



Case Number: 3303369/2020

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms S Panesar

and

Respondent

Brookfield Drinks
Limited

Held by CVP on 7 June 2021

Representation

Employment Judge Kurrein

Claimant:

Mr C Kelly, Counsel

Respondent:

Mr G Hine, Consultant

REASONS FOR THE JUDGMENT

sent to the parties on 8 July 2021
provided at the request of the Respondent

Claims and Issues

- 1 On 20 March 2020 the Claimant presented a claim to the tribunal alleging she had been unfairly dismissed by the Respondent. On a date unknown to me the Respondent presented a Response in which it contended that the Claimant had been fairly dismissed for redundancy, alternatively that her dismissal had been for some other substantial reason

Evidence

- 2 I have heard the evidence of the Claimant on her own behalf and of Mr McNally, the effective owner of the Respondent and its associated companies, on its behalf. I have read the documents that I was referred to in a bundle containing about 250 pages and heard the parties' submissions I make the following findings of fact

Findings of Fact

- 3 The Claimant was born on 19 October 1973 and started her employment with the Respondent on the 1st July 2014. She was recruited by the then Finance Director, Miss Ann Wilson, with whom she had worked in the past. Her official job title was Financial Controller.
- 4 On the 10 March 2016 there was a variation in the terms of her employment so that she received a contribution towards her pension of 8% of salary and an annual allowance of £554 for private healthcare.

- 5 The Respondent is one of a number of companies controlled by Mr McNally. In or about 2018 he opened a company in Malta, Brookside Drinks International (“BDI”), to which he later transferred the rights to one of the products distributed by his business known as Kestrel beer.
- 6 On 25 October 2018 the Respondent and BDI Holdings Limited entered into a formal agreement whereby the Respondent was to provide the accounting services to BDI in return for certain management fees. I accepted the Claimant’s evidence that whilst an administrator was appointed to BDI their role was limited to inputting transactions on the accounts software controlled by the Respondent, and that there were many errors in those transactional entries. This resulted in an increased workload for the Claimant.
- 7 In May 2018 two members of the Finance team gave notice, so that the Respondent had to recruit both a financial assistant and a sales ledger assistant.
- 8 The Claimant was told by Mr McNally that those positions should only be filled by part-time staff, rather than the full time positions that were to be vacated by the employees who had given notice. One consequence of that was that when those new staff were recruited there was only a one part-time week for handover. This also increased the Claimant’s workload.
- 9 I accepted the Claimant's evidence that there were considerable difficulties with completing the Respondent’s June accounts due to transactional entries in the accounts by the new staff being in error.
- 10 In June 2019 the then Finance Director was placed on gardening leave and, following negotiations, left the Respondent on 1 August 2019.
- 11 It has been the Claimant’s case, although she has not made a PID claim, that following her informing Mr McNally that the payments being made to the former Finance Director were substantially lower than those to which she was entitled, his attitude towards her changed.
- 12 In August 2019 Mr McNally made contact with the recruitment consultants Michael Page. There was an exchange of emails on the 27 August 2019 in which there was discussion concerning a replacement Finance Director. At that date a potential candidate had been identified, Mr S Coogan, and on the 27 August it was suggested by Michael Page that he would be able to meet Mr McNally the following week
- 13 In fact they met on 10 September 2019 at a hotel in Milton Keynes. Mr McNally accepted that this was a form of interview in that he asked Mr Coogan questions and followed up the answers to assess Mr Coogan's ability to take up the position he had in mind.
- 14 The Respondent's Sales Director, Mr. King, also met Mr Coogan at about this time
- 15 Shortly after this, on 16 September 2019, Mr McNally set out in writing what he described as his “business case” for the appointment of a Director of Finance and the redundancy of the position of Finance Controller

- 16 At that time the Claimant's salary was approximately £65,000. Mr McNally made the point that he wished to create a new role, being a bridge between the Finance Controller and the Finance Director, resulting in a merger of both with the title of Director of Finance. He took the view that the appointee would have to have the skills to help develop a pub division. and would have to be able assist in the investment and growth of that division.
- 17 Mr McNally thought it clear that the business could not justify both Finance Controller and Director of Finance positions and that the role of Director of Finance, with a salary less than that presently enjoyed by the Claimant, should be created and the Claimant made redundant.
- 18 There were further interchanges between Mr McNally and Michael Page on 23 September 2019. Michael Page emailed to say that Mr Coogan's view following the meeting the previous Friday was positive and he was very interested in pursuing the role and hoped that Mr McNally felt the same way. It was also thought that he had got on well with Mr King.
- 19 That was followed by an email of the 2 October 2019 in which Michael Page provided Mr McNally with the address and contact details of Mr Coogan and continued,
- Let me know if you need anything further. I have given Sam the heads up on what we discussed in terms of timings. Feel free to reach out to him directly if you need to update him on anything or need anything further.
- 20 Mr McNally replied later the same day to tell Michael Page that he was speaking to the current incumbent on Monday and hoped to "wrap thing wrap things up" in a couple of weeks.
- 21 On Monday 7 October 2019 the Claimant was called into a meeting by Mr McNally and told that she was at risk of redundancy for reasons that appear below. I preferred her evidence of what took place at this meeting to that given by Mr McNally. When she joined Mr McNally in his office he read out his 'business case' and the letter that was sent to her later that day and she effectively said nothing. She was told she could leave early and did so.
- 22 I did not accept Mr McNally's evidence that in the course of this meeting the Claimant made it clear that she was not willing to work full time or to work for the pay being offered
- 23 A statement of that nature by the Claimant would, in my view, have immediately impacted on a businessman of Mr McNally's experience: it would have been noted because the consequence of the Claimant making such a statement would effectively absolve the Respondent from having to consult with her further.
- 24 If that was really what she said no further meetings would have been necessary, because the Claimant would not have accepted a full time post as Director of Finance. It is also the case that the note made by Mr McNally of that meeting, and the letter he sent the same day, make no mention at all of such an important point. I find on the balance of probabilities, particularly in light of the evidence regarding the next consultation meeting, that such a

statement was not made by the Claimant in the course of this meeting or the next.

25 On 11 October 2019 Mr McNally emailed his advisors, Peninsula, setting out the Claimant's details as to her job title, start date, salary, working hours and date of birth and concluded

“Expected date of redundancy - she will be advised on the 21 October 2019

3 months notice”

26 I accepted the Claimant's evidence that she made a written note of what took place on 14 October when she met Mr McNally again. She took particular care to do so because she considered the note prepared by Mr McNally for the earlier meeting to be less than accurate

27 Once again, Mr McNally alleges that in the course of this meeting the Claimant said that she would not take a full time job and would not work for less pay. The Claimant denies that she said anything of the sort.

28 As before, however, Mr McNally's evidence was not corroborated in any way by the notes he took of the meeting, or in the letter he sent to the Claimant that day recording what took place in the meeting. I make the same observations on that issue as I do in respect of the earlier issue regarding what the Claimant allegedly said.

29 The Claimant was signed off with stress at work following that meeting until 29 October 2019. Mr McNally was aware of that.

30 Against that background I thought it surprising that he then wrote to her on 17 October 2019 to thank her for advising him of her absence, but going on to say that he had not heard from her whether she wished to attend an interview for the Director of Finance role, but if she wanted to do so he would be holding it on the 21st of October at the Respondent's offices.

31 The Claimant replied on 18 October 2019.

Please could you explain why I am being asked to attend an interview for this role when I am, as far as I'm aware, the only potential candidate and it is my role that is at risk of redundancy?

As you know, I have been signed off work sick until 29 October so please also bear this in mind when you're asking me to come into work on 21 October 2019

32 Mr McNally replied later the same day,

This is to advise you that you would still need to attend an interview for the role.

33 On 22 October 2019 Mr McNally wrote to the Claimant to advise her that the redundancy consultation had been concluded. He continued,

As explained to you at the start, and throughout the consultation, the reason for proposing a redundancy is because I am looking to create a new role which is a bridge between the Finance Controller and the previous Finance Director. This would be a merger of both roles and would be called the Director of Finance. This role encompasses a number of tasks and responsibilities from

the previous Finance Director job outline and the current Finance Controller job outline. All ways of avoiding the redundancy and all alternatives have now been considered and explored.

Unfortunately, it has not proved possible to find a solution to the current problem other than to make a compulsory redundancy. Consequently, your employment will therefore terminate by reason of redundancy.

I have tried to contact you regarding this matter by phone. Twice on the 21 October and once on the 22 October, but could not make contact despite asking you to return my calls. I was also contacting you to discuss whether you wanted to attend an interview for the role of Director of Finance. On the basis that you have not responded, I can therefore only assume you are not interested in this role and I will have to look to fill the role from outside the company.

- 34 The letter then went on to deal with the formalities concerning the Claimant's entitlements and her right of appeal. It stated her EDT would be 11 January 2020. She was placed on gardening leave.
- 35 The Claimants was entitled to three months notice, so that her EDT was not until the 22nd of January 2020.
- 36 On 23 October 2019 Mr McNally signed the service agreement for Mr Coogan to be appointed to the role of Director of Finance and it was later agreed that he would start work on 31st January 2020. His salary and other emoluments have not been disclosed. An interim Finance Director was engaged for the intervening period.
- 37 The Claimant appealed by email on 25 October: she had to do so then because she had only been given three days within which to appeal. She set out in detail the grounds of her appeal, she being wholly unaware of Mr Coogan's appointment at that time.
- 38 Although Mr McNally initially indicated that he would hear the appeal it was eventually dealt with, by consent, on paper by the interim Finance Director and was dismissed
- 39 Since her dismissal the Claimant was unemployed for a period until about October 2020 and then gained new employment by which she has fully mitigated any ongoing loss.

Submissions

- 40 I have heard the submissions made on behalf of the parties. There is no need to set them out here

The law

- 41 The law in this case is, in my view, relatively straightforward.
- 42 I deal with the issue of redundancy first, which is defined in section 139 Employment Rights Act 1996:-

139 Redundancy

- (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.

43 The law relating to dismissals for some other substantial reasons is set out in section 98 Employment Rights Act 1996:-

98 General

- (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.

Further Findings and Conclusions

Redundancy

- 44 I regret to say that I was quite unable to follow the submissions made on behalf of the Respondent on the interpretation of this provision.
- 45 In the course of the evidence, and as was plain from the papers, the duties formerly carried out by the Claimant would continue to be carried out for the Respondent, but by a different person. That is also plain from Mr McNally's business case. It expressly states that he is combining the two roles.
- 46 In this case I also bear in mind that the Respondent's accounts team had only recently been reduced by the equivalent of one full time role.
- 47 Against that background I am quite unable to make a finding that the requirements of the Respondent's business for employees to carry out work of a particular kind had or was expected to cease or diminish any further. This was a successful and growing business at the time. The Claimant was then the sole employee within the Respondent responsible for the accounting function: in essence she was being replaced by Mr Coogan.
- 48 I therefore cannot find that the reason for the Claimants dismissal was, as stated at the time and subsequently, 'by reason of redundancy.'

Some other substantial reason

- 49 The Respondent has to satisfy me on the balance of probabilities that this was the principal reason for the dismissal. In its Response it was effectively 'tacked on', almost as an afterthought. This was also true of Mr McNally's evidence,

- which only dealt with this issue in general terms, much of it wholly unsupported by concrete evidence.
- 50 I thought it unfortunate that Mr McNally's 'business case' did not deal with the objective skill set that he required for the role of Director of Finance. There was no comparison of the Claimant's qualifications and experience against that of Mr Coogan. No defined job description for the new role was disclosed. How he expected the Claimant to attend interview without providing one is inexplicable.
- 51 He has not disclosed any evidence of the Respondent being in 'financial jeopardy', which was, in any event, contradicted by the Claimant's evidence and that at Companies House. He did not disclose any financial information. He accepted that his businesses had more than enough cash in hand to repay any bank borrowings.
- 52 His evidence that the Claimant was 'struggling' was undermined by his decision to reduce staff in her department and dismiss the former Finance Director some months earlier. I rejected his evidence, uncorroborated in any way, that the Claimant had declined to work more days or longer hours.
- 53 Mr McNally also placed substantial difficulties in the Claimant's way as to her eligibility for the proposed Director of Finance role:-
- 53.1 by making it a full time role, working longer hours for less pay;
- 53.2 by only informing her of an interview after she had been signed off sick;
- 53.3 inviting her to attend an interview for the role on a date when he knew that she had been signed as unfit to work for reasons of work related stress;
- 53.4 by giving her only three days to appeal his decision.
- 54 In my view these restrictions only corroborate the implication that Mr McNally's true reasons for the process he went through with the Claimant was simply to replace her with Mr Coogan.
- 55 Against the above background I thought Mr McNally's statement,
I had an open mind and I was denied the opportunity of demonstrating this by her not turning up for interview.
to be simply unbelievable.
- 56 I find as a fact that Mr McNally had no intention of doing anything other than dismiss the Claimant from when he first contacted Michael Page.
- 57 In my view that is the only implication that can be drawn from all my above findings and the series of emails between himself and Michael Page. The content of the telephone calls that took place between Mr McNally and Mr Coogan and Michael Page's employee have not been recorded or disclosed, but it is clear there were several.
- 58 However, the very fact that Michael Page were able to give Mr Coogan a 'heads up' implies to me that he has been told of what he could expect to take place in the future.

- 59 On the basis of all my above findings I have concluded that:-
- 59.1 the Respondent has failed to establish, on the balance of probabilities, that the reasons for the Claimant's dismissal was a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held; and
- 59.2 having regard to the provisions of S.98(4) Employment Rights Act 1996 and the decision in Newbound v. Thames Water Utilities Ltd [2015] IRLR 734 the Claimant's dismissal was not fair

Employment Judge Kurrein

Date: 13 August 2021

Sent to the parties and
entered in the Register on:
12 January 2022

For the Tribunal

Notes Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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