



# EMPLOYMENT TRIBUNALS

**Claimant:** Gordon Sackett

**Respondent:** ISS Mediclean Ltd t/a ISS Facility Services

**Heard at:** Exeter (video hearing) **On:** 01 & 02 November 2021

**Before:** Employment Judge Housego

## Representation

Claimant: In person

Respondent: Stephen Butler of Counsel

## JUDGMENT

1. The name of the Respondent is amended as above.
2. Claimant was unfairly dismissed by the Respondent.
3. The Respondent is ordered to pay to the Claimant the sum of £2,554.34.

## REASONS

### Summary

1. Mr Sackett was dismissed. The Respondent says this was a fair redundancy dismissal. The Claimant says it was no such thing, and was just a retitling of his job, at a similar rate of pay, with a place he used to be responsible for added back in. The Respondent says that it was a much higher role and required capabilities the Claimant did not have. The Claimant says there is scant evidence of that.
2. I decided that the Mr Sackett was unfairly dismissed by the Respondent, because he was not redundant as claimed.
3. I decided that Mr Sackett had shown loss limited to the period between leaving the Respondent's employment and starting a new job 7 weeks later.

4. I delivered an extempore judgment and written reasons were requested by the Respondent and so this judgment is prepared.

### Evidence

5. I heard oral evidence from Anthony Murphy, who ran a company reorganisation and dismissed the Claimant, and from David Brooks, a manager at a similar level to Anthony Murphy, who dismissed the Claimant's appeal. I heard oral evidence from the Claimant. There was an agreed bundle of documents of 220 pages.

### Law

6. The reason put forward is redundancy, which is a potentially fair reason for dismissal<sup>1</sup>. Was that the reason? Was the situation within the statutory definition of redundancy<sup>2</sup>? Was the dismissal procedurally fair<sup>3</sup>? If not, what were the chances of dismissal if there was a fair procedure<sup>4</sup>? These questions require findings of fact, and as the Respondent dismissed the Claimant the burden of proving those facts lies on them, and the standard of proof is the balance of probabilities (more likely than not).
7. If the reason was redundancy, the issue is whether it was fair, or not. The starting point for the issue of fairness is the words of Section 98 (4) of the Employment Rights Act 1996 ("the Act")<sup>5</sup>.
- Was there adequate consultation?
  - Were there alternatives to dismissal (such as voluntary redundancy by others, part time working, alternative employment)?
  - Was the choice of a pool for selection reasonable?
  - What were the criteria for selection, and were they fair?
  - Was the Claimant properly assessed against those criteria?
8. There is no burden of proof in deciding the issue of fairness, for it is an assessment of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.
9. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act.

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<sup>1</sup> S98(2) of the Employment Rights Act

<sup>2</sup> S139 of the Employment Rights Act 1996:

(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.

<sup>3</sup> Sainsburys Supermarkets Ltd. v Hitt [2002] EWCA Civ 1588

<sup>4</sup> Polkey v AE Dayton Services Ltd [1987] UKHL 8

<sup>5</sup> "... 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"

10. The compensatory award is dealt with in Section 123 of the Act<sup>6</sup>.
11. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (“the ACAS Code”). There is provision for increase in compensation of up to 25% if the Acas Code is not followed by an employer which unfairly dismisses an employee.

### The Hearing

12. Mr Sackett had not prepared for the hearing. He had not prepared a witness statement. He had received but not complied with a case management order of 19 March 2021 requiring him to send in detail of what he was asking the Tribunal to order, to provide to the Respondent any documents he relied on, and to set out, with evidence, what he had done to get a new job. It also required him to prepare a written witness statement.
13. The Respondent’s solicitor had written to him by email on:
- 26 August 2021, saying that he had not provided any documents, so they would prepare the bundle of documents without input from him. It said there was no schedule of loss and asked him for one. It asked for evidence of attempts to mitigate loss.
  - 03 September 2021 asking for a response to the last email.
  - 10 September 2021 pointing out that he had not replied to either email and saying that they would be pointing out in this hearing that he had failed to comply with case management orders, and offering him assistance in case preparation.
  - 23 September 2021, saying that he still had not responded and that the hearing was listed for 01 and 02 November 2021. It enclosed the bundle of documents and an index to it. It said that a strike out of the claim would be requested for failure to comply with case management orders, and on the basis that the claim was not actively being pursued.
14. Mr Sackett then responded on 26 September 2021. He said he had sent documentation to the Tribunal in November 2020. He said his loss was:

3 weeks work lost =£2054.34  
7 months spent job seeking since notification of being put at risk £20,771.66  
Loss of statutory rights £500  
Total £23,326

He said he was bringing no witnesses.

15. On 27 September 2021 the Respondent’s solicitor replied to ask for copies

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<sup>6</sup> S123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

of any documents sent to the Tribunal in November 2020. He was asked:

*“Have you been able to find alternative employment since leaving ISS? If not, do you have evidence that you have been applying for other jobs? Please can you provide evidence of any job application / interview invites?”*

16. On 01 October 2021 Mr Sackett sent a blank email to the solicitor attaching his ET1, but nothing else.
17. In the hearing Mr Sackett accepted that he had failed to devote attention to his claim, and apologised for his failure to prepare for the hearing properly.
18. Having concluded the evidence on 01 November 2021 the hearing was adjourned for submissions at the start of 02 November 2021. He said in his evidence that he had obtained a fixed term contract followed by permanent employment, both at lower salaries and so had ongoing loss. I indicated that Mr Sackett would, if successful, need to provide detail of the loss he said he had suffered, with documentation in support (such as letters of offer, contracts, and P60s and P45s), and make application for these documents to be admitted late. Mr Sackett emailed me and Counsel for the Respondent, without attaching any documents, on Monday 01 November 2021 at 18:23 to set out a revised schedule of loss:

In view of the information made available to me today, I would like to adjust my claim to £10,000 based on the following calculation

1. Monthly gross with ISS £2967.38
2. Monthly gross with NHS Property Services £2500 for 7 months
3. Monthly gross with Boden Facilities £2645.83 for 8 months

Therefore

loss of earnings during this period £5844.06

loss of statutory rights £500

3 weeks work lost £2054.34

Stress, ill health and inconvenience £1600.

19. Counsel provided written submissions to which he spoke. The written submissions can be read by a higher Court if required, with my typed record of proceedings in which I recorded the oral submissions. It was either a redundancy or a fair *“some other substantial reason”* dismissal on a business reorganisation. Mr Sackett’s role had been removed and the new role was at a higher level with different financial and client engagement requirements. There was no unfairness in the procedure. It was not for the Tribunal to substitute its own view for that of the Respondent. It mattered not whether it was a sound business decision or not if it was a genuine business decision. If there was any unfairness it was inevitable that Mr Sackett would have been dismissed at the same time or soon thereafter. Mr Sackett reiterated his point that his job had been retitled but not really changed.
20. After finding for the Claimant on the substance of his claim, I decided that

the compensatory award would be limited to the loss of earnings until he found new employment, plus the conventional figure for loss of statutory industrial rights. While a litigant in person is accorded some latitude in the way s/he presents a case, that does not extend to ignoring clear case management orders, failing to respond to requests from the Respondent for information and document the claimant should provide, and then seeking to revise everything to do with a schedule of loss at the start of day 2 of a 2 day case, and then with no supporting documentation. I decided that Mr Sackett had proved no loss save during the period when he had no employment. The Respondent did not challenge the arithmetic.

### Findings of fact

21. The Respondent is a facilities management company. Mr Sackett had worked for Carillion since 2013. For all that time he was facilities manager for Carillion for the Land Registry in Plymouth and other sites. He was manager of the Weymouth Land Registry as well until March 2018. (Whether before or after the Respondent took over the contract is not known to me. He was responsible for delivering the service within budget. He interfaced with the clients. He had line management responsibility for those delivering the service to the client – these were the people he managed.
22. Carillion collapsed into administration. All its employees were dismissed as redundant. The contracts were re-awarded and on 08 March 2018 the Respondent obtained the contract on which Mr Sackett was employed. This was not treated as a TUPE transfer, even though Mr Murphy's witness statement states "*He transferred to ISS from Carillion (the previous provider of the services) on 5 March 2018*". Mr Sackett agrees this was the case. Whether this is correct or not is not part of this claim. There was little or no information from Carillion about those who were working on the contracts the Respondent acquired, including Mr Sackett. In particular, when he asked for a job description the Respondent was not able to provide one. Mr Sackett was paid £35,600 a year. I omitted to enquire (and it was not in the evidence) whether this was the same salary as when with Carillion, or a salary offered by the Respondent.
23. It is, as Mr Sackett pointed out, somewhat surprising that on joining the Respondent Mr Sackett was not issued with a job description alongside a contract, and that it appears that there is no generic job description for a facilities manager with the Respondent.
24. The Respondent had acquired other contracts. Mr Murphy was given the task of restructuring these contracts. It was an onerous task. He split the country into north and south. He reorganised the London area where there was overlap. He decided that he would have Regional Facilities Managers. He decided that they would have a greater role in developing a budget as well as delivering the service within a budget. He decided that these managers would be asked to try to upsell other services and to try to lead the relationship with the client rather than react to client request complaint or demand. I do not doubt that Mr Murphy wanted Regional Facilities Managers to approach the role in a more proactive way than Mr Sackett had been asked to perform his role.

25. Mr Sackett had a first consultation meeting on 13 February 2020. It was with Mr Murphy and lasted half an hour. Mr Murphy told Mr Sackett that his role was at risk of redundancy (it was removed from the organogram) but that there was a role for which he could apply, that of Regional Facilities Manager South West. There would be a selection process. He would be competing with other applicants including external applicants. The salary for that role depended on the applicant, but was in the range £35,000 - £40,000. The meeting, as with others, was short. Mr Sackett is a man of few words, and I do not attribute anything negative about the shortness of the meetings for that reason.
26. On 18 February 2020 Mr Sackett asked for both job descriptions. He was provided with the new job description but not (as set out above) with one for his existing role. This new job description stated *“There is a requirement for ISS Facilities Managers to manage specific sites across a specific geographic region as dictated by the contract. Initially these will be in Weymouth, Exeter and Plymouth locations.”* The Job Purpose was stated as *“As the Facilities Manager for specific sites you will be responsible for ensuring that your team and our supply partners deliver a safe compliant services (sic) on time and to budget with strong attention to detail, while maintaining excellent working relationships with the Client, other ISS teams and building users.”* The key responsibilities, service delivery, team management and general sections of the job description do not major on the two matters stressed by Mr Murphy, of compiling as well as delivering budgets, and leading the client relationship rather than being responsive.
27. Having received this and read it, on 21 February 2020 Mr Sackett emailed Mr Murphy *“Do you know that this was my job until March when Terry Ward was given Weymouth?”* He did not receive a reply to this, and Mr Murphy did not engage with the point.
28. On 06 March 2020 Mr Murphy was provided with a report on Mr Sackett. It was by Korn Ferry and was a psychometric testing report of many pages. There is a section headed *“Recommendations”* with a box headed *“overall summary”* but it was left blank. It appears that the report sets out people’s tendencies leaving the reader to draw his or her own conclusions.
29. The end of March 2020 brought lockdown 1, and I do not underestimate the difficulties this caused Mr Murphy. However by 01 April 2020 he had made some decisions and issued an update. It records that for the role of *“Regional Manager South Wales and South West* there had been active recruitment and he was at the final stages with several candidates. He thanked someone for interim management of this region for the last 12 months. This was the role above Mr Sackett’s.
30. There was an interview on 15 April 2020 (virtually) and Mr Sackett was told the outcome would be based on the situational interview and on the psychometric test outcome.
31. On Monday 03 May 2020 Mr Murphy told Mr Sackett he would be dismissed by reason of redundancy, and that there would be a third meeting about notice and to discuss the testing outcome. Mr Sackett then had a lengthy absence from work from 05 May 2020 work with stress. He was still

off on 15 June 2020.

32. Mr Murphy issued an update on 15 May 2020. Chrissy Davies was appointed as Regional Manager South Wales and South West. That is the level above Mr Sackett. This also said that Harry Harwood would be Facilities Manager South West, who would join at 29 June 2020. He had led facilities management at a main hospital in the southwest. He was paid £40,000 a year. That was, Mr Murphy said, a result of negotiation between him and the applicant.
33. It appears that the designation of Regional Manager for the job Mr Sackett was going for was dropped after Mr Sackett was dismissed, and Chrissy Davies was designated Regional Manager.
34. On 21 June 2021 Mr Sackett emailed Mr Murphy to say that he was fit to return to work but that he was aware that someone had been recruited into his role and asked what he should be doing on return. He did not return.
35. On 30 June 2020 Mr Murphy asked Mr Sackett to a 2<sup>nd</sup> consultation meeting, to be held on 03 July 2020, virtually. On the same day he was sent another email asking him to a final consultation meeting on the same day, following 1<sup>st</sup> and 2<sup>nd</sup> meetings. It appears that the second email was simply an error, but it is confused because the minutes of the meeting of 03 July 2020 refer to it as a 2<sup>nd</sup> meeting, as is stated in the body of the notes. The meeting was 9 minutes, and while Mr Sackett is a man of few words, it is apparent that there was no consideration of alternatives to a dismissal. Mr Murphy sent a letter on 06 July 2020 saying that he hoped to have consultation ended by mid- July 2020 *“at which time I will need to make a final decision about the status of your role”*. However, someone else was appointed to the role effective 29 June 2020.
36. Also on 06 July 2020 Mr Murphy invited Mr Sackett to his 3<sup>rd</sup> meeting, on 09 July 2020, again virtually, and that duly took place.
37. On 13 July 2020 Mr Murphy wrote to say that Mr Sackett’s employment would end on 07 August 2020 by reason of redundancy, no suitable alternative employment having been identified.
38. No evidence was presented to me, orally or documentary, of what effort was made to identify an alternative employment for Mr Sackett. I conclude that these were empty words. I find, for want of any evidence of it, that no effort was made to identify suitable alternative employment for Mr Sackett.
39. On 17 July 2020 Mr Sackett appealed. He pointed out that the only variation to the role was the reintroduction of the Weymouth Land Registry, and that what the business did, where it did it, and how it was done had not changed. He pointed out (correctly) that no other facilities manager in NW, NE or Midlands was put at risk, and that he was the only facilities manager engaged in Land Registry work who was placed at risk. He had been removed for no legitimate reason and was not redundant.
40. Mr Murphy arranged for Mr Brooks to take the appeal. He is a manager at a similar level to Mr Murphy, in a different part of the Respondent’s business.

They take one another's appeals, with the third person in the Respondent at a similar level also taking, and giving out, appeals. While this might appear a little "cosy", I find it reasonable, for at this level of management there are not many options.

41. On 03 August 2020 Mr Murphy emailed Mr Brooks to ask him to call him, about Mr Sackett. He wrote a briefing note for Mr Brooks dated 03 August 2020 and emailed it to Mr Brooks on 04 August 2020. It was not sent to Mr Sackett, who saw it only as the result of a subject access request. It is detailed and goes through the whole of the interactions of Mr Murphy and Mr Sackett, including some negative things about interview and about how he had been unsuccessful for a new role, which was said to be different to the role he had before.
42. The appeal was on 10 August 2020. Mr Brooks appeal was short, as Mr Sackett said that he had put everything in writing. Mr Sackett made clear his view that the role had just been retitled. He pointed out that the buildings being looked after were the same plus adding back the Weymouth building he had in the past. It was, he said, just the same as he was doing with Carillion. It was no less and no more than simply replacing him with someone else. Mr Brooks said that he needed to make some more enquiries as he needed "*proper facts*". Mr Sackett said that other facilities managers had not been put at risk, and Mr Brooks said he would look at this too.
43. Mr Brooks then had a detailed discussion with Mr Murphy, who persuaded Mr Brooks to his point of view. I have no doubt but that Mr Brooks was trying to be fair: he was an impressive witness, but what the human resources person who was taking the minutes and advising was doing is unclear. It is - to anyone who knows the first thing about employment law - clear that after a hearing the decision maker does not go and make his or her own investigation especially by speaking to the decision maker without the person affected having any opportunity to challenge what is said. Mr Brooks points out that this was not exactly in secret, because he told Mr Sackett he was going to try to find out some more, but what was said was unknown to Mr Sackett, and it did influence Mr Brooks, who was candid and honest and said so.
44. That procedure was unfair, but of course it, and the briefing note, might have made no difference<sup>7</sup>. A sound decision maker can be misled by the information provided to him/her, and that renders the decision substantively unfair<sup>8</sup>. That was what happened here. Mr Brooks deserves credit for his observation to me that plainly there was a training need identified for him.
45. Mr Brooks held an outcome meeting on 26 August 2020 and said that he was satisfied that there was a difference between the role Mr Sackett held and the role of the new person. The client requirement was different. Mr Sackett made the incisive comment that Mr Brooks had said he was content that there was a difference but had not said why it was so. The reason, of course, was that he had taken Mr Murphy's word for it. After further discussion in which Mr Brooks mentioned Weymouth, Mr Sackett asked if the

<sup>7</sup> *Polkey v A E Dayton Services Ltd* [1987] UKHL 8

<sup>8</sup> *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55



only difference Mr Brooks could find was the addition of the Weymouth site. Mr Brooks said geographically, yes, but that the manager required “*certain characteristics*” possessed by the new appointee. He did not elaborate. He indicated that sychometric testing had shown Mr Sackett not to possess them, and he had not been successful in his application.

46. The outcome letter of 04 September 2020 said that there was a change of portfolio by the addition of the Weymouth site. It said that the position “*required a different skill set*” to the role he had held. Other Facilities Managers were placed at risk. He did not say whether this was the ones Mr Sackett had referred to: there was duplication of role in London, but that was not a parallel situation.

### Conclusions

47. The Claimant’s role was not changed in any fundamental way. The addition of the Weymouth Land Registry was just to add back a site Mr Sackett had looked after before. This was not challenged in the hearing and there is nothing in the documents to contradict it. Mr Sackett has always said this. It is, on the balance of probabilities, true. There is, then, no geographic difference. A site in Exeter was added some time before Mr Sackett was placed at risk of redundancy. It is part of the role of a facilities manager for a contractor that sites can come and go. The geography was unchanged (adding back Weymouth was not a change), and that sense Mr Sackett had always been a regional manager, as he looked after a region. The salary range for the role encompassed Mr Sackett’s salary. That the new person got more was down to his negotiating skills.
48. There was no evidence put before me (other than Mr Murphy’s assertion) that there was now a requirement for budgetary expertise, and an ability to manage a client in a way different to responding to client request. Since this is the claimed justification for dismissing Mr Sackett as redundant, and since the burden of proving this is on the Respondent that is fatal to their case. Evidence from Mr Sackett’s replacement, copies of reports from that person of client interaction, or of budgets he had prepared, or evidence of successful upselling might have shown that there was a real difference. There was no such evidence put before me.
49. I conclude that Mr Murphy did not consider find Mr Sackett someone he wanted to work with in the future management of the Land Registry contract, that Mr Murphy did want a more proactive approach to facilities management, and the large scale reorganisation he was effecting gave him the opportunity to remove Mr Sackett. The lack of any tangible effort to find a role elsewhere is notable, particularly when reviewing Mr Sackett’s cv, which shows that he has worked in disparate parts of the UK and abroad, shows that there was no real wish to retain him in the business. This is a company whose role is facilities management, and which employs (according to the ET3) 36,500 people in the UK. It is hard to see how there was no single suggestion made by management for him to follow up if there was a wish to retain him. The Respondent failed in its duty in this regard also. As *Harvey*<sup>9</sup> puts it: “*In order to act fairly in a redundancy situation, an employer is obliged to look for*

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<sup>9</sup> The authoritative textbook on employment law

*alternative work and satisfy itself that it is not available before dismissing for redundancy.”*

50. I do not find the appeal fair for the reasons given above.
51. Before preparing these full reasons I did not notice the possibility that the person who replaced Mr Sackett (for that is what happened) is entitled just “Facilities Manager” so the point was not discussed and I exclude it from consideration.
52. The dismissal was, in reality, not a redundancy, because the needs of the business for an employee to carry out the work of Mr Sackett did not cease or diminish, and were not expected to do so. Nor was it the result of a business reorganisation. Mr Sackett’s region was the same, the only change being to restore Weymouth to it. It was not reorganised. I reject Mr Murphy’s evidence that because the region was expected to grow that was a substantial difference. That growth was only a possibility, and if it occurred then either Mr Sackett would cope with it, or the regions would have to be varied. It was not suggested that the growth would be of a different sort of work. It would be more of the same.
53. This was in fact a disguised capability dismissal. If Mr Murphy wanted his facilities managers to adapt the way they worked that is merely a change of emphasis. Most jobs change over time, and a change in management focus is not a redundancy situation. It is not a fair dismissal to dismiss a competent person because the employer wishes to replace them with an excellent person, or someone he thinks may do the job differently or better, which is what occurred. There was no suggestion that Mr Sackett was other than competent at his role, over about 8 years.

### **Remedy**

54. This is dealt with earlier in this judgment. There can be no claim for injury to feelings or distress. The claim for 7 months’ pay before dismissal is not comprehensible, because the Respondent paid him for those 7 months. The basic award is extinguished by the redundancy payment. The compensation is limited to the period before Mr Sackett got other employment and a sum for loss of statutory industrial rights.

Employment Judge Housego  
Date: 5 November 2021

Judgment & reasons sent to parties: 30 November 2021

FOR THE TRIBUNAL OFFICE