EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Czege	**v**	Colour Marketing Limited

Heard at: Bury St Edmunds (by CVP) **On:** 04 & 05 October 2021

Before: Employment Judge M Warren

Appearances

For the Claimant: In person.

Assisted by an Interpreter: Ms A Kapronczai (Translation: Hungarian)

For the Respondent: Ms K Sheriden (Counsel).

RESERVED JUDGMENT

The claimant's claim that he was unfairly dismissed fails and is dismissed.

REASONS

Background

1. Mr Czege was employed by the respondent as a Production Operative between 25 July 2016 and 31 July 2020. After early conciliation between 23 October and 19 November 2020, he issued these proceedings claiming unfair dismissal on 7 December 2020.

2. The parties were notified that the case was set down for hearing over 2 days on 4 and 5 October 2021 by letter dated 8 May 2021, which also set out case management orders.

The Issues

3. The respondent says that it dismissed Mr Czege for the potentially fair reason of redundancy. Mr Czege accepts that there was a genuine redundancy situation, but says that his selection and dismissal was unfair. He says that his dismissal was unfair for the following reasons:

   3.1 The process of selection was seriously flawed, worked to his disadvantage, leading to his dismissal.

   3.2 The scores attributed to him in the scoring exercise were inconsistent with his appraisals.

   3.3 His score of 12 out of 20 for skills was in particular plainly wrong, he referred to having been responsible for training two new workers.

   3.4 He could have worked on other machinery such as the RAM punch, sanding machine or he could have done table work.

   3.5 Somebody called Paulina, who worked in the office, was placed in production but had no experience whereas he, with experience in production, was made redundant.

   3.6 He only scored 17 out of 20 for timekeeping and he was never late.

   3.7 He scored 13 out of 20 for disciplinary and yet had no warnings.

   3.8 He scored 14 out of 20 in respect of key performance indicators (KPI) and yet he had always met daily targets, (except when he was using out of date machinery).

   3.9 He scored 7 out of 20 for teamwork and yet he was a lone worker and therefore his teamworking could not be assessed.

   3.10 (Not appearing in his ET1 but referred to at the outset of the hearing) The respondent kept people on who had fewer skills than he had, including Paulina (see above) and an agency worker called Matthew, who he says was taken on as an employee after he had been dismissed.

   3.11 No one from the office had been made redundant.

Strike out application

4. At the outset of the hearing, the respondent made an application to strike out the claim. What I said to the parties in response to that application in refusing it, is set out in the paragraphs below.

5. Mr Czege is Hungarian. English is not his first language. He is assisted today by a court appointed interpreter. The claim is one of unfair dismissal in an alleged redundancy situation.

6. Case management orders were made on 8 May 2021. They are standard national case management orders made in every case of unfair dismissal. They state that as at 21 September 2021, the claimant and the respondent shall prepare full written statements of the evidence they and their witnesses intend to give at the hearing. That is intended to make it clear that an individual claimant must provide a statement as well as a statement from his witnesses. (I am not particularly happy with that national standard wording, I do not think it is as clear as it could be and this situation happens too often.) Mr Czege says that he did not understand that to mean that he had to provide a statement himself. He thought it just meant that he has to provide a statement by his other witnesses. He sent three statements by his three proposed witnesses on 22 September to the respondent.

7. The respondent was in fact not ready to exchange witness statements at that time, as they should have been. The respondent tells me and I accept, that at least two emails were sent to Mr Czege explaining to him that he had to do a witness statement himself. Mr Czege tells me he did not understand.

8. On 23 September Mr Czege said he was ready to exchange witness statements, but the respondent was not ready because Ms Harrison was ill and they could not finalise her statement.

9. On 29 September, the respondent was ready to exchange witness statements. As I understand it, Mr Czege replied indicating he did not think that was appropriate because the bundle had already been filed with the Tribunal. On 30 September the respondent explained why that is not so.

10. On 1 October, the respondent tried to contact Mr Czege by telephone and he did not respond.

11. On 1 October at 17:17 the respondent sent its witness statements to the Tribunal and to Mr Czege.

12. So the position I am in this morning is that the respondent does not have a witness statement from Mr Czege, he has not prepared one. It therefore applies for Mr Czege's case to be struck out, saying that he has behaved unreasonably, he is in breach of the Tribunal's order, the respondent does not know the case which it has to answer and is being put to considerable inconvenience and expense for a claim which at its highest, is of low value, (Mr Czege quite quickly found other employment).

13. Mr Czege told me that he does wish to say more in evidence, than is set out at 8.2 of his ET1.

14. A few words then about the Law on an application to strike out in a situation like this at the outset of the hearing. I will keep it brief because we have an interpreter. The primary guidance is from Lord Justice Sedley in a case called Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA. The power to strike out is a draconian power. Two cardinal conditions for its exercise are either the unreasonable conduct has to be deliberate and persistent or a fair trial has to be impossible. The first object of any system of justice is to get triable cases tried and the courts are open to the difficult as well as the compliant. A key question is whether there are less drastic means to resolve the situation which do not involve a strike out.

15. I must also have regard to the overriding objective and seek to balance the prejudice to the parties.

16. Bearing in mind that guidance, what we have here is a clear language problem and inequality of arms because the respondent is represented by very able Counsel and Mr Czege representing himself, is not a lawyer. It seems to me that a proportionate way to deal with this situation is to hear evidence from Mr Czege first and see what it is that he wants to say, taking evidence in chief the old fashioned way and then adjourn to allow Ms Sheriden to take instructions. The length of that adjournment will depend upon how much if anything Mr Czege has said which is something new or unexpected. I very much doubt that it will need to be a very long adjournment. This is a very simple case and I am confident we will finish it in the two days allocated.

17. The application to strike out is refused.

Evidence

18. As explained above, we had no witness statement from Mr Czege. In giving evidence, he confirmed under oath that the content of his claim form, including what is said at 8.2, were true. He then gave further oral evidence in chief, extracted by questions from me.

19. Mr Czege produced three statements from witnesses he wished to rely upon namely Miss Karolina Lorens, Joanna Lorens and Jbriela Lorens. After I explained to him that whilst I could read and take into account the content of those witness statements, I would have to treat them with circumspection as the witnesses were not here to answer questions under oath, he decided to call Ms Joanna Lorens to give evidence. She appeared and was cross examined.

20. The respondent called evidence from two directors, namely Mr Mark Tennent and Ms Anne Harrison. They were cross examined by Mr Czege, with assistance from me where appropriate.

21. I had before me a bundle of documents prepared by the respondent's solicitors running to page number 78. I am grateful to the respondent's solicitors for ensuring that the pagination coincided with the electronic page numbers. It would be helpful if respondent's solicitors generally could remember to try and make sure that all the documents in an electronic bundle have Optical Character Recognition, as directed by the President in his national practice direction.

The Law

22. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA). Section 98 (1) and (2) of that Act set out 5 potentially fair reasons for dismissal, one of which is redundancy.

23. Redundancy is defined in section 139(1) of the ERA as follows:

> *"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
>
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
>
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(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."*

24. Mr Czege does not dispute that there was a redundancy situation.

25. If an employer is able to satisfy the Tribunal that the reason that the employee was dismissed was one of those potentially fair reasons, the Tribunal must go on to apply the test of fairness set out at section 98(4):

> *"Where the employer has fulfilled the requirements of subsection (1), 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."*

26. The seminal case to assist us in deciding whether the decision to dismiss by reason of redundancy satisfies the test of fairness set out at section 98(4) is Williams & others v Compare Maxim ltd 1982 ICR 156 EAT, which clarified that the Tribunal should ask itself whether, *" the dismissal lay within the range of conduct which a reasonable employer could have adopted".* In that case, factors were identified which might help us in answering that question:

- 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 unions view was sought, and
- Whether any alternative work was sought

27. Commenting on redundancy and procedure in the House of Lords in the case of Polkey v A E Dayton Services 1988 ICR 142 Lord Bridge said:

> *"the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation"*

28. It is not for the Tribunal to consider the accuracy of the scoring, I must ask myself whether the employer set up a system that was fair, which had been reasonably applied, fairly and honestly. See Per Buchanan v Tilion 1983 IRIR 417 approved in Eaton Ltd v King 1995 IRLR 75

29. Glidewell LJ in R v British Coal Corpn ex parte Price 1994 IRLR 72 para 24 said of "consultation" that it:

> "…*involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".*

30. In summary, he said that fair consultation means:

- When the proposals are still formulative:
- Providing adequate information;

- Giving adequate time to respond, and
- Giving conscientious consideration to the response

31. Every case must turn on its individual facts.

32. Just because selection criteria are not wholly objective, does not render a selection process unfair. In Mitchells of Lancaster (Brewers) Ltd v Tattersall UKEAT/0605/11/SM the Master of the Rolls said:

> *"Just because criteria of this sort are matters of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way, although inevitably such criteria involve a degree of judgment in the sense that opinions can differ, possibly sometimes quite markedly, as to precisely how the criteria are to be applied, and the extent of which they are satisfied, in any particular case. However, that is true of virtually any criterion, other that the most simple criterion, such as length of service or absenteeism record. The concept of a criterion only being valid if it can be "scored or assessed" causes us a little concern, as it could be invoked to limit selection procedures to box-ticking exercises"*

33. A review from the authorities of the principles to be applied when the issue is whether the pool for selection is appropriate was conducted in the case of Capita Hartshead Ltd v Byard UKEAT/0445/11/RN and summarised by Mr Justice Silber along the following lines, (paragraph 31):

> (a) It is not the function of the Employment Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted, (Williams, see above).
>
> (b) The reasonable response test is applicable to the selection pool.
>
> (c) There is no requirement to limit the pool to those doing same or similar work, the content of the pool is a matter for the employer and is difficult to challenge if the employer applies its mind genuinely to the problem.
>
> (d) The Tribunal should consider with care and scrutinise carefully the reasoning of the employer to determine if it has "genuinely applied" its mind to the content of the pool.
>
> (e) If the employer has genuinely applied its mind to the pool, it will be difficult, but not impossible, to challenge the make up of the pool.

34. I remind myself that it is not for me to impose my own views on the selection. I also remind myself that I must look at the circumstances of the case in the round. Failure to act in accordance with one or more of the

principles in Compair Maxam does not necessarily involve the conclusion that the dismissal was unfair. Whether in the circumstances of any particular case an employer has acted reasonably in taking or not taking any step or failing to follow any procedure renders a dismissal unfair is a matter for the Tribunal to decide in the light of all the circumstances of the case in reaching the conclusion as to whether or not the dismissal was reasonable within the meaning of s 98(4). (See Grundy (Teddington) Ltd v Summer & Salt (1983) IRLR 98 EAT).

Findings of Fact

35. The respondent provides a paint sampling service to industry and retail outlets. At the relevant time it employed 23 people and there were 2 directors, Ms Harrison and Mr Tennent.

36. Mr Czege was employed as a Production Operative from 25 July 2016. His contract of employment is in the bundle at page 27 and the Job Description at page 34. The Job Description for a Production Operative describes that such person should be able to work in any area of the factory as required, that they should use and develop multiple skills in core areas/machines, they should have a willingness to evolve their knowledge, have a practical knowledge of the mechanical equipment and processes, be flexible in their approach to their jobs and demonstrate that they can work as an active and constructive member of a team.

37. During 2019 the respondent experienced difficult trading circumstances and suffered an operating loss of circa £75,000 to the year ending 21 August 2019, (they had made a profit of £60,000 the previous year). Management Accounts to the end of January 2020 showed a loss to date of £17,000.

38. In February 2020 a major customer went into administration and as a consequence, the respondent incurred a bad debt of about £38,000. Ms Harrison made a personal loan to the company to keep it going so that it could meet its payroll commitments.

39. The country went into lockdown on 23 March 2020. Business for the respondent was seriously impacted, with orders being cancelled or postponed.

40. The respondent furloughed half its staff, rotating those who were on furlough on a 3 week cycle.

41. The respondent's directors held weekly zoom meetings with their staff to keep them up to date. Mr Czege only attended one such meeting, during which he was disruptive.

42. The prospects for the respondent during lockdown were bleak. Mr Tennent drew up a business plan which entailed making 5 of its 23 staff redundant. The aim was to retain a workforce with flexible skills.

43. On 10 June 2020 the respondent's staff were informed of its plans by an email which explained the situation, at page 58 of the bundle. The announcement includes the following:

> "… we need to reduce our overheads to meet the challenge, and will therefore restructure all roles and responsibilities.
>
> Our modelling shows that we need to reduce the number of production employees to 12 and the office staff to 4, so we are giving you notice that all roles are at risk of redundancy.
>
> This announcement is the commencement of a 2 week consultation period, in which we would consider and welcome any alternative proposals. Please contact Anne and Mark with any suggestions for our consideration.
>
> At the end of the 2 weeks the consultation period will come to an end and the directors will contact you individually to confirm the finalised staffing structure."

44. The document explains that the selection criteria will include a skills matrix, timekeeping, disciplinary record, KPI performance, teamworking and aptitude. The proposed timeline is set out.

45. Individual consultations were carried out by Zoom. Mr Czege chose not to contact the directors as invited to.

46. The scoring for the selection matrix was carried out by the two directors, the Production Manager and the Operations Manager. They were each to score a maximum of five for each of the criteria. There was no discussion before, during or after the scoring exercise, either as to the approach they should take to deciding what score to attribute, nor to discuss what score they had in fact attributed to each individual. The scoring was collated and totalled by Ms Harrison. She produced the table which appears in the bundle at page 71. The names of the individuals, apart from Mr Czege, have been omitted. Five people were to be made redundant and Mr Czege's score was fifth from lowest. He was therefore the last of the five people to be selected for redundancy.

47. Although the authorities are clear, it is not for the Employment Tribunal to descend into detail over the scoring nor to second guess, (or substitute its own view) the respondent's scoring. Nevertheless, where a claimant says that the scoring attributed to him makes no sense, then in order to do justice, one has to look for any rational basis to the scoring. I consider the scoring attributed to Mr Czege and the justification provided by the respondent in the paragraphs below. It will be recalled that each score is out of a potential total of 20:

    47.1 Mr Czege scored 12 for skills. He is particularly adamant that this cannot be justified. His training record was in the bundle at page 35. Out of 19 potential skills, he had completed induction training on 9. Of those 9, he had reached level 2 described as,

"building up skills" on 5 of them and reached level 3 described as, "basic competence" on just 2 of them. There were 2 further levels to be achieved in the training record, level 4 was, "can train others" and level 5 was "can improve the activity". Mr Czege was not recorded as having achieved Levels 4 or 5 on any of the skills. Ms Harrison's very clear evidence, which I accepted, was that Mr Czege did not have particularly high skill levels compared to his colleagues.

47.2 Mr Czege scored 13 under the heading, "disciplinary". Mr Czege protested that he had never received a warning. The respondent says that he received verbal warnings and informal warnings about his lack of tidiness. He denied that. I note that in the appraisals for 2018 and 2019 at pages 40 and 41, references are made to his untidiness and the need to improve his housekeeping. I accept that he was warned on occasion about his lack of tidiness and that this was the reason he scored 13 out of 20 for his disciplinary record.

47.3 Mr Czege received a total score of 14 for "KPI Performance". Mr Tennent's evidence on this subject was unhelpful; he could not recall how he scored Mr Czege for KPI Performance nor how he scored people who worked in the office, who were not subject to Key Performance Indicators. Ms Harrison was very clear, and I accept her evidence as to her scoring, which is that because she is an accountant, she looked at production figures, the amount of time required for the variety of jobs, the amount of re-working that was required and the amount of spoilage. For those who worked in the office she based her score on her knowledge of the work that they did for her, in terms of speed, accuracy and how long they left a telephone ringing. She acknowledged that the latter was an intuitive exercise. She said that the Production Manager and Operations Manager would have had a very clear idea of the performance of everybody in the factory and in particular, of Mr Czege's performance against KPIs. I challenged both Ms Harrison and Mr Tennent about the fact that the appraisals both seemed to indicate that Mr Czege was achieving targets. Their answers were that the appraisals were aimed at giving positive encouragement and that actually, setting him a target at the end of 2019 to achieve 98% of KPIs indicated that he had not been hitting his targets at the desired level.

47.4 For teamwork, Mr Czege scored 7. His argument as set out in his claim form, was that he was a lone worker and therefore his teamwork abilities could not be assessed. The clue probably lies in the fact that he takes such a position. He acknowledged in evidence that he preferred to and chose to work alone. He also acknowledged in evidence that he was not prepared to do overtime when his colleagues were away ill or on leave. He said he refused to do overtime because the respondent would not pay an enhanced rate. He did not attend the weekly Zoom meetings during lockdown,

except the one at which he was disruptive. The respondent also points to his untidiness, which impacted on his work colleagues.

47.5 Finally, Mr Czege scored 10 for aptitude. He makes no complaint about this in his claim form and did not mention it when I was identifying the issues at the outset. The respondent points to the training record which demonstrates his lack of progress in terms of achieving any level of skill on some operations and his limited achievement on others.

48. On 23 June 2020, Mr Czege was invited to a Zoom meeting with Mr Tennent on 24 June, he did not attend. The Production Manager, Mr Biss, therefore spoke to him on 24 June and explained to him that he had been selected for redundancy. This was subsequently confirmed to him in a letter dated 30 June 2020, which appears at page 66. It confirms that he will receive 4 weeks' notice and that his last day of employment will be 31 July. He was informed of his right to appeal.

49. In response, Mr Czege wrote to protest that his selection for redundancy was not fair. In reply, the respondent wrote to him on 8 July setting out the scores he was given. There was no further correspondence between the parties.

50. Five people in total were made redundant. The person referred to as Paulina who worked in the office was transferred to the factory and all five redundancies therefore came from the factory floor. Paulina had joined the respondent in April 2018 and initially worked in the factory, until November 2019. She transferred to the office to fill a vacancy at that time. I accept the evidence of Ms Harrison that in the factory she had developed many skills, she was a versatile worker, the scores attributed to her in the selection exercise were such that she was retained, upon being transferred to the factory.

51. There was some suggestion from Mr Czege that new staff had been employed. Mr Tennant and Ms Harrison were unable to understand to whom Mr Czege was referring. Mr Czege had not been able to assist, other than to say that from his new place of work, he had been able to observe coming and goings at the respondent's premises and that he had observed new people attending work three or four months after he had been made redundant. Ms Harrison speculated that he might have been referring to somebody called Jbriela Lorens, who was on a zero hours contract, as was the person the claimant referred to as Matthew. As Ms Harrison explained, when work picked up after the initial lockdown, when there was specific work to be done, the zero hours contractors were called in to undertake specific tasks and paid on a piecework basis, until those tasks were completed.

Conclusions

52. As I have said, it is not for me to analyse in detail the scoring attributed to the claimant or his colleagues and decide what I would have done.

53. I must assess whether genuine consideration was given to the pool for selection, whether fair and objective criteria were, insofar as possible, chosen and fairly and objectively applied.

54. The pool for selection was the entire workforce with the exception of the directors and the managers. Given the circumstances faced by the respondent, I am satisfied that Mr Tennent and Ms Harrison genuinely considered from whom selection should be made. The decision to include the entire workforce is fair.

55. The selection criteria were entirely sensible and contained a blend of the objective and the subjective to a degree which is within the range of what a reasonable employer would chose to do.

56. It may have been better if the respondent had produced an agreed method to be adopted by the four assessors in arriving at their scores. That said, I am satisfied that all four assessors were left to their own devices to come up with their own scores for each of the 23 members of the workforce and that any variation in the approach to scoring by any one particular assessor would impact on each of the 23 employees in the same way. Anonymously combining scores of the four assessors to reach a total on the basis of which selection would be made, is a method which should minimise the scope for individual fluctuations to the disadvantage of any one employee. Having regard to the evidence that I have seen and the explanations which I have been given for the scoring attributed to Mr Czege, I am satisfied that the criteria were fairly applied. There is nothing in the scoring which suggests to me any element of bad faith, obvious error or overt sign of unfairness.

57. Mr Czege and his fellow employees were warned in good time about the potential redundancy. They were consulted at an early stage, before the scoring was undertaken. Mr Czege chose not to avail himself of the opportunity to discuss the proposals. The coronavirus crisis gave rise to a situation where it was within the range of reasonable responses of the reasonable employer not to hold personal one to one meetings one might otherwise ordinarily have expected in a redundancy exercise. In my judgment, the procedure adopted by the respondent was within the range of procedures which might be adopted by a reasonable employer.

58. Genuine consideration was given to whether there was any alternative work that either Mr Czege or the other 4 who were dismissed, might have been given.

59. Mr Czege did not dispute that it was a genuine redundancy situation. I accept that the individual referred to as Matthew was on a zero hours

contract on piece rates, that he was not called in to work until some months after the redundancy exercise, in order to undertake specific tasks as a result of work which had come in and needed doing.

60. For these reasons I find that the dismissal was fair and Mr Czege's claim of unfair dismissal is dismissed.

Employment Judge M Warren

Date: 27 October 2021

Sent to the parties on:

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For the Tribunal Office