



EMPLOYMENT TRIBUNALS

Claimant

Miss E Wright

Respondent

v Astrid Fournel (Fournel Southwold) Ltd

Heard at: Bury St Edmunds

On: 09 & 10 December 2021

Before: Employment Judge KJ Palmer (sitting alone)

Appearances:

For the Claimant: In person.

For the Respondent: Mr J Fournel (Director).

JUDGMENT having been sent to the parties on 19 January 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant presented the claim to this tribunal on 11 February 2021. She was employed by the respondent as a manager between 6 January 2006 and 30 November 2020 when she was dismissed purportedly by reason of redundancy having accepted an offer of voluntary redundancy. The respondent is an established jewellery shop in the popular coastal town of Southwold in Suffolk. They also have a small museum on the premises.
2. The claimant's claims which were set out in her ET1 are homemade. Neither the claimant nor the respondent are represented before this tribunal. After the claim was issued it was not case managed by the tribunal but was simply set down for a Full Merits Hearing. Therefore there is some difficulty in clarifying precisely what those claims are. The claimant ticked the box for unfair dismissal and then refers to a claim arising out of the whistleblowing legislation and a claim for breach of contract. Dealing with the claim for breach of contract, it is clear that the claimant was paid monies in lieu of notice and ostensibly her claims appear to be claims for unfair dismissal and a claim arising out of the whistleblowing legislation.

The unfair dismissal claim

3. Unfair dismissal claims are governed by s.98 of the Employment Rights Act 1996. In a claim for unfair dismissal where the dismissal is admitted it is for the respondent to show what the reason was for the dismissal and that it is a potentially fair reason falling under s.98(2) of the Employment Rights Act.
4. In this case the respondent relies on redundancy as the reason for the dismissal. If the respondent is able to show what the reason was for the dismissal and it is potentially fair. Then under s.98(4) the Tribunal must determine depending on all the circumstances including the size and administrative resources of the employers undertaking whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the employee. In those circumstances we are guided by authority and essentially when we are dealing with redundancy tribunals have to consider a number of other factors. Redundancies often occur and employees often feel that they have been unfairly treated as a result of the redundancy. The principal set down by authorities is that the tribunal will not generally look behind a commercial decision to make redundancies. They may be very bad commercial decisions ultimately and sometimes they are but it is not the tribunal's place to question business decisions which result in redundancy.
5. The test for redundancy is whether the requirement for an individual to carry out the work in the place in which they carry it out has either ceased or diminished and that is a statutory test. When applying that test in tribunals, the tribunal will rarely look behind a commercial decision and will only conclude that a redundancy is not by reason of redundancy if there is surrounding evidence to support the view that the decision was a sham and that there were some other reason for the dismissal outwith the suggested redundancy and in order to come to that conclusion tribunals have to sift the evidence that is before them. It is a difficult process because tribunals have to decide on the basis of the evidence on the balance of probabilities whether they think the reason being given for a dismissal as a redundancy is genuine or whether it is a sham.
6. Turning to the whistleblowing legislation, this is in the Employment Rights Act and is enshrined at s.43. Protection is afforded to an employee who makes a protected disclosure. Protected disclosures are defined in s.43A as a qualifying disclosure as defined by s.43B which is made by a worker in accordance with any of the s.43C to H. S.43B then sets out the qualifying disclosures and these are as follows:-

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.”
7. To qualify a disclosure has to fall within one of those definitions and it then subsequently has to be made to someone who falls under the sections 43C to H.
8. In this case the claimant is relying upon a disclosure she said that she made on 2 November relating to knowledge that had come to her that Jeremy Fournel one of the directors of the Respondent had been convicted for unlawfully downloading child images from the internet and that he was on the sex offenders register as a result. The disclosure she relies upon is a discussion with Astrid Fournel on 2 November where she raised an issue as to whether Jeremy should be in the shop when minors might be attending the shop or even on their own and indeed her own child may also be in the shop and is that something that the respondent should take into account. The disclosure was made to Astrid Fournel and Astrid Fournel for the purposes of s.43C would be the claimant’s employer.
9. If an individual worker or claimant is able to establish that a protected disclosure has been made under s.43A then s.103A of the Employment Rights Act 1996 states as follows:

“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

The claimant’s claim falls into two parts and we will need to deal with those separately. Dealing with the evidence that I had in front of me, essentially what happened took place between a period from June or July of 2020 up to the dismissal on 30 November 2020 and it is that period of time with which this claim is principally concerned.

10. The claimant says that the respondent introduced Jeremy Fournel as a new director, he had previously worked for the respondent but sporadically and the claimant says he was introduced as a new director in July of 2020 and that in doing so a great many of her responsibilities as manager were ceded to Jeremy being the new director and there is some considerable dispute between the parties as to the process that was undergone.

11. The respondent says Jeremy was coming in because Astrid wanted to take a step back from the business, she had been operating as a director, and she wanted to take a step back and that therefore Jeremy was coming in essentially to replace her.
12. What is clear is that there was a significant shift in the role that the claimant was then asked to perform and there were then a series of meetings discussing what the claimant's role going forward would be and there is no doubt that there were some changes in that respect.
13. In evidence I heard much about an incident that occurred on 2 September when the claimant was in the shop and inadvertently the sign was placed to closed and a number of potential customers may or may not have bypassed the shop during a period when it should have been open. Astrid Fournel and Jeremy Fournel were opposite in the Swan Hotel and realised that the shop was not open and then Astrid Fournel confronted the claimant. Recollections vary as to the nature of that confrontation. I heard much evidence about whether Astrid was under the influence of alcohol and the claimant's evidence on that was uncertain because in her evidence before this tribunal she claimed that Astrid was certainly under the influence however she had resiled from that suggestion in a note sent to Jeremy Fournel which was in the bundle before me.
14. I do not think a huge amount turns on the dispute about what took place on 2 September, what is clear is that there was a confrontation and then as a result the claimant became very upset and the claimant then went off sick due to stress and remained off sick for a period of time as a result. That was symptomatic of something of a breakdown in the relationship between the claimant and her employers and this is in some ways supported by a short witness statement that I have in front of me from Parminda Bosley who worked at the shop at the same time. I must stress that she was not here to give evidence and therefore I can add very little weight to what she says however I do accept that there was a poor working atmosphere that had grown up as a result of events that had taken place probably with the introduction of Jeremy Fournel as director and the shifting of the claimant's responsibilities.
15. I also heard that the claimant had applied during the course of the refining of her responsibilities for flexible working and that this had been refused. So essentially going forward there was a poor atmosphere and the claimant was clearly very unhappy with what had happened.
16. Turning first of all then to the incident that took place on 2 November which is the whistleblowing incident that the claimant relies upon. She said that she spoke to Astrid and it was in an area of the shop which was not open to the public and in fact no one was in the shop, a fact that Astrid also confirmed. There is some dispute about actually what took place and where it took place but what is not in dispute is that the issue was raised by the claimant to Mrs Fournel and the claimant made it clear that she felt that it was something that ought to be addressed by the respondent in light of the fact that one of the directors of the business had been convicted of downloading illegal images including those of children and was on the sex offenders register and people were asking questions about what had happened and

the claimant raised this to the respondent in light of the fact that other members of staff had raised the issue and some customers had also raised the issue and she queried whether it was appropriate for Mr Fournel to be serving in the shop when minors may be attending the shop on their own and it was something that she raised. She relies on this as being the reason or the principal reason for her dismissal.

17. What is clear to me is that Mrs Fournel was not happy that this had been raised and regarded it as a private and personal matter and clearly there was some discomfort as a result of that discussion.
18. I am bound to say also that there were a series of meetings between the parties to discuss the claimant's role and also to discuss what happened at the incident on 2 September, one of which was attended by Ms Harris who is an HR Consultant who was engaged on occasion by the respondent to assist with HR matters and there is some dispute about what took place particularly at the final meeting on 14 October and whether there was scheduled to be a further meeting or not. The claimant says that there was and the respondent says that no such discussion took place.
19. On the balance of probabilities I am inclined to believe the claimant's evidence that there had been some discussion about the possibility of another meeting and that due to the possibility of an impending lockdown the respondent indicated that it was not something that they were prepared to consider. Whilst this something that I take into account I do not consider this pivotal in the issues that I have to determine.
20. The key for me in this case is to on the evidence in front of me on the balance of probabilities determine what the reason was for the dismissal, whether it was redundancy or whether the principal reason was something else in which case the unfair dismissal claim would succeed and if that something else was the incident on 2 November and if I determine that that disclosure was a protected disclosure then both the unfair dismissal claim and the whistleblowing claim would succeed. I have to determine what the reason was for the dismissal.
21. Prior to doing that I should first determine whether I consider that the disclosure made on 2 November was a protected disclosure under s.43A. Having analysed the law and the nature of that disclosure I conclude that it was a protected disclosure. The nature of the disclosure was such that it falls under s.43B and therefore was a qualifying disclosure capable of protection. In my judgment it was a disclosure falling under 43B(1)(d) and that therefore it was capable of protection.
22. I note in the evidence before me produced by the respondent that much is made of the claimant's failure to make that disclosure in good faith. The good faith requirement was taken out of the legislation in 2013 and was replaced with another requirement that the disclosure be made in the reasonable belief of the worker making the disclosure that it was in the public interest. Having analysed the evidence I do consider that it was made in the public interest and that that belief was reasonably held by the claimant and therefore for that reason I consider that the disclosure on 2 November was protected under the legislation.

23. Turning now to the evidence, I have to determine what the real reason was for the dismissal and whether it was as the respondent indicates redundancy. In this respect I am particularly guided by the evidence I heard from Ms Harris. Ms Harris gave evidence that as an HR Consultant engaged by the respondent she was asked to discuss with the respondent the issue of redundancy. I should point out that at the time this happened there were only two employees working for the respondent, there was the claimant and there was a Parminda Bosley known as Pinkey.
24. Key to the respondent's case was the evidence produced this morning pursuant to my request for further disclosure yesterday and it is arguable that this should have been disclosed at the outset. Nevertheless it was ultimately before me. It is very important. Essentially Ms Harris gave evidence yesterday in a witness statement and in live evidence that at the beginning of September she had been approached by the respondent with a view to advising the respondent about what would need to be done if they were to consider making employees redundant. She then produced today a follow up email which was dated 1 September where she set out the steps that needed to be followed in pursuing a redundancy. There then ensued a series of exchanges between Ms Harris and between Jeremy Fournel where redundancy was considered and even the redundancy of the claimant was considered. As early as 9 September there was discussion about the likely cost of pursuing a redundancy of the claimant.
25. I have the benefit of having all of the exchanges between Ms Harris and the respondent and I am bound to say that I am very impressed by Ms Harris' advice. She gives very clear advice and nowhere in there is the suggestion that the redundancy that is to be pursued or to be contemplated is a sham. Nowhere in there is there a suggestion that Ms Harris is being asked to advise how to dress up a dismissal for another reason as a redundancy. Ms Harris behaves entirely professionally throughout that exchange and that evidence is compelling.
26. It is also compelling that the process started on 1 September, that is a day before the altercation when Mrs Fournel came from the pub and found the shop to be closed and it is two months before the protected disclosure on 2 November. So it is clear to me that there was some contemplation of redundancy in advance of two of the key issues that the claimant relies upon in support of her assertion that the dismissal was trumped up and was not really by reason of redundancy.
27. There are other factors which weigh heavily in the respondent's favour in this respect. I heard evidence from Astrid Fournel to the effect that the business was in financial difficulties and I questioned her as to why there was no evidence in the bundle to support that. Well that evidence was produced today and I have seen the profit and loss account for the year ended 31 December 2020 and it is very clear that what Mrs Fournel was telling me is entirely true. That the business was in financial difficulty and would have made a substantial loss had it not been for the Government's Job Retention Scheme and Covid grant. Moreover the business also had to take out a £50,000 loan to remain afloat. So that weighs also very heavily in the respondent's favour as to the real reason for the dismissal.

28. Further aspects which I have to take into account is the clear fact that no one else has been employed since the claimant was dismissed save for Pinkey having been employed for an extra month or so but since Pinkey was also made redundant no one else has been employed in the business. The business has been managed and run by the directors, Mr Jeremy Fournel and Astrid Fournel and that also weighs heavily in the respondent's favour in suggesting that what they tell me is the case and that is that the dismissal was genuinely by reason of redundancy.
29. And the final evidence which persuades me that the real reason for this dismissal was redundancy is the fact that the claimant until these proceedings had raised no complaint about the issue that she relies upon or the issues she relies upon now. She had plenty of opportunity in correspondence particularly around the time that a process was entered into of consultation prior to the possibility of her being made redundant. She could have raised a number of issues concerning the protected disclosure and the fact that she considered that the dismissal by reason of redundancy was a sham but she did not do that. Not only did she not raise any of the issues that she now relies upon in these proceedings she actually entered into a voluntary redundancy arrangement with the respondent albeit having teased an extra small payment out of them to do so and that weighs against the claimant in these proceedings.
30. I am bound to say that I have great sympathy with the claimant's position and do understand that life was very difficult for her during that period of time post July 2020 having said that on the balance of probabilities (and for the reasons that I have outlined I am not convinced that there is sufficient evidence in front of me to persuade me that the reason was anything other than a redundancy and therefore the claimant's claim under the whistleblowing legislation is bound to fail under s.103A.
31. Turning to the unfair dismissal claim, I do therefore find that the reason was a potentially fair reason under s.98 (2) the reason being redundancy.
32. I now turn to the final test which I must apply which is that under s.98(4), whether in all the circumstances the respondent was reasonable in treating it as a sufficient reason for dismissal. In redundancy cases we have to look at a number of factors. Firstly, was there a fair selection? Secondly, was there a proper and reasonable consultation in process and was there a procedure followed which was reasonable in the circumstances? Was suitable alternative employment considered.
33. I find that all of those aspects were covered in the advice which was given to the respondent by Ms Harris. It was clear that the claimant was in pool of one, she was the only one performing that job, she could not be compared or put into a pool with Pinkey and even if that was the case both of them we ultimately dismissed by reason of redundancy anyway. So I cannot conclude that there is any unfairness in the selection and in terms of the consultation, Ms Harris very ably and properly set out a process through which the consultation would take place and that was in train and started by virtue of the letter of 13 December. The respondent followed her advice to the letter and it was only foreshortened when the voluntary redundancy

process was discussed and ultimately entered into. So for the reasons I have just highlighted I also consider that the respondent has passed the test under s.98(4) and that the dismissal was by reason of redundancy and it was fair. Therefore for the reasons I have set out the claimant's claims must fail; they do and they are dismissed.

1 February 2022

Employment Judge KJ Palmer

Judgment sent to the parties on

4 February 2022

For the Tribunal office