EMPLOYMENT TRIBUNALS

Claimant
Mr Saim Yaqub

Respondent
Bestway Wholesale Ltd

Heard at: Southampton (by CVP) On: 4 March 2022

Before: Employment Judge Dawson, Ms Blake, Mr Ley

Appearances
For the claimant: Representing himself
For the respondents: Mr England, counsel

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. In this claim, the claimant brings claims of unfair dismissal and race discrimination. As was clarified at an earlier hearing before Employment Judge Roper, although the claim form refers to "other payments", that is a reference to the compensation sought in respect of the claims of unfair dismissal and discrimination.

2. The claimant was employed by the respondent as an Operations Manager until his dismissal by reason of redundancy. The claimant was employed at the Plymouth depot of the respondent's operation which was closed permanently. The depot ceased trading on 2 September 2020 and staff remained employed until 16 September 2020. Two members of staff moved from the Plymouth to the Exeter depot.

Conduct of the Hearing

3. The hearing was conducted by video pursuant to an earlier direction of the tribunal. The claimant was present in the UK throughout the hearing, despite the fact that he has been recently residing in Saudi Arabia.

4. At the outset of the hearing it transpired that, despite the bundle and witness statement of the respondent's witness being sent to the claimant on 1 March 2022 by email, the claimant had not seen the same. It also transpired that two emails which the claimant had sent to the tribunal, being those of 19 August 2021 and 2 March 2022, had not been seen by the respondent. The documents were exchanged between the parties and the matter adjourned between 10:30 a.m. and 12 noon to allow the parties to consider those documents and also to allow the tribunal to read the witness statement of Mr Peacock and the bundle. We indicated to the claimant that if he was in difficulty in conducting the case because of the fact he had only just seen the witness statement or the bundle, we would hear any application he wanted to make at noon.

5. When the hearing resumed, the claimant indicated that he was happy to continue with the case.

6. The claimant had not served his own witness statement and after discussions with the parties, he sought to rely, as his evidence in chief, upon the contents of the claim form and the contents of the emails of 19 August 2021 and 2 March 2022. The respondent made no substantial objection to that way forward and the tribunal permitted that. The respondent only called evidence from Mr Peacock.

Issues

7. The issues were set out in the case management order of Employment Judge Roper made at the hearing on 5 August 2021. At the outset of this hearing it was agreed that those issues remained the same, although the claimant also sought to advance a further reason why his redundancy was unfair. By reference to the document at page 115 of the bundle, he sought to argue that in September 2019 there had been a role of "Delivery Operations Manager Exeter" which had been advertised. In August 2020, when he was facing redundancy, he asked the respondent about that job. His argument was that the respondent should have considered giving him that job as an alternative role when he faced redundancy in September 2020.

8. The respondent resisted the widening of the issues, stating that the late notice of the application would cause it prejudice and its witness, Mr Peacock, may not be able to deal with that point. Although we were sympathetic to that point, we considered that it was a short point which the respondent would be likely to be in a position to deal with. We could take into account any difficulty which the respondent had in defending the point when making our findings of fact. We allowed the widening of the issues to that extent.

Law

Unfair Dismissal

9. Section 98 Employment Rights Act 1996 provides that it is for the respondent to show the reason for dismissal and that it is a potentially fair reason.

10. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".

11. Section 139 Employment Rights Act 1996 provides:

    (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—
        …
        (ii) to carry on that business in the place where the employee was so employed,

12. Where the reason for dismissal is redundancy, the House of Lords in *Polkey* v *Dayton* referred to the relevant procedures required in a redundancy dismissal in the following terms"… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.'

13. The case of *Sainsbury's Supermarket Ltd v Hitt* [2002] EW CA Civ 1588 makes clear that the range of reasonable responses applies to all aspects of the dismissal decision, albeit that was an unfair dismissal case (para 29).

14. In respect of "bumping" in *Byrne v Arvin Meritor* UKETA/0239/02 the EAT stated that "the issue is what a reasonable employer would do in the circumstances and, in particular, by way of consideration by the tribunal, whether what the employer did was within the band of reasonable responses of a reasonable employer?" (para 18)

15. In *Amazon v Hurdus UKEAT/0377/10/RN*, in connection with the question of alternative employment, the EAT stated "**[17]** Here the tribunal has, in our judgment, lost sight of the review function which it was required to carry out. The question was whether the Respondent took reasonable steps to find alternative employment for the Claimant so that he could retain his employment. Even if the Claimant had no realistic prospect of securing the Labour Manager's position (see para 48) because the job had been effectively promised to Ms Danvers if her six month fixed-term employment in the post went well, that does not render his dismissal by reason of redundancy unfair. It is only if there was a vacant post for which the Claimant was suitable but he was not considered for it that the employer acts unreasonably in this context."

Discrimination

16. The following are relevant sections from the Equality Act 2010.

13 Direct discrimination

1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

17. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

18. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

Findings of Fact

19. It is, nowadays, largely accepted that memory is fallible and even confident recollections of events can often be mistaken. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd,* the High Court stated that the best approach for a judge to adopt in a commercial case is to place little reliance on witness recollections of what was said and base factual findings on inferences drawn from the documentary evidence, unknown or probable facts. We have followed that approach, whilst bearing in mind that this is an employment case rather than a commercial case. In any event much of the evidence is not in dispute.

20. Prior to the redundancy events to which we will turn in a moment, the claimant was employed as an Operations Manager in the respondent's Plymouth depot. The respondent operates an independent food wholesale business with, according to the Response, approximately 60 branches across the country. The claimant had commenced work with the respondent in March 2004.

21. In June 2018 the claimant was promoted to the role of Operations Manager and located in the Plymouth depot. However in January 2019, due to absence, the claimant's employment was terminated. It does not appear to be disputed that it was terminated around 18 January 2019. Subsequently, on appeal, the claimant was reinstated but he did not return to work until August 2019. By that point a new Operations Manager had been engaged and when the claimant returned to work there were two operations managers.

22. In June 2020 the respondent decided to restructure the Plymouth depot. The respondent's evidence which, again, was not challenged was that as a result of the restructure the headcount would be reduced. There would only be one Operations Manager going forward, only three supervisors instead of six, and only one picker and one driver, whereas before there had been six.

23. Mr Peacock held a meeting with staff at the Plymouth depot on 29th June 2020, the notes are at page 71 of the bundle. A consultation process was outlined including individual consultation meetings with a view to the process ending on 7 August 2020.

24. The claimant was placed in a pool with the other Operations Manager and both operations managers were scored by Mr Peacock (the General Manager) and the General Manager from the Bristol depot. A consultation meeting took place with the claimant on 6 July 2020 (page 81). On 15 July 2020, the claimant took part in an assessment exercise where he completed an interview and presentation. Following that, the scoring process was carried out and the claimant was scored more highly than the other Operations Manager and the intention was to retain him going forward. As it happened, the other Operations Manager obtained alternative employment and requested voluntary redundancy in any event. Again that evidence, set out in more detail in the witness statement of Mr Peacock, was not challenged and is consistent with the documents which are in the bundle before us. We therefore accept that evidence.

25. However, by 22 July 2020 the respondent's board had decided to close the Plymouth depot in its entirety. There is no dispute that the Plymouth depot did close in its entirety and the unchallenged evidence of Mr Peacock was that the board members who made the decision were not part of either the Plymouth depot or the Exeter depot (to where the Plymouth work was being transferred). There is no suggestion that any of the board members were motivated by any knowledge of or about the claimant in making that decision.

26. On 22 July 2020, another meeting took place with the respondent's staff when they were told that the depot was to close. The announcement appears at page 92 of the bundle and sets out a timeline for the consultation process (page 94). It is fair to say that Mr Peacock's recollection of the consultation process was shaky at best but, on the balance of probabilities, we accept that it is likely that the two collective consultation meetings referred to took place. When he was asked about the timeline in re-examination Mr Peacock told us that collective consultation did take place, although he could not remember any of the details and said he would need to search through his emails. Although there is no note of either of those meetings in the bundle, a lack of consultation has not been

raised as an issue by the claimant in this case and, as far as we are aware, no claim has been made in respect of a lack of collective consultation. We, therefore, find that it is more likely than not that such collective consultation did take place.

27. However it is apparent that the individual consultation meetings anticipated in the timeline at page 94 of the bundle did not take place. Following the announcement it appears that there was only one consultation meeting with the claimant rather than three and that was the one that took place on 12 August 2020 (page 103 of the bundle).

28. At the meeting on 22 July 2020 employees were given a document headed "Frequently Asked Questions" which considered, at question 17, the question of alternative employment. Although the answer states that a list of vacancies would be updated regularly and provided to affected colleagues, it appears that the list was contained on the company's website and the claimant agreed that he was aware of that. The claimant also accepted, in his evidence, that Mr Peacock had said that he would look at the website for roles which would be suitable for the claimant and subsequently told him that he had not found any.

29. As we have indicated, a further individual consultation meeting took place with the claimant on 12 August 2020 at which he was told that he would have been appointed to the Operations Manager role but because the respondent was to close the Plymouth depot another consultation was ongoing and his position would be made redundant with a potential date of 16 September. He was asked whether he had any questions or comments but did not raise any (page 103 of the bundle).

30. There were no further consultation meetings with the claimant and on 2 September 2020 he was given a letter of dismissal (page 119). The dismissal was to take effect on 16 September 2020 and the claimant was not required to work his notice. The letter gave him the right of appeal but he did not appeal.

31. On 11 September 2020, the claimant contacted Mr Jones at the Exeter depot, stating that he understood there would be a Non-Trading Team Leader vacancy coming up which he would like to apply for (page 124). The claimant was informed that the role would be at a salary of £23,000 per year since it was a more junior role than he was in. The claimant was earning £28,000 per year. On 16 September 2020 the claimant offered to reduce his salary to £26,000 for the role but made clear that he would not reduce his salary to £23,000 per year (page 125). The respondent declined to increase the salary for the role. Mr Peacock told the tribunal (and it was not challenged) that in the past the respondent had restructured its pay structures so that there were defined salaries for particular roles. The respondent no longer paid people according to experience, length of service etc. We accept that evidence, it was not challenged and was given without hesitation and in some detail.

32. At about the same time, the claimant was aware that the incumbent Exeter Operations Manager was on long-term sick leave due to work stress. The claimant suggested that the company ask him if he wanted to be demoted from his role because he was under pressure. According to the claimant's email of

19 August 2021 he was told that that was not possible and he did not argue about it. However later, on the claimant's own evidence after his employment had ended, the Operations Manager did take a demotion. Mr Peacock stated that he did so at the end of the year, in November or December 2020. There is no reason to doubt Mr Peacock's evidence in that respect and we accept it.

33. Mr Peacock's evidence in respect of this issue is that the Operations Manager was suffering from long-standing mental ill health. He says that it was not felt right to demote him, the respondent wanted to work with him and wanted him to look after himself and get better. The respondent was seeking to allow him the time to do that. It was ultimately the decision of the Operations Manager himself to step down. Again we have no reason to disbelieve that evidence. It is consistent with what the claimant says, namely that he was told it was not possible to ask the Operations Manager if he wanted to step down and there is nothing to suggest that the decisions in that respect were for any other reason than that given to us.

34. The claimant also suggested that the respondent should create a second Operations Manager role in Exeter. He says that in the past the respondent had allowed two roles to coexist for a time (such as two Operations Managers) and then, when a vacancy arose in another depot, one of the Operations Managers was transferred out. In answer to that, the respondent argues that the proposal was not reflective of what was happening within the respondent at the time. The respondent was making redundancies and had made the decision, initially, to remove one Operations Manager from the Plymouth depot. It would be entirely inconsistent with that to increase the number of Operations Managers in Exeter. The respondent also asserts that the only reason that there were two operations managers at Plymouth was because of the unusual situation which had arisen when the claimant was reinstated to his role but remained on sick leave until August 2019.

35. In respect of the document at page 115, the respondent's case, with which the claimant agreed, is that in September 2019 the Delivery Operations Manager role in Exeter was not filled. No one was appointed to it and, subsequently, the respondent decided not to have that role at the Exeter depot. Thus at the date when the claimant wrote about the role, on 19 August 2020, the role no longer existed within the respondent's organisation.

36. In circumstances where alternative employment was not found, the claimant's employment terminated on 16th September 2020.

37. Two people transferred from the Plymouth branch to the Exeter branch. One person took up the team leader role which the claimant did not pursue when the salary would not be increased. Another applied for a supervisor role which was more junior to the team leader role and which the claimant did not apply for and said, in evidence, he would not have applied for. The employees who moved to take those roles were both white.

Conclusions

38. We state our conclusions by reference to the list of issues contained within the order of Employment Judge Roper.

39. In respect of issue 1.1, at the outset of the hearing the claimant confirmed that he accepted that his dismissal was by reason of redundancy. Had that been in dispute we would have found that the reason for the claimant's dismissal was redundancy. The reason for the dismissal was that the respondent was closing its Plymouth depot and, therefore, it was ceasing to carry on business in the place where the claimant was employed. That is a redundancy situation within the meaning of section 139 Employment Rights Act 1996.

40. In answering that issue we have also given the answer to issues 1.2.1 and 1.2.2, for the purposes of clarity we accept that was the reason for the claimant's dismissal.

41. We have found that issue 1.2.3 has caused us the most concern in this case. The respondent did not consult with the claimant in the way that it said it would in the announcement of 22 July 2020. Instead of consulting with the claimant on three occasions after the collective consultation had been carried out, it only consulted with the claimant once, namely on 12 August 2020. That would seem to be fertile ground for the claimant to argue that there was not sufficient consultation.

42. The consultation has, however, to be seen in the context of what was happening overall. There had been consultation when the respondent was simply considering reducing its headcount. The claimant had gone through a consultation process in that respect including being scored. Prior to the consultation meeting on 12 August the claimant had been notified (on 22 July 2020) that the respondent was considering the closure of the Plymouth branch. The claimant did not seek to raise any matters at the meeting on 12 August 2020. The respondent had carried out two collective consultation meetings with appointed representatives.

43. If this was a case which had come to the tribunal without the announcement of 22nd July stating that the claimant will be entitled to 3 consultation meetings, we would have found that the consultation process was within the range of reasonable responses that a reasonable employer could carry out. The claimant was fully aware of what was happening and had the opportunity to raise any matters he wished to. There had been collective consultation. The question which we must also address, however, is whether the announcement of 22 July 2020 means that our opinion must change. We do not think that it does. Ultimately the question for us is whether the consultation was within the band of reasonable responses, considered within the context of section 98(4) Employment rights Act 1996. We find that it was and that the respondent behaved reasonably.

44. In respect of issue 1.2.4, Mr England, for the respondent, analysed the case on the basis that the pool from which the claimant was selected was all of the employees within Plymouth. We agree. Mr England also submits that the only way in which we could find that the pool was inappropriate was if we find that staff at Exeter should also have been pooled for the purposes of consideration for redundancy. Again, we agree.

45. We do not find that staff from Exeter should have been pooled with the claimant. The respondent was closing an entire depot. That depot was a considerable distance from the Exeter depot and the Exeter depot was to continue functioning. The choice of the pool was, primarily, a matter for the employer and the decision simply to pool staff at one depot is not one which we could say was outside the range of reasonable responses.

46. In respect of issue 1.2.5, we also find that the respondent took reasonable steps to find the claimant alternative employment. It advertised its vacancies and allowed the claimant to consider those vacancies. Mr Peacock went to the lengths of reviewing the vacancies and informing the claimant of the results of his review. The claimant says that more should have been done in certain specific respects as set out in paragraph 1.4 of the list of issues and we will turn to those now.

47. At issue 1.4.1 the claimant says that he should have been offered the Team Leader's salary at £26,000 per annum. As we have indicated, the respondent had applied specific salary bands to specific roles. We do not think that there is any obligation on a respondent to create a role at a higher salary for an employee who is facing redundancy. The claimant was able to apply for the vacancy which did exist and he chose not to. We do not think the respondent needed to do more.

48. In respect of issue 1.4.2, we consider there were good reasons for the respondent not wanting to approach the Operations Manager at Exeter when he was off with long-term mental ill health. It could well be detrimental both to an employee's health and to the relationship between employer and employee if, in a process where an employer is trying to support an employee to come back to work, it suggests that employee might wish to accept a demotion. Applying the band of reasonable responses, whilst we accept some employers might have approached an employee in those circumstances, we do not think it was outside the band of reasonable responses for this employer not to do so. Moreover there is no suggestion that the respondent did not approach the incumbent Operations Manager because it wanted to lose the claimant's services. We record that the respondent was intending to retain the claimant at the Plymouth depot after the first redundancy process.

49. In respect of issue 1.4.3, we do not believe that the respondent was under any obligation to create an additional role for an operations manager at the Exeter depot. We accept the respondent's case that it was seeking to reduce its headcount rather than increase it. It cannot be said that the respondent's decision in this respect was outside the range of reasonable responses, indeed we consider that it was an eminently reasonable position in circumstances where the company was having to lose large numbers of staff.

50. The same point applies in relation to the argument which arises out of page 115 of the bundle. We accept the evidence of Mr Peacock that the Delivery Operations Manager role did not exist in September 2020. In those circumstances we do not think that there was an obligation upon the respondent to create the role to avoid making the claimant redundant.

51. Moving back to issue 1.3, in all the circumstances we consider that the decision to dismiss was a fair sanction (to the extent that is an appropriate description of a dismissal by reason of redundancy), it was within the range of responses open to a reasonable employer.

52. Had we found that the consultation process was unfair in that the claimant was only afforded one consultation meeting rather than three (as set out above) we are confident that the outcome of the process would have been exactly the same. There is nothing that the claimant could have said which would have prevented the closure of the Plymouth depot and he said everything that he wanted to in respect of seeking alternative employment. Additional meetings would not have lengthened the process when the timescale set out in the announcement of 22nd of July is considered. Thus, even if the claimant had been afforded additional consultation meetings there would have been no different outcome. The claimant would still have been dismissed by letter of 2 September 2020 and his employment would have ended on 16 September 2020.Those conclusions deal with issue 1.5 and have the effect that even if the dismissal was unfair because the consultation procedures were not followed, we would not have awarded the claimant a compensatory award. Whilst the claimant would have been entitled to a basic award, because he has been paid a redundancy payment he would not have been awarded any amount in respect of his basic award. Thus even if we had found for the claimant on this point, it would not have entitled him to financial compensation.

53. In respect of the race discrimination claim our conclusions are as follows.

54. We have explained why the claimant should not have been offered the role of Team Leader in Exeter at a salary of £26,000, why the respondent did not need to ask the incumbent Operations Manager at Exeter whether he would wish to be demoted (or dismissed) and why the respondent was not obliged to create a new role for the respondent at the Exeter branch.

55. Whilst it is true (issue 2.2.4) that, of the three people who were prepared to transfer to Exeter, only two white employees did so, there are good reasons for that. One of the roles which a white person was transferred to was the team leader role which the claimant declined to pursue when a salary of £26,000 was not offered to him. The other role, a supervisor role, the claimant would not have accepted because it was even more junior and he did not apply for it.

56. In those circumstances there is no evidence from which we could conclude that a person in the claimant's position who was white would have been treated more favourably. Indeed we are entirely satisfied that a white person in the claimant's position would have been treated exactly the same as the claimant. Such a person would not have been offered a team leader role at £26,000 per annum or had a job created for them. The respondent would not have approached the incumbent Operations Manager regardless of the race of the person in the claimant's position, because they were concerned for his mental welfare. We are entirely satisfied that the decisions made by the respondent were made on the basis of commercial viability or consideration for the Exeter Operations Manager and not in any way influenced by the claimant's race.

Again, in reaching that conclusion, we note that the respondent was intending to keep the claimant's services until it decided to close the Plymouth branch.

57. In those circumstances the claimant's claims are dismissed.

Employment Judge Dawson
Date 29 March 2022

Judgment sent to parties: 12 April 2022

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.