> "41. …The Assistant Manager resigned in late December. I had understood from the Claimant at our meeting on 29 November that she did not consider the role suitable, and for that reason I did not consider offering it to her. In hindsight I perhaps should not have made that assumption, but I certainly didn't make a conscious decision to avoid offering the role to her. …"

36. Clearly her sickness record was not a good one. There are numerous absences, many of them lengthy, and this would have a cost for an organisation looking to save costs. No evidence was presented about the new Assistant Manager in Plymstock, save for her photograph which shows a much younger person. There is therefore nothing implausible or fanciful about this aspect, and given the burden of proof provisions, in the absence of any such cogent evidence from the respondent we have to find that it made out.

37. A justification argument was put forward by the Red Cross, on the basis that if this was discriminatory, their action in not mentioning this vacancy to Mrs Carroll was a proportionate means of achieving a legitimate aim. Mr Goodwin did not mention this in his oral arguments and suffice to say that we do not find that a failure to comply with the legal duty to make reasonable efforts to identify alternative employment can be a legitimate aim.

38. So, both the complaints of unfair dismissal and disability discrimination are upheld.

Employment Judge Fowell

Date: 14 September 2021

Judgment & Reasons sent to parties: 04 October 2021

FOR THE TRIBUNAL OFFICE