



EMPLOYMENT TRIBUNALS

Claimant: Daniel Kennedy

Respondent: Hendy Group Ltd

Heard at: Southampton (video hearing)

On: 04 November 2021

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Richard Wayman, of Counsel

JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.
2. The Respondent is ordered to pay the sum of £19,566.73 to the Claimant.
3. The Recoupment Regulations apply.

REASONS

Summary

1. Mr Kennedy was dismissed. He agrees that there was a redundancy situation, and does not say that his selection was unfair. He claims that the Respondent made insufficient efforts to find alternative employment for him. I found that to be the case.
2. I gave an ex tempore judgment, and dealt with remedy in the hearing. At the conclusion of the hearing the Respondent sought full written reasons.

Evidence

3. For the Respondent I heard oral evidence from:
 - Graham Tarrant, the Claimant's former line manager;

- James White, Head of Brand Performance based at Bournemouth Toyota;
- Danny Ball, Toyota Brand Manager Chandler's Ford;
- Dan Jenkins, General Sales Manager Christchurch Jaguar Land Rover;
- Steve Morrison, Renault Brand Manager Eastleigh; and
- Simon Palmer, Used Car Sales Director

I also heard oral evidence from the Claimant.

4. There was an agreed bundle of documents of 148 pages.

Law

5. The reason put forward is redundancy, which is a potentially fair reason for dismissal¹. It was accepted to be the real reason, and Mr Kennedy accepts that there was a redundancy situation, and that he was fairly selected to be placed at risk of dismissal by reason of that redundancy situation.
6. The sole issue is whether his dismissal was fair, or not. There is an obligation on the employer to make efforts to find the employee alternative employment. As *Harvey*² puts it: *"In order to act fairly in a redundancy situation, an employer is obliged to look for alternative work and satisfy itself that it is not available before dismissing for redundancy."*
7. The starting point for the issue of fairness is the words of Section 98 (4) of the Employment Rights Act 1996 ("the Act")³. 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.
8. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act.
9. The compensatory award is dealt with in Section 123 of the Act⁴.
10. 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

11. The hearing was commendably brief, and Mr Kennedy was to the point in his questions of the Respondent's witnesses, and direct in his answers to Mr

¹ S98(2) of the Employment Rights Act

² The authoritative textbook on employment law

³ "... 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"

⁴ 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".

Wayman's focussed cross examination. The evidence was concluded by 12:30. I made a typed record of proceedings which also recorded the submissions made by Mr Wayman and by Mr Kennedy. I afforded breaks at approximately hourly intervals, and a long lunch break to allow time for reflection before submissions, and after my ex tempore judgment to allow time for Mr Wayman to take further instructions. I went through the arithmetic of the remedy with the parties, and at the hearing both sides thought it correct. I assessed remedy using Bath Publishing's online employmentclaimstoolkit.

Findings of fact

12. The Respondent is a well-known car dealership. Mr Kennedy has spent over 30 years in the motor trade, specifically in sales of both new and used cars. He has held managerial positions, including with the Respondent.
13. He started with the Respondent in 2013, in used cars. Then he managed a new distributorship for Kia cars, which was a new brand to him. He was successful. He began to be involved in training people working in the Respondent's various dealerships. The Respondent set up a training academy. In 2015 Mr Kennedy became one of three full time trainers. He would travel extensively to deliver training, with many overnight stays. He enjoyed the role, and there were no issues with his performance. The training academy provided all the training for the Respondent's sales teams. Mr Kennedy loved the role, and at one point, about a year before the pandemic started, that he really appreciated the usual Monday-Friday 9-5 working hours and would not want to return to the stresses and hours of sales management. In his oral evidence Simon Palmer intimated that Mr Kennedy tended to leave work early on occasion. This appeared to be an attempt to paint Mr Kennedy in an unfavourable light as not being a hard worker. If that was the implication I have no hesitation in rejecting it.
14. When the pandemic started there was a lockdown. Those working in the training academy were furloughed. Ultimately the Respondent decided that there would be a permanent reduction from three to two trainers. There was a selection exercise. By a small margin (168 to 172) Mr Kennedy was selected for redundancy. He was on furlough at the time. He never returned to work.
15. On 04 September 2020 he had a consultation meeting with James Dinsdale, a "*people adviser*", who was not asked to give evidence to me. The process was run by Sarah Martyn ("*Director of People*") who was also did not give evidence (but was present throughout the hearing). She would have been the person to have spelled out the attempts to satisfy the obligation on the Respondent, had they met it. Since it was accepted that the Respondent relied on the oral and documentary evidence placed before me, it is apparent that the human resources department took no step whatever to assist Mr Kennedy. I do not consider that telling him he could apply for posts open and advertised to the world, and on the same basis as every other applicant, to be help.
16. Mr Kennedy was told that he could apply for posts listed on the Respondents intranet. He was not at work. He was given no assistance to apply for any post, and no post was suggested for him to apply for. The most assistance that was offered was that Graham Tarrant said that he was willing to speak to anyone who wanted to phone him. He would be as any other applicant, internal or external.

17. Mr Palmer assumed that Mr Kennedy was given details of posts he could apply for, but he had no concrete knowledge of any positive step taken by anyone in the Respondent. There is no evidence of any such step being taken by him or anyone else. Neither Mr Palmer nor Mr Tarrant had any knowledge of anything done by the Respondent to try to avoid dismissing Mr Kennedy by reason of redundancy. They made some assumptions, but had taken no step before the hearing to verify them.
18. A week after being told that he was to be dismissed (so in late September 2020) Mr Kennedy was required to (and did) return his laptop. He no longer had access to internal email or to the intranet. He had the only the same access as any member of the public to the jobs notified on the website.
19. There were multiple jobs available with the Respondent in sales in the period between Mr Kennedy being given notice and his dismissal, a 7 week period ending 09 November 2020.
20. On 09 September 2020 Mr Kennedy applied for a position as sales manager Bournemouth Toyota. In mid September 2020 he was interviewed for the post by James White (Area Sales Manager) and Danny Ball (Toyota Franchise Manager). Mr White said that he was very personable and interviewed well. He said that while he had previous sales experience he was not convinced of his desire to lead and motivate a team. He said they wanted someone with recent car managerial experience and a proven track record of building a team. He said Mr Kennedy did not possess these attributes. He said that he was concerned that Mr Kennedy lived in Basingstoke which was a long journey. He said he felt Mr Kennedy was simply keen on remaining employed. They appointed another candidate. None of the other candidates were at risk of dismissal. It was another employee of the Respondent was appointed, who worked in Bournemouth in a smaller used car department.
21. Mr Ball said that Mr Kennedy came across as full of energy and positivity at interview (and his evidence before me makes that highly likely to be the case). He felt Mr Kennedy was keen to remain with the Respondent but less keen on the actual role. He was not *"the right fit"*. He said he was not sure that he would gel with the new car sales manager. I accept the evidence of Mr Kennedy that his 15 minute chat with that person was very positive. It is plain that Mr Kennedy has an engaging personality, is very clear, and has enthusiasm. He wanted the job: I do not accept the 2nd hand evidence that there was anything negative about this possible relationship. That manager did not give evidence.
22. Mr Kennedy found this role himself, and applied for it. There was no input from Graham Tarrant (line manager) Simon Palmer (director and senior manager) or anyone from human resources. Mr Kennedy was on his own.
23. That was followed by another meeting with James Dinsdale and Graham Tarrant on 11 September 2020 and on 21 September 2020 James Dinsdale sent Mr Kennedy an email to which a letter was attached. The letter was notice ending Mr Kennedy's employment on notice, expiring on 09 November 2020. The email stated that the consultation process was at an end. It ended:

"May I wish you and your family well and all the best for your future

endeavours.”

Neither the letter or the email make any reference to any possibility of help to find another role in the Respondent. The Respondent did not satisfy itself of anything in relation to the possibility of alternative employment. It just left Mr Kennedy to fend for himself.

24. Mr Tarrant told Mr Kennedy in the meeting of 11 September 2020 that he could not assist with any role outside his own department (the training academy where there were no opportunities). That may well be the case, but if so someone else in the Respondent should have done. On the limited evidence given to me that would have been Simon Palmer, director with line management of Mr Kennedy or Sarah Martyn, the “*People Director*”.
25. On 07 October 2020 Mr Kennedy applied for a sales adviser role at Christchurch Jaguar Land Rover. This was a level below that of manager. Mr Jenkins eventually got back to him, but not until 30 October 2020. He told Mr Kennedy that they had by then offered the role to an external candidate. Mr Jenkins *did not know* that Mr Kennedy was being dismissed by reason of redundancy. There was no input from anyone in management or human resources. The simple narration of this chronology clearly shows the failure of the Respondent to meet its obligation to Mr Kennedy. There was no support, there was delay in dealing with the application, someone else was appointed who was not an employee, at the same time as Mr Kennedy was dismissed. (I do not criticise Mr Jenkins – it was not his fault that he did not know that Mr Kennedy was being dismissed.)
26. Mr Kennedy also found a role to apply for with the Respondent’s Renault dealership at Chandler’s Ford. He applied on 13 October 2020. There was no support for him from anyone in the Respondent’s human resources or his management. He was as any other applicant. Mr Morrison saw from the application that Mr Kennedy had made application to the Toyota dealership. He rang Mr White for feedback. This influenced his decision, negatively. He was not interviewed. Mr Morrison took another candidate from within the Respondent who had extensive Renault experience. There are, apparently, complex procedures with Renault, and there may have been good reason to appoint the other candidate, but it is noteworthy that there was not even an interview for Mr Kennedy, because his application was not considered worthy of furthering because of Mr White’s input. There is force in Mr Kennedy’s submission that far from helping him, he was blocked every time he tried to get a different role.
27. Mr Palmer’s oral evidence was that they had a “*duty of care*” to Mr Kennedy and that while it was a matter for him what roles he applied for, the long and unremitting journey times to and from work might not have been sustainable for him. He was influenced by the conversation a year or so before which Mr Palmer portrayed as a settled intention of Mr Kennedy never to go back to selling. I reject this and prefer Mr Kennedy’s account – yes, he liked his role very much and ideally would carry on with the role: but when he was faced with redundancy this was far from ideal. He had talked with his family about it, had “*got his head round*” going back to being a sales manager, and having done so, with his customary enthusiasm was looking forward to it with confidence. I accept that evidence. Mr Palmer’s “*duty of care*” observation indicates that he

was antipathetic to Mr Kennedy's job aspiration, rather than supportive of it.

28. Mr Kennedy has a grown-up daughter living in Bournemouth. While the travel would be onerous he would be able to see her more. In any event he had travelled extensively and long distances for the training academy. While anyone would prefer office hours to longer and weekend sales hours, that was not any reason to think he could not return to a sales role successfully.
29. On 28 October 2020 Mr Kennedy applied for the role of sales manager at Salisbury Toyota. He did not hear back.
30. On 06 November 2020 Mr Kennedy asked if he could instead remain furloughed so that he could continue to seek alternative employment within the group, and chased up his two outstanding applications.
31. He heard back from Sarah Martyn on 09 November 2020 (the last day of his employment). It transpired that he had been emailed on 03 November 2020 to his internal email address, to which he had not had access since late September 2020. It was from Daniel Gempton (in human resources) and said that he had been unsuccessful in both applications (without interview). It was considered that his motivation for applying was questioned: that he was more interested in a job than in the particular jobs he was applying for. The email stated:

"Whilst we do not wish to deter you from applying for alternative roles within the group, the response will be consistent for other Sales related roles."

This was the human resources department, which should have been supporting Mr Kennedy in a search for an alternative to dismissal, instead saying that they would not give him *any* sales role *anywhere*. This to a man who had spent 35 years selling cars, or training people how to sell cars. It is hard to imagine anything less helpful. There was absolutely nothing positive about that email. There was no suggestion that he might try something else (although what is hard to imagine).

32. The email of 09 November 2020 from Sarah Martyn said that furlough would not be extended, that they saw no likelihood of reversing the reduction in size of the training academy. She attached the email of 03 November 2020 from Daniel Gempton, endorsing what it said by stating that it *"explained our position in relation to your sales applications"*.
33. After being dismissed, on 17 December 2020 Mr Kennedy applied for a role with a group Skoda dealership in Bournemouth but received no reply.
34. At no time was any consideration given to Mr Kennedy's long career history in sales, including with the Respondent, in used car sales and setting up a successful Kia distributorship without prior knowledge of that brand. Instead the focus was all on his recent work in the training academy.
35. I observe that the basic premise put by the Respondent's witnesses is fundamentally unsound. It is that someone so good that he trains sales managers is not able to do the job he is training others to do. As I observed in my ex tempore judgment, if being out of a customer facing or management role

for a while was an issue, that would merely mean there might be a training need: but he would have been the person to give that training until his role was made redundant.

Conclusions

36. The Claimant's role was redundant and his selection for dismissal for that reason was fair – Mr Kennedy has always accepted this.
37. The Respondent failed in its obligation to Mr Kennedy in seeking to avoid dismissal as a result. The reasons for this conclusion are set out above. Mr Kennedy did all he could: it is not as if he was waiting for the Respondent to help him. He was as proactive as he could be. The claim therefore succeeds.
38. Mr Wayman submitted that there should be a 100% *Polkey*⁵ reduction. I made no reduction. The submission is that if the procedure was unfair – failure to attempt to avoid dismissal – it made no difference because Mr Kennedy had access to all the jobs, applied for them and was unsuccessful. The submission fails because the reason he did not get another job within the Respondent was, on the balance of probabilities, that very failure. The central fact is that at the time there were multiple jobs available for Mr Kennedy, for which he was qualified, and which he wanted. Ultimately, by 03 November 2020 the Respondent was actively blocking him from getting one.
39. I did not accept Mr Wayman's submission that the Respondent was in each case entitled to take the best person for the job, and in each case that was what they had done. That assumes that Mr Kennedy was unsuitable for the role (or that it was not a suitable job for which he could be considered, which amounts to the same thing). That is not a sound assumption. That there might (I make no finding of fact that this was so) in every case have been a better candidate when the vacancy was advertised to the world does not mean that the role was not suitable for Mr Kennedy. If it was suitable the Respondent had an obligation to consider Mr Kennedy for it, not appoint someone new to the business instead.
40. Of course Mr Kennedy's prime aim was to avoid being dismissed. He identified with the brand. He wanted to see out his career with the Respondent. That is not synonymous or indicative of not wanting the jobs for which he was applying. A change of direction was not what he wanted, but when, as the phrase has it "*push came to shove*" he was going to throw himself into a new role with enthusiasm. As he put it, in an ideal world he would have stayed in the training academy: but this was not an ideal world and he would try his best to make a success of a new role. He had the skills enthusiasm and experience to do so.

Remedy

41. Mr Kennedy had provided no documentation about his search for work. Mr Wayman submitted that Mr Kennedy had failed to show that he had mitigated his loss as he was obliged to do. Mr Kennedy had printed off his job search record from Totaljobs, one of several agencies he said he had used. I permitted him to email it to Mr Wayman and to me. I accorded the opportunity for a break to consider it, which Mr Wayman very sensibly declined. Mr Kennedy said that it was very hard to find a job, approaching

⁵ *Polkey v A E Dayton Services Ltd* [1987] UKHL 8

Christmas and with the pandemic and lockdowns still affecting things. He had started with a search 50 miles from home and expanded it over time. In the end he had got a job managing a team of 8 sales advisers for cinch (an online car sales company) as a "Customer Experience Team Leader". He started work for them on 24 May 2021. Apart from having to wait 3 months before joining their pension scheme his losses stopped then. He had claimed job seeker's allowance in February 2021 which was paid until he started work. He had not claimed before as he had not known he was eligible.

42. I decided that Mr Kennedy's job search within the Respondent during his notice period was indicative of a person who was trying hard to find employment. He had a wife and children to support. His redundancy payment was not so large that it was likely that he had done nothing while spending it. He and his wife had to buy new cars which cost more than that payment. He needed work. He found a similar job in 7½ months. There was no reason for him to look outside the Respondent until dismissed, for he was making efforts to remain with them. In the extraordinary circumstances of the pandemic, I think Mr Kennedy has done very well to find an equivalent job in that period. He has mitigated his loss fully.
43. He had a company car and hired another for his wife. They were similar cars. That for his wife cost £259 a month. It is likely that the lost benefit of his company car was worth that amount to him. The Respondent made pension contributions for him of £156.25 a month.
44. There is no basic award, as a redundancy payment of the equivalent amount was paid, extinguishing that liability.
45. Mr Kennedy applied for an uplift on the award. I declined to order any uplift. That provision penalises an employer which fails to follow the right process. It is not designed to do so for an employer which follows the right process, but does so unfairly. The unfairness is compensated by the award.
46. Mr Kennedy asked for a preparation time order. I declined to make one. The Respondent had not behaved abusively, vexatiously or otherwise unreasonably in the conduct of the proceedings and this was not a case where the Respondent falls within the "*no reasonable prospect of success*" heading.

Schedule 1 – award

IN THE EMPLOYMENT TRIBUNALS CASE NO: 1401096/2021
BETWEEN Daniel Kennedy AND Hendy Group Ltd
CLAIMANT'S SCHEDULE OF LOSS

1. Details

Date of birth of claimant	01/07/1965
Date started employment	17/05/2013
Effective Date of Termination	09/11/2020
Period of continuous service (years)	7
Age at Effective Date of Termination	55
Date new equivalent job started or expected to start	21/05/2021
Remedy hearing date	04/11/2021
Date by which employer should no longer be liable	21/08/2021
Statutory notice period (weeks)	7
Net weekly pay at EDT	561.00
Gross weekly pay at EDT	922.62
Gross annual pay at EDT	47,976.00

2. Basic award

Basic award Number of qualifying weeks (10.5) x Gross weekly pay (538.00)	5,649.00
Less redundancy pay already awarded	-5,649.00
Total basic award	0.00

3. Compensatory award (immediate loss)

Loss of net earnings Number of weeks (27.6) x Net weekly pay (561.00)	15,483.60
Plus loss of statutory rights	500.00
Plus Company Car	1,942.50
Plus loss of pension	1,171.88
Pension loss	1,171.88
Loss of occupational pension	1,171.88
Total compensation (immediate loss)	19,097.98

4. Compensatory award (future loss)

Loss of future earnings Number of weeks (0) x Net Weekly pay (561.00)	0.00
Plus loss of pension	468.75
Total compensation (future loss)	468.75

5. Adjustments to total compensatory award

Compensatory award before adjustments	19,566.73
Total adjustments to the compensatory award	0.00
Compensatory award after adjustments	19,566.73

6. Summary totals

Basic award	0.00
Compensation award including statutory rights	19,566.73
Total	19,566.73

Schedule 2 – Recoupment

**IN THE EMPLOYMENT TRIBUNALS CASE NO: 1401096 2021
BETWEEN
DANIEL KENNEDY AND HENDY GROUP LTD**

RECOUPMENT

Recoupment

Prescribed period 10/11/2020 to 04/11/2021

Compensation cap applied

Total award	£19,566.73
Prescribed element	£15,483.60
Balance	£4,083.13

Compensation cap not applied

Total award	£19,566.73
Prescribed element	£15,483.60
Balance	£4,083.13

Employment Judge Housego
Date: 05 November 2021

Judgment & reasons sent to the parties: 6 December 2021

FOR THE TRIBUNAL OFFICE