EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Maxwell**

Respondent: **Capacity2Learn Ltd**

On: **7 October 2021**
9 November 2021 (in Chambers)

Before: **Employment Judge Ahmed (sitting alone)**

At: **Leicester**

Representation
Claimant: Mr Max Gordon of Counsel
Respondent: Miss Helen Owen, Consultant

RESERVED JUDGMENT

The Claimant was unfairly dismissed. The issue of remedy is adjourned to be listed on a date to be fixed.

REASONS

1. In these proceedings the Claimant brings a complaint of unfair dismissal only.

2. This case was listed for a hearing with a time estimate of one day which unfortunately proved inadequate. Although the oral evidence was completed there was insufficient time for submissions, deliberations or the delivery of the decision. The parties agreed to submit written representations and for the decision to be reserved on a date to be fixed. I am grateful to both parties' representatives for their detailed and helpful written submissions received since the oral evidence concluded on 7 October and which I have taken into account in arriving at my decision.

3. The facts of the case are relatively straightforward and unless otherwise stated are not in dispute. The Claimant was employed by the Respondent as an ICT Engineer from 1 August 2014 until his dismissal ostensibly by reason of redundancy on 13 January 2021.

4. The Respondent is a relatively small employer and at the relevant time had only 4 employees, including the Claimant. The sole Director is Ms Carys Owen who was the only witness to give evidence on behalf of the Respondent at the hearing. Given the size of the business it does not have an internal HR function. It outsources its HR issues to an external consultancy. The main area of their work is to provide IT support on an annual contract basis to local Primary schools. This mainly involves on-site Technical Support from a named engineer. The Engineer is allocated to specific schools to deal with IT issues and to support the relevant IT infrastructure.

5. As with many other businesses the Respondent was significantly and detrimentally affected by the COVID-19 pandemic. Shortly after the outbreak it found that project work ceased significantly when schools decided to direct funds to higher priority areas. The Respondent identified a need to save approximately £31,000 in the financial year in order for it to keep trading.

6. At the relevant time the 4 employees were: Mr Rob Kettle, a Senior Technical Engineer responsible for the day to day running of the business and effectively the Claimant's line manager, an Apprentice Engineer (who has been disregarded for the purposes of the redundancy selection pool) and two ICT Engineers, one of which was the Claimant.

7. Following an assessment of the business going forward Ms Owen concluded that the business could potentially manage with only one ICT Engineer and therefore identified a need for one redundancy, being one of the two ICT Engineers. She decided to first ask both the Engineers if they wished to volunteer for redundancy. Neither the Claimant nor his colleague wished to do so. Ms Owen therefore decided to commence a formal redundancy process with the assistance of advice from the HR consultancy.

8. Ms Owen held meetings with the Claimant and his colleague on 27 October 2020. It is agreed that this amounted to a consultation meeting though there is a dispute as to what was discussed. Notes of the meeting appear in the bundle. At the hearing it was conceded that, contrary to the notes, the proposed scoring matrix was not provided to the Claimant. It is agreed however that the Claimant was asked to offer his input as to what should be included in the proposed criteria. The Claimant made four suggestions - client feedback, attendance, length of service and 'having one's own vehicle to transport and take equipment to schools'.

9. The selection criteria that was ultimately chosen included client feedback (though it was called 'customer feedback') and attendance as well as a range of other matters under various broad headings. The Respondent decided against inclusion of length of service. The broad headings were: (1) planning collaborating and proactivity (2) operational management (3) technical skills (4) personal skills and attributes (5) drive and motivation, (6) adaptability (7) customer feedback and (8) attendance/absence. Each broad heading set out a 'marking scheme' on whether the candidate should be awarded anything from 2 to 10 points. There is then a column for comments on why the particular score has been given. It is not clear whether the final version of the selection criteria was wholly the work of Ms Owen or that of the HR Consultancy. Marking of the criteria was undertaken by Ms Owen and Mr Kettle.

10. There was then a further meeting between the Claimant and Ms Owen on 6 November 2020. There is a dispute as to whether that amounted to a consultation meeting.

11. Mr Kettle gave the Claimant 34 points and Ms Owen 38 . In fact both of them marked the Claimant exactly the same save that on 'customer feedback' Mr Kettle gave the Claimant 2 points and Ms Owen 6. The average score for the Claimant was therefore 36. The scores of the Claimant's colleague have not been provided but his average was 53.

12. In her evidence Ms Owen said that the selection criteria was chosen to reflect the changing nature of the work and how she felt the retained employee could adapt. She went on to say that following discussions with Mr Kettle she agreed that the Claimant had basic technical capability for the majority of the low-level support required by schools but that he often needed help to do anything beyond that. Mr Kettle felt that it was difficult to introduce new technologies into schools with the Claimant. They both concluded that whilst the Claimant had 'ticked along at a satisfactory level of service to schools in the past, the future need for flexibility, adaptability and self-reliance in the new normal and ongoing pandemic was critical'. The Claimant did not appear to meet such a challenge

13. At the meeting on 6 November Ms Owen gave the Claimant his scores and told him he had scored less than his colleague. There is a dispute as to whether the Claimant was provided with the reasoning as to how those scores were arrived at.

14. On the day prior to the meeting, the Government announced an extension to the furlough scheme to 31 March 2021. Ms Owen suggested to the Claimant that he could be furloughed until March 2021 and he would then be made redundant at the end of that period unless the business increased dramatically or other options became available. A draft agreement was prepared but could not be agreed. There are no issues that arise from that discussion for present proceedings but it explains the delay in the Claimant's final leaving date. It is agreed that the effective date termination of the Claimant's employment was 13 January 2021.

15. In relation to the some of the meetings the Claimant relies on transcripts of recorded meetings he undertook covertly. There was no issue as to the admissibility of those transcripts.

THE ISSUES

16. The issues in this case are agreed as follows:

16.1 Was there reasonable and adequate consultation prior to redundancy?

16.2 Was the claimant provided adequate information to respond?

16.3 Was the selection criteria clear and transparent?

16.4 Was the criteria appropriate and capable of being applied objectively?

16.5 Was the criteria applied fairly?

THE LAW

17. There is no dispute as to the applicable law. The relevant statutory provisions are contained in sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") which are as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(c) is that the employee was redundant,

(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."

18. In **Williams v Compair Maxam Ltd** [1982] 83, the EAT gave the following guidance on redundancy selection cases:

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, 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.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

19. In **Polkey v AE Dayton Services Ltd** (1988) ICR 142, the House of Lords held that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'. With regard to redundancy dismissals, Lord Bridge (at page 364) said:

" The employer will not normally act 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'.

20. As to the meaning of 'consultation', Glidewell LJ sitting in the Divisional Court in **R v British Coal Corporation ex-parte Price** (1994) IRLR 72, said proper consultation means:

(a) consultation whilst the proposals are still at a formative stage,

(b) adequate information upon which the employees can respond,

(c) adequate time in which to respond,

(d) a conscientious consideration of the response to consultation.

21. In the case of **British Aerospace plc v Green** [1995] IRLR 433, the Court of Appeal concluded that in general an employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him.

22. In **Eaton Ltd v King** (1995) IRLR 75, the EAT made it clear that it is sufficient that the employer shows that it had set up a good system of selection, that it was fairly administered and that ordinarily there was no need for the employer to justify the assessments on which the selection of redundancy was based.

23. In **Pinewood Repro Ltd t/a County Print v Page** (2011) ICR 508, the EAT underlined the importance of providing an employee with adequate information in order to give him or her the opportunity to challenge a selection for redundancy. The EAT however fell short of saying that an explanation or provision of reasoning will always lead to a finding of unfair dismissal in redundancy but did add (per HH Judge Ansell at paragraph 46) that:

"It may well be that it is too broad a principle for the Tribunal to set out as they did that it is necessary for an employer to provide an explanation of why an individual has received the scores that he has. If those scores were to do with issues such as attendance, timekeeping, conduct, productivity, further explanation may not be necessary. It is, in our view, for a Tribunal to decide whether an employee has been given a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects and with the consultor thereafter considering those views properly and genuinely and that may well include being given sufficient information to be able to challenge the scores given to him in the completion of a redundancy exercise. In the modern climate much of this information would hopefully have been available to an employee via a previous appraisal process."

CONCLUSIONS

24. I will deal firstly with the matter of the transcribed notes of the covertly recorded meetings. I derive little or no assistance from them and in themselves they are not conclusive or helpful on any of the disputed matters. There are significant gaps in the recordings which seriously undermines the accuracy and totality of the record.

25. It is agreed that the principal reason for dismissal was 'redundancy', which is a potentially fair reason for dismissal under section 98(2) ERA 1996.

26. The Claimant's argument set out in his witness statement that he was not offered or considered for suitable alternative employment is (realistically) no longer pursued.

27. In coming to my decision I have been careful not to substitute my reasons for that of the employer. In particular I have been careful not to substitute any scores given by the Respondent in the marking exercise.

28. The two main areas on which the Claimant relies in support of his argument that he was unfairly dismissed are firstly, the alleged failure to properly consult and secondly, the application as well as the content of the selection criteria and process.

Consultation

29. I am satisfied that there was only one consultation meeting and that took place on 27 October 2020. It occurred at a time when the proposal of redundancy was in the formative stage and no decision had yet been made on the matters to be included in the selection criteria. The claimant was offered the opportunity to propose ideas for inclusion in the selection criteria and provided input. His suggestion of 'client feedback' was accepted though it appears to have been overlaid with additional sub-elements on which he did not have any say. His suggestion of 'attendance' was also accepted. His suggestion of length of service was not agreed on the grounds that it could potentially amount to age discrimination. His suggestion of 'own vehicle and transport to take equipment to schools' was correctly rejected as the claimant knew that his colleague did not have his own vehicle and therefore this would have benefited him directly rather than being a genuine selection criterion.

30. On the evidence I am satisfied that the Claimant was not provided with details of the rest of the selection criteria including the all-important sub-paragraphs or descriptors of the main headings nor was he consulted in relation to them. The Respondent was still in the process of formulating these as at 27 October and there is no other meeting where the final version was discussed, explained or agreed.

31. I am also satisfied that the meeting on 6 November was *not* a consultation meeting. It was not undertaken with a view to consulting with the Claimant but to communicate the scores. Things were no longer at a formative stage. In fact, they were very much at an end. I therefore accept Mr Gordon's submission that the Claimant did not have an opportunity to fully understand the matters on which he was being consulted as he was never told the full version of the selection criteria before a final decision was made.

32. I am also satisfied that the Respondent did not go through the scores with the Claimant or the reasoning as to how they were arrived at. I accept the Claimant's evidence that he asked to see how he had 'failed'. If the Respondent had taken the Claimant through the scores he would know why he had failed and would not need to ask that question. There was therefore a failure to engage in meaningful consultation. In this case there is no reason why an explanation of the reasoning as to how the scores had been reached could not have been given to the Claimant. The Respondent does not argue that there was no such need but rather

it did so. On the evidence I find they did not. The notes simply say ‘run through scores’. If the reasoning had been given it is likely the notes would have been much more detailed on the subject and the Claimant is likely to have commented on them.

Selection criteria

33. Whilst the Respondent took on board some of the suggestions of the Claimant for the selection criteria, the vast majority of the criteria were the product of the Respondent’s own thinking or of those advising them. In the end the final product contained very little input from the Claimant.

34. All of the criteria with the exception of attendance were entirely subjective and applied without reference to any independent evidence or material. Whilst the commercial reality may be that selection criteria will always contain some subjective elements to a greater or lesser degree, all of the criteria in this case (save for attendance) were based on the unchallengeable opinion of the marker rather by reference to any evidence such as performance records, training documents, appraisals etc.

35. Most troubling of all perhaps is that the marking scheme appeared largely as an assessment of past performance, capability and previous conduct issues. Ms Owen refers to the Claimant’s ‘basic technical ability acceptable for low-level support but for anything more complicated the Claimant would need to refer to Mr Kettle’. That may be true but in the column headed ‘evidence/supporting comments’ there is no objective evidence that could verify that. The whole analysis is redolent of a dismissal for performance, capability and past conduct issues. In my judgment an employer would not be acting reasonably for the purposes of section 98(4) ERA 1996 if it uses the guise of a selection exercise to weed out what it considers a poor performing employee with past performance and conduct issues and that is effectively what the Respondent was doing.

36. I am also satisfied that there is valid criticism in Mr Gordon’s submission that the criteria were inherently vague and unclear. Even Ms Owen appears at times to have misunderstood how they should be applied. She accepted that at in some instances her scores had been influenced by considerations outside the strict ambit of the selection criteria particularly in relation to ‘Personal Skills and Attributes’ and ‘Drive and Motivation’. The Claimant was marked down for ‘Technical Skills’ because he was perceived to be against using MS Teams but as Ms Owen conceded the Claimant’s reluctance did not fit the criteria of Technical Skills. There was no suggestion that the Claimant could not use MS Teams (he had extensive knowledge of its use) only that he was against using it for his own personal reasons. There were several instances where Ms Owen conceded that she had gone outside the strict parameters of the criteria in her scoring exercise.

37. Thus, I conclude that the Claimant was not marked against the criteria as properly understood or applied appropriately. As such the decision to dismiss for redundancy was unfair having regard to the provisions of section 98(4) ERA 1996.

Polkey

38. Although there are some written submissions in relation to *Polkey*, it seems to me that this aspect requires further oral evidence before determination. The parties should therefore be prepared to deal with this, and all other remedy issues, at a hearing which shall be fixed in due course with a time estimate of one day.

Employment Judge Ahmed

Date: 19 November 2021