EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108824/2021 and 4108423/2021 (V)

Held by Cloud Based Video Platform (CVP) on 7-10 December 2021

Employment Judge Doherty

Ms L McGroarty	**1st Claimant** **Represented by:** **Mr Bathgate, Solicitor**
Ms K Phillips	**2nd Claimant** **Represented by:** **Mr Bathgate, Solicitor**
Manorview Investments Ltd	**Respondents** **Represented by:** **Ms Burnett,** **Employment Law Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) 1

REASONS

1. Both claimants presented complaints of unfair dismissal under Section 94 the Employment Rights Act 1996 and of automatically unfair dismissal under section 152(1)(a) and (b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA).

2. The claimants were represented by Mr Bathgate, solicitor and the respondents by Ms Barnett, Employment Consultant.

3. At the point of submissions the claims were advanced under Section 153 of TULCRA, and there was no objection to the Tribunal considering the claims on this basis given the issues which were ventilated in the hearing. The basis of redundancy selection was said to be membership of a Trade Union (section 152(1)(a)).

4. The respondents defend both claims. It is their position that dismissal was fair, and was by reason of redundancy. It is accepted by the claimants that there was a redundancy situation. Their position is that they were selected for redundancy because they were members of the trade union, Unite, and the dismissal was automatically unfair. In the event they do not succeed in that claim, the claimant's position is that their dismissal was unfair contrary to section 94 of the Employment rights Act 1996 (The ERA).

The Hearing

5. For the respondents the Tribunal heard evidence from;
Lara Brown – General Manager for the Innishmhor Complex where the claimants worked.
Dee Smith – Operations Support Manager for the respondents.
Clare Johnstone - former Head of People for the respondents.
Carlton Graham - Operations Director for the respondents.
The claimants gave evidence on their own behalf.
The parties lodged a joint bundle of documents.

Findings in Fact

6. The respondents operate in the hospitality business. They have around 500 employees, and operate across 9 venues, which include hotels, bars and nightclubs.

7. The first named claimant, whose date of birth is 17 November 1995, was employed as a chargehand by the respondents working at Innishmhor, from 1 April 2017. Her net pay was £255 per week. When on Furlough she received £204 per week.

8. The first claimant joined the Trade Union, Unite, on 1 March 2018.

9. The second named claimant, whose date of birth is 18 December 1995, also worked at Innishmhor as a chargehand. She had been employed by the respondents since 1 September 2015. Her net pay was £178.50 per week. When on Furlough she received £142.80 net per week.

10. The second claimant joined Unite in July 2018.

11. The respondents do not formally recognise any Trade Union but the Unite representative, Mr Simpson, was commonly involved in discussions with management including discussions about strategic matters.

12. Both the claimants were vocal in raising workplace issues with the respondents. They instituted a collective grievance about the respondents tipping policy and health and safety in 2018, and of bullying and harassment in February 2020. After one of the grievances training was provided for staff.

13. As a result of one of the grievances raised a meeting took place in February 2020 between the claimants, the company MD and Ms Clare Johnstone.

14. In the course of that meeting the first claimant raised that on a previous occasion Ms Johnstone had asked her to disclose who were members of Unite, and she suggesting that suspected membership of Unite caused one of the managers, Lara Brown, to treat another member of staff unfavourably.

15. Ms Johnstone, who had joined the company in November 2019, stated that it was simply curiosity in her part, and she apologised if this had caused offence.

16. Neither of the claimants have been the subject of any disciplinary action.

17. Ms Brown and Ms Smith had management responsibilities for the claimants. Both found they could be challenging members of staff. At some point in 2018 Ms Smith discovered that the claimants were organising meetings with staff members from which she was excluded. As the manager Ms Smith felt badly about this, and emailed Mr Graham about it (page 161) asking for advice.

18. On two occasions in September 2019 and January 2020 and Ms Brown emailed her line manger asking for advise on behavioural issues she had with the first claimant. In February 2020 she emailed her manager asking for advise on working hours requested by the first named claimant.

19. In a subsequent subject access request (SAR) made by the claimants, which was dealt with by Mr Graham, these emails were not disclosed. Mr Graham receives around 100 emails per day, and they were not located by him using the Microsoft search engine.

20. The lockdown initiated as a result of the Covid pandemic resulted in venues operated by the respondents having to close, including Innishmohr, which is a bar/nightclub operating in Coatbridge.

21. The respondents decided to make redundancies in the properties which were in protracted lockdown. It appeared that they were not going to be able to open Innishmohr as a viable business as early as other venues, due to the fact that it did not provide food, and was a late-night music entertainment venue.

22. Ms Johnson, who was the then Head of People, was instructed to commence a redundancy process at Innishmhor. It was not considered that keeping staff on the Furlough scheme was viable on an ongoing basis due to the length of time which the respondents expected Innishmohr be closed. There were costs associated with keeping staff on furlough, and Innishmohr had become loss-making.

23. It was decided that the level of middle management, chargehands, should be removed. Team members, and chargehands were grouped into two different pools for redundancy selection. It was proposed that there be three

redundancies form a pool of three chargehands thus removing chargehands altogether.

24. The pool of three chargehands comprised the claimants and a Mr Leyden, who was also a member of Unite.

25. It was also proposed that there would be a reduction of six Team Members form a pool of 13 team members. The pool of 13 Team Members included a Ms Victoria Edgar.

26. The redundancy process got underway towards the end of August 2020.

27. The company asked for volunteers for redundancy. Ultimately they obtained 5 volunteers for redundancy, including a Mr Hamlyn who was a late volunteer.

28. The claimants were sent a letter advising them they were at risk of redundancy on the 27th of August.

29. On 28th August Ms Johnston emailed to Ms Victoria Edgar, stating that she has '*been trying to get hold of you this week and it is important that I pass this information on to you',* and provide details of redundancy consultation process.

30. Ms Edgar resigned before the consultation meetings took place.

31. The claimants attended their first consultation meeting on the 2 September. In the course of that they were both asked if they would consider working elsewhere. The first named claimant stated that she would prefer to work locally, naming the Commercial Hotel, and she said that it would depend on her flexible working request. The second named claimant also said she would submit a flexible working request and that the Commercial Hotel would be good.

32. The claimants were invited to attend a second consultation meeting on the 23 September. In the course of the consultation the claimants, aided by their TU representative Mr Simpson, advanced the position that the chargehand

only pool was incorrect and that chargehands and Team Members should be pooled together.

33. Initially Ms Johnston resisted this, however ultimately the claimants produced evidence in support of their position and having taken advise, it was agreed by the Ms Johnstone that the consultation process would be restarted with a pool which included chargehands and Team Members.

34. Ms Johnstone emailed the claimants on the 9th of October advising that further to having received information from Mr Simpson she confirmed that the respondents decision making relative to the affected pools had been incorrect, and that Team members and chargehands should be pooled together.

35. The redundancy process was then restarted for the revised pool of employees.

36. This was the case even although the Team Member redundancy process had been completed, and two Team members, Marc Steel and Jenna Murphy, had been made compulsorily redundant.

37. Mr Steel was sent a letter dated 29 September advising he was dismissed as redundant as of 13 October. Ms Murphy was sent a letter on 2 October advising she was dismissed as of 9 October.

38. The claimants were invited to attend a first consultation meeting on the 12 of October.

39. The respondents amended the weighting in the scoring in response to feedback from the claimants and their trade Union representative.

40. The claimants were scored against a scoring matrix which contained a mixture of subjective and objective elements. These where; length of service; performance and skills; attendance records; and disciplinary records. ‘Performance and Skills’ was broken down into a number of subcategories. These where; guest service; taking instruction; cash handling; and cleaning.

41. The claimants were then scored with the others in the pool, who were re-scored, with the exception of Mr Steel and Ms Murphy whose scores were not revisited, as they had already been made redundant.

42. Ms Smith and Ms Brown were both asked to complete the scoring for the claimants. Both managers were asked to score the claimants as concerns had been raised about Ms Brown by the claimants and therefore the respondents included Ms Smith in the process.

43. The managers were also asked to provide justification for their scores under Performance and Skills, which they did by providing a number of operational examples. Ms Johnson collated their feedback into one document which was then provided to the claimants.

44. Both claimants disagreed with their scores under the heading of 'Performance and Skills', and provided detailed written feedback on this. Ms Johnstone showed this to Ms Brown, who did not accept the claimants position; she discussed it with Ms Smith, who also did not accept the claimants position.

45. The first named claimant scored a total of 25 under the scoring matrix, and the second claimant scored a total of 24.

46. The claimants were thereafter invited to attend a further two consultation meetings and a final meeting on the 3rd of November. They did not attend the final meeting on the advice of their Trade Union representative.

47. There were not many job opportunities with the respondents due to the effects of the pandemic. There was an opportunity of a Housekeeping role in the Lyndhurst Hotel, which was not local to the claimants. Mr Lydon was advised about this post, and it was open to him to apply for the job, but the post was in fact filled by another member of staff as the it needed to be filled quickly, and the claimants were not offered the opportunity to apply. The claimants were advised of two vacancies both of which required qualifications they did not have.

48. The claimants' scores meant that they were selected for redundancy. Mr Lydon, who had originally been in the pool of three chargehands avoided redundancy selection as a result of Mr Hamlyn volunteering late in the process.

49. The respondents wrote to the claimants on the 4th of November confirming the decision to dismiss them by reason of redundancy.

50. At the point when the claimants were dismissed, from the combined Team Members and chargehands at Innishmohr, the respondents had made two compulsory redundancies (Mr Steel and Ms Murphy); had obtained 5 volunteers for redundancy; and had one resignation (Ms Edgar). The respondents carried on their business with a team of 6 employees. The Bar Rota for November 2020 lists the 6 Team Members who continued to work in the bar.

51. The first named claimant received a statutory redundancy payment of £820.77. The second named claimant received a statutory redundancy payment of £912.40.

52. The claimants were advised of their right to appeal the decision to dismiss, and they did so on a number of grounds, including that they had been selected for redundancy because of Trade Union activities.

53. The claimants also lodged a grievance. The respondents did not deal with this separately but advised the claimants that the matters raised would be considered as part the redundancy appeal process.

54. The appeal was dealt with by Mr Graham. He was satisfied that the decision to dismiss was fair, and unconnected to Trade Union activity and he wrote to the claimants in some detail confirming his decision. He considered the scoring process and the claimant's disagreement with their scores under Performance and Skills, but did not accept it was unfair, and he made reference to this in his letter dealing with the appeal.

55. Mr Graham did not know how many affected employees were in the pool for redundancy selection.

56. The respondents were aware that the claimants were members of Unite. They were unaware if any other staff members affected by the redundancy process were members of Unite.

Submissions

57. Both parties provided helpful written submissions which they supplemented with oral submissions.

58. Ms Barnett took the Tribunal to what she said were the relevant legal principles and submitted in summary that there had been a fair reason for dismissal and a fair redundancy process.

59. Mr Bathgate's submissions are dealt with in more detail bellow, but in summary he submitted that the respondents had made one more employee redundant than was required and the onus had shifted in terms of the section 153 TULCRA claim to the respondents to prove the competing reason for dismissal and they had failed to do so.

60. Mr Bathgate submitted that in the event the claimants succeeded, any *Polkey* reduction should be applied so to reflect a 50% chance that each claimant may have been dismissed, in circumstances where there were two dismissals but only one post needed to go.

Note on Evidence

61. The Tribunal did not form the impression that any of the witnesses in this case sought to deliberately mislead, however their evidence was sometimes quite general in nature and at times the Tribunal found some of the evidence unreliable to the extent that it impacted on credibility.

62. Both the claimants clearly had a view about the reason for their redundancy selection, and albeit the respondents did not accept that, there was no material conflict arising from their evidence around their involvement in the redundancy process itself which the Tribunal had to resolve.

63. In her evidence in chief the second named claimants asserted that she been singled out for special treatment after she joined Unite in July 2018 and became involved in workplace issues. However there was no evidence of alleged detrimental treatment beyond a general statement (other than the alleged selection for redundancy), to support the conclusion that she had been subjected to detrimental treatment after having joined Unite. Neither claimant had been disciplined, despite their managers finding them challenging, which was inconsistent with the notion that they were singled out for detrimental treatment.

64. The Tribunal had to apply some scrutiny to the evidence of the respondents witnesses, as this is case in which the Tribunal is being asked to draw an adverse inferences from primary facts found.

65. The Tribunal found that Ms Brown and Ms Smith were both credible witnesses, to the extent that they could give evidence about relevant matters. Both witnesses were to a degree unreliable in their recall of the detail of the process, however the Tribunal did not draw any adverse inference from this but was satisfied that this was explained by the passage of time, and a genuine inability to recall the detail of a process in which they only played a specific and limited part, and in which they did not have a general involvement.

66. Both witnesses were taken to the emails which were not disclosed as part of the SARS request and gave explanations for these which were credible in an operational context and the tribunal did not draw anything adverse from these.

67. Ms Brown and Ms Smith confirmed that they were asked to give justification for their scores of the claimants. They also confirmed that they were asked

about the claimants feedback. Their evidence was inconsistent to the extent that Ms Brown said she saw the written feedback, Ms Smith could not remember seeing written feedback but said she thought she had been told about it by Ms Johnson. Notwithstanding this difference as to how they had received the claimants feedback, the Tribunal was satisfied on the basis of the evidence that they had been told about the claimants feedback, and had disagreed with it, confirming the scores which they had given the claimants.

68. It was put to Ms Johnstone in cross examination that this process had only taken one hour. She did not accept this, and given what was involved, the Tribunal on balance accepted her evidence on this.

69. Ms Johnstone was the principal person within the respondent organisation who dealt with the redundancy process. The Tribunal did not from the impression that she deliberately sough to mislead. It accepted Ms Johnstone's evidence that her question about Unite members which she asked shortly after she joined the respondents was as she said, based on her personal curiosity.

70. However, Ms Johnson has now left the respondents employment and the Tribunal formed the impression that her recall of the detail of the process was in all likelihood adversely affected by the passage of time, and by virtue of the fact that she is no longer engaged in the respondents organisation.

71. There were two material points where the Tribunal found that Ms Johnston's evidence so unreliable that it lacked credibility.

72. The first was her suggestion that the redundancy process restarted at some point towards the end of September. The correspondence in the bundle to which she was taken demonstrates that she wrote to the claimants on 9 October indicating the process was then to be restarted. This rendered Ms Johnston's evidence to the effect that Marc Steel was the individual who 'saved' Mr Leyden from redundancy nonsensical, as he had been dismissed on the 29 September. Ultimately Ms Johnston conceded that her evidence about Mr Steel being selected in place of Mr Leyden was incorrect, or may

have been incorrect, and she said she thought that Mr Leyden avoided redundancy because of a late volunteer for redundancy, Mr Hamlyn.

73. This position was confirmed by Mr Graham, whom the Tribunal found to be in the main credible and reliable, and it was satisfied that Mr Hamlyn's late volunteering for redundancy meant that Mr Leyden kept his job.

74. The second matter related to the circumstances surrounding the employment of one of the Team Members, Victoria Edgar and the size of the 'at risk' pool of Team Members.

75. In cross examination Mr Bathgate confirmed with Ms Johnston that the pool of Team Members numbered 13,and that the respondents sought a reduction of this by 6, leaving 7 employees. He put to Ms Johnson to a list of names of Team Members, and asked who amongst them had taken voluntary redundancy. Going through the names Ms Johnson accepted that five employees had taken voluntary redundancy. When it came to Ms Edgar she said that she resigned before the process had been started. Ms Johnston was asked if she was sure about that, and said she was sure as she could be from memory.

76. She was then taken by Mr Bathgate to her email of 28th August, which he introduced in cross examination, in which Ms Johnston writes to Ms Edgar that she has '*been trying to get hold of you this week and it is important that I pass this information on to you',* and then goes on to provide details of redundancy consultation process.

77. Ms Johnson said that Ms Edgar had resigned, and that she never met with her as part of the consultation process, and the Tribunal accepted as evidence. That however did not mean that she was not included in the original 13 Team Members who were identified in the pool as at risk of redundancy.

78. The Tribunal did not find convincing Ms Johnson's evidence that the email had been sent by mistake. The fact that Ms Johnson's email stated that she had been trying to get hold of Ms Edgar to advise her about redundancy

consultation process, did not suggest that she knew that Ms Edgar had resigned before the pool was identified. Rather it supported the conclusion that Ms Edgar was included in the pool of 13 Team Members originally identified as at risk of redundancy.

79. As indicated above the Tribunal found Mr Graham to be generally a credible and reliable witness. There was one point in his evidence however which Tribunal found unreliable. That was that Mr Graham said he had not seen the claimants feedback on the scoring. His letter rejecting the appeal does however make specific reference to the claimant's feedback, and it was suggested by the claimants the feedback had been forwarded, at least as part of the grievance, and on balance the tribunal was satisfied that he had seen this.

80. Mr Graham was challenged about the reasons why the emails from Ms Brown and Ms Smith about the claimants were not disclosed in the SARS documentation disclosed. The tribunal found his evidence to the effect that Microsoft search capacity had not disclosed these emails, in the context where he receives over hundred emails a day, to be credible and drew no adverse inference from this.

81. Mr Graham was taken to a late production introduced by the claimants which bore to show the rota for bar staff at Innishmorh in November 2020, which numbered 6, and was able to confirm that this Rota reflected the staff then in place.

Consideration

Automatically Unfair Dismissal – section 153 TULRCA

82. Both claimants also have 2 years qualifying service entitling them to bring a claim under section 98 of the ERA for ordinary unfair dismissal, which is dealt with bellow, and the Tribunal began by considering the complaint of automatically unfair dismissal under TULRCA.

83. It was submitted that the dismissals were automatically unfair under section 153 of TULRCA which provides;

153 (1*) Where the reason or principal reason for the dismissal of an employee was that he was redundant, but it is shown—*

(a)that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer, and

(b)that the reason (or, if more than one, the principal reason) why he was selected for dismissal was one of those specified in section 152(1),

the dismissal shall be regarded as unfair for the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal).

Subsection of section 152 (1) (a) is relied upon. It provides;

(1)For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a)was, or proposed to become, a member of an independent trade union, ...

Section 153 applies where there is a genuine redundancy situation. It was accepted by the claimants that there was a redundancy situation and that there was a reduction in the number of employees required to carry out the work which they performed in their workplace.

The first limb of the test under section 153 is that the redundancy applied equally to others in the same or similar positions who were not dismissed. There is no issue that that limb is fulfilled here. Other employees from the affected pool were retained.

Under section 153 the employee has the evidential burden of proof to show there is an issue which warrants investigation, and which is capable of establishing the claim of automatically unfair dismissal .

If an employee satisfies the Tribunal there is such a reason, the burden reverts to the employer who must prove, on a balance of probabilities, which of the competing reasons was the principal reason for dismissal.

84. Mr Bathgate relied on a number of elements to show that there is an issue which warrants investigation. He submitted that normally, in a claim where a selection exercise is completed, the Claimant's scores are produced, as is a table showing all other affected employees' scores. These show the cut off in the scores as to when redundancy would kick in, and also how many candidates were in the pool and how many escaped redundancy. He relied on the fact that only minutes of the first consultation meeting held on 02/02/20 were produced. The Respondents position is that there were meetings on 22/09/20, 03/10/20, 09/10/20, 16/10/20, 22/10/20 and 27/10/20, however no minutes were produced nor correspondence following the outcome of those meetings.

85. He also submitted that there is correspondence missing from the bundle of documents, e.g. a letter from Clare Johnston to the Claimants dated 23/10/20 as set out in the Appeal outcome letter.

86. In respect of the numbers of compulsory redundancies, the number of volunteers, who was in the pool, the timing of some of the compulsory redundancies, the timing of the restart of the redundancy procedure, Mr Bathgate submitted the respondents evidence was wholly unsatisfactory. Lara Brown/Clare Johnston didn't know who the candidate was who had 'saved' Mr Leyden. They speculated it might be Marc Steel but the documentary evidence did not support this. Clare Johnston asserted Victoria Edgar had resigned. However documentary evidence supported her sending an e-mail (purportedly in error) advising on the redundancy process on 28 August 2020. Ms Johnston was evasive about when the restart of the redundancy process, with a view to trying to stretch it back to the end of September so that Marc Steel's dismissal was caught by this. This is not

supported by the documentary evidence, pages 94-101 and also by Carlton Graham's evidence.

87. Carlton Graham could not say who was in the pool, how many volunteers there were, and couldn't confirm how many compulsory redundancies there were. He confirmed he didn't consider the response given by the Claimants to the justification for their scores from Dee Smith and Lara Brown.

88. The Tribunal did not consider that much turned on the missing correspondence or minutes of meetings. There was no challenge to the fact that the consultation meetings took place, or to the fact that the respondents altered the weighting of the scoring criteria in response to feedback from the claimants, which is what the missing letter relied upon by Mr Bathgate purported to refer to.

89. Nor did it consider much turned on Mr Graham's evidence that he had not seen the claimants feedback, which it appeared to the Tribunal simply to be an error on his part, given that his appeal outcome letter makes specific reference to it.

90. In relation to the absence of the scoring matrix's for other effected employees, a good deal was made about the identification of who was in the pool for section, but there was no challenge in cross examination to the claimants ranking in the scoring.

91. For the reasons given in the Note on Evidence the Tribunal did not find Ms Johnston's evidence about when the redundancy process was re-started, or significantly whether Ms Edgar was in the pool of 13 Team Members originally at risk, to be reliable. As indicated above the Tribunal was satisfied that although she may have resigned before engaging in the redundancy consultation process, Ms Edgar was part of that pool, on the basis that Ms Johnston wrote to her on the 28 of August stating she had been trying to get hold of her and inviting her to the consultation process.

92. The effect of that conclusion is that by the end of the process the workforce had reduced by 10 opposed to the 9 employees (3 Chargehands and 6 Team

Members) the respondents had identified it was necessary to make redundant at the outset of the process.

93. Those 10 are made up of ;

(a) Two compulsory redundancies (Mr Steel and Ms Murphy)

(b) Five volunteers

(c) One resignation- Ms Edgar

(d) The two claimants.

94. The fact that the respondents had made both the claimants redundant in these circumstances did raise an issue which warranted investigation, and the burden of proof shifted to the respondents to show that reason for dismissal was not on the grounds of trade union membership.

95. In considering the competing reasons for redundancy selection, and in considering whether the respondents had shifted the burden in establishing that the claimants had not been selected because they were members of Unite, but rather because of the application of the redundancy process, the Tribunal considered a number of elements.

96. The first was that both claimants had been members of Unite since 2018, and had been vocal about workplace issues. Despite accretions made by Ms Philips, there was no evidence to support the conclusion that they had been targeted or subjected to any detrimental treatment since joining Unite.

97. Secondly, albeit Unite are not a Trade Union recognised by the respondents, the respondents regularly involved Mr Simpson, the Unite representative, in decision making about matters which affected staff.

98. The respondents permitted the claimants to be accompanied by their Unite representative at redundancy consultation meetings.

99. The respondents took into account information provided by Mr Simpson about the fairness of the redundancy pool which they had initially identified,

and acted on it, restarting the redundancy process as a result. They also amended the weighting of the scoring in response to the claimants feedback.

100. The respondents did not know who among their staff was a member of Unite, other than the claimants who had made it clear to the respondents that they were members of a Trade Union. For the reasons given above the Tribunal did not conclude that anything significant turned on Ms Johnston's question about Unite membership.

101. Taking these factors together, there was no basis on which to conclude that there was an anti-union sentiment, or an anti-union agenda in the respondents workplace

102. The Tribunal was satisfied that Ms Edgar had resigned very early on in the process. Albeit the pool became smaller, the respondents carried on and made 9 redundancies as planned. Significantly they have continued to operate with a lesser number of staff than they had originally envisaged at the outset of the redundancy process. The respondents now operate with 6 Team Members. Support for this is found in a rota document dated November which was introduced late as a production by the claimants, and spoken to by Mr Graham.

103. The Tribunal considered that these elements were sufficient to discharge the onus of proof which had shifted to the respondents, and they had established on the balance of probabilities that the reason for redundancy selection was the application of the redundancy selection process, and not because the claimants were members of a Trade Union.

104. The effect of that conclusion is that the claims of automatically unfair dismissal do not succeed.

Unfair Dismissal under Section 98 of the ERA

105. The Tribunal went on to consider the claims of 'ordinary' unfair dismissal under Section 98 of the ERA.

Section 98 provides;

(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.

106. It was accepted by the claimants that there was a redundancy situation within the workplace and the Tribunal was satisfied on the basis of the evidence that there was a reduction in the needs of the business for employees to carry out work of the particular kind in the place where the claimants worked.

107. One of the main arguments before the Tribunal centred round the fact that the pool of affected employees had reduced to 12 from 13 because of Ms Edgar's resignation, but that 9 employees were still selected for

redundancy. It was therefore argued that one more employee than necessary was made redundant.

108. That argument it appeared to the Tribunal, went to the reason for dismissal of one of the claimants.

109. The Tribunal was satisfied that although the pool was smaller than originally identified, the respondents effected the 9 redundancies as planned. On basis of the reduction of the size of the pool they then carried on with one less member of staff than had been originally envisaged (6 team members instead of 7). That supported the conclusion that the need for employees to perform the work which both the claimants performed had reduced and that the reason for dismissal for both claimants was redundancy.

110. The Tribunal was therefore satisfied that it had been established that both the claimants had been dismissed by reason of redundancy.

111. The focus of the Tribunal's consideration was then section 98(4) of the ERA.

112. Applying an objective test the Tribunal has to consider if there was a fair warning and consultation, an appropriate identification of the pool for redundancy selection; a reasonable selection criteria, fairly applied and whether there was a failure to offer suitable alternative employment.

113. The Tribunal was satisfied that the claimants were warned that they were at risk of redundancy and that there was a meaningful consultation. Support for this conclusion is found in that the respondents took into account the claimants complaint about the incorrect pool and acted on the information presented to the extent of re-starting the consultation process. They also took into account the claimant's concerns about the selection criteria and amended the weighting to address concerns raised by the claimants. Lastly they included a second manager in the scoring exercise to take account of concerns raised by the claimants about one of the managers who was conducting the scoring. All of these factors supported the conclusion that the consultation process was reasonable.

114. There was no attack on the scoring matrix, and for the reasons given above the Tribunal was satisfied that the claimants were given the opportunity to provide feedback on this, which was then fed back to the mangers, who did not alter their scores as a result of this. The Tribunal was also satisfied that this information was considered at appeal. This exercise was not one which was objectively unreasonable.

115. Nor could it be said that applying an objective standard, the steps the respondents took regarding redeployment were unreasonable. The claimants were asked about redeployment and their preferences to work locally noted. It was credible that in the environment where the redundancies were being implemented, there were very few jobs. It was also credible that one job as housekeeper (which was in any event not local to the claimants) required to be filled quickly, and was filled before the claimants were offered the chance to apply.

116. For the reasons given above the tribunal was satisfied that at the outset of the process the respondents had identified a necessity to make 6 employees redundant from a pool of 13 Team Members and 3 redundancies from a pool of 3 chargehands. In total therefore they were seeking to make 9 redundancies out of a total pool of 16, leaving 7 jobs intact. Ultimately the respondents did make 9 redundancies, but they lost another employee by means of natural wastage (resignation of one of the pool of employees). The Tribunal considered whether this was a factor which was capable of rendering the decision to dismiss unfair.

117. Crucial to the consideration of this is that the respondents continued to operate with a team of 6, which as indicated above meant that all 9 positions were redundant. None of the staff who were made redundant were replaced, as is supported by the Staff Rota from November 2020. Applying an objective test of reasonableness it could not be said that, in circumstances where the respondents made 9 redundancies as planned, the fact that that size of the pool originally identified had reduced by one as a result of natural wastage was capable of rendering the decision to dismiss one which fell out with the band of reasonable responses.

118. The effect of that conclusion is that the claims of unfair dismissal do not succeed and are dismissed.

Employment Judge: Laura Doherty
Date of Judgment: 16 December 2021
Entered in register: 11 February 2022
and copied to parties