Case number: 3301319/2021

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mrs P Smith	**Alan Greenwood & Sons Ltd**

Heard at: **Reading via Cloud Video Platform**

On: 24 March 2022

Before: **Employment Judge French**

Appearances:

For the Claimant: Mr S Sim, Solicitor

For the Respondent: Mr D Ludlow, Solicitor

RESERVED JUDGMENT

1. The claim for unfair dismissal is well-founded and is upheld.
2. The respondent failed to provide the claimant with written particulars of her employment and is ordered to pay the claimants two weeks' pay in relation to the failure. This totals £754.16 gross.
3. The tribunal will decide the remedy for unfair dismissal at a further hearing on a date to be fixed.

REASONS

Introduction

1. This is a claim brought by the claimant by way of claim form issued on 19th February 2021 for unfair dismissal. In its response, the respondent denies that it unfairly dismissed the respondent, relying on redundancy as the reason and in that regard submits that it was both substantively and procedurally fair.

Evidence

2. I was provided with and read, a bundle consisting of 165 pages. I heard evidence from the claimant on her own behalf. For the respondent, I heard from Ms Carole Daniels, Area Manager, as well as from Ms Alison Mills, Human Resources Manager. I also heard and read written closing submissions from both parties. I was also directed to a bundle of authorities by the respondent.

Issues

At the outset of the hearing, I agreed with the parties that the following issues needed to be determined by the tribunal:

I. What was the reason for dismissal? Was it a genuine redundancy?
II. If it was a redundancy, was it substantively and procedurally fair?

Fact finding

Unfair Dismissal

3. The claimant was employed as an accounts administrator for the respondent's Send branch from 23 June 2018 until her dismissal on 24th January 2021. The respondent is a funeral director which employs approximately 50 members of staff across 31 branches.

4. All parties agreed that the Send branch was a particularly busy branch which handled the accounts, funeral arrangements, coroner call outs and home removals. Despite this, the team at the time of the claimant's employment was a small one, consisting of the claimant, Louise Bell (an accounts manager) and Carole Daniels, Area Manager.

5. During the covid 19 pandemic, the claimant was placed on furlough, due to a medical condition that required her to shield. She was released from shielding in July 2020 and returned to work in August 2020.

6. On the evidence of Carole Daniels, when the claimant returned to work her attitude had changed and she felt that she was falling behind with her work. She referred to an incident on 29 September where the claimant had incorrectly noted a

telephone message from the coroner at the police station and recalls the claimant gave a sarcastic response when spoken to about it.

7. On 1st October there was a discussion between the claimant and Carole Daniels regarding timekeeping. It is understood that both parties were running late for work on that occasion which resulted in the out-of-hours phone line still being diverted to the on-call member of the team. Ms Daniels spoke to the claimant about her timekeeping, which she describes as being a comment in passing rather than a formal meeting.

8. The claimant, however, felt sufficiently aggrieved by the discussion to report it to Alison Mills, Human Resources Manager. Having discussed the matter with her, the claimant indicated that she did not wish to take the matter further by way of formal action but asked for the incident to be noted.

9. There was then a further incident on 11 December where Carole Daniels described the claimant as having reacted badly to an offer of help from Louise Bell, the accounts manager. A summary of Louise Bell's recollection of this appears at page 118 of the bundle. Having had the matter reported to her by Louise Bell, Carole Daniels then spoke to Alison Mills about it and left the matter with her. It is understood that the claimant later sent a text to Alison Mills about the incident, however, she did not pursue anything further and no further action was taken.

10. In November 2020, discussions took place between Carole Daniels, Alison Mills, and Alan Greenwood, Director about changing the team structure to provide additional support with funeral arranging. The first meeting took place on 10th November 2020, following which, on the evidence of Alison Mills, it was agreed that another funeral arranger was required.

11. There respondent says that there was a subsequent meeting on 24 November, where it was proposed that the existing role of the claimant would be turned into a hybrid role involving 50% accounts and 50% funeral arranging.

12. Both Alison Mills and Carole Daniels agree that following those conversations and by the end of November 2020, the way that the respondent planned to achieve the new role was to make the claimant redundant and give her an opportunity to apply for the new role. This was prior to any consultation with the claimant.

13. On 18 December 2020, a meeting took place between the claimant, Alison Mills and Carole Daniels. During the meeting the claimant was advised that her role was going to be made redundant and was handed a letter as at page 94 of the bundle. The letter purports to refer to a proposed change, however, on the evidence before me and as stated above, I find that the decision to make the claimant redundant had already been made at this time.

14. The claimant then received a further letter dated 23 December at pages 98-99 which confirmed that her position had been made redundant, set out her notice and redundancy pay and that her date of termination would be 24 January 2021, albeit she was not required to work her notice period.

15. Following the meeting the claimant asked the respondent a number of questions, at pages 96 and 97 of the bundle, about the redundancy and the new job role. This was responded to by way of email at page 96 of the bundle which attached a document in response.

16. There was a dispute over the document attached to that response, in that there are two documents, one at 97a and one at page 95. The one at page 95 refers to one new role available, whereas the document at page 97a refers to two new roles being available.

17. The claimant states that the attachment she received was the document at page 97a of the bundle and I accept her evidence on that point. Alison Mills states that the reason that there were two versions is that there was a second role at another site. She states that this was discussed with the claimant by telephone but that the claimant said she did not wish to be considered for the role because she did not want to travel.

18. The claimant denies that this conversation took place. On the evidence before me, I prefer the evidence of the claimant on this point. Alision Mills is the human resources manager for the respondent's whole company. She would have known the importance of an alternative role in a redundancy situation and had such a role been offered, I would have expected there to have been written confirmation or evidence of this. Further, Alison Mills did not refer to this offer in her witness statement which was prepared for these proceedings. Again, given her role as human resources manager I would have expected her to recognise the importance of this and include the same had such a discussion taken place.

19. There then followed a subsequent meeting on 4th January during which the claimant expressed her interest in applying for the new role. The claimant was subsequently interviewed for the role on 11th January 2021 via video call. The interview was brief, lasting 12 minutes.

20. On 15th January the claimant was advised that she was unsuccessful in her application. She was not provided with any feedback despite requesting this. The evidence of Alison Mills was that the reason she did not provide feedback is that she did not wish to upset the claimant. I do not accept that explanation. The claimant specifically requested feedback and would have known, given that she was unsuccessful in the job application, that this would not be positive. Alison Mills is a human resources manager and would have recognised that the feedback may have been helpful, not least in relation to future interviews.

21. Alison Mills also stated that she had scored the defendant out of 10 as part of the interview process and that she needed a score of 6 to have been successful. She stated in the ET3 response form that she had scored a 4, however in her evidence, she stated she scored 3 to 4, being different scores to different responses. The scoring system used was not in evidence, neither were the notes taken from the interview. In that regard Alison Mills gave evidence to say the records were held in her office and she had not considered them important. I do not find this credible. Again, she is a human resources manager. She was aware of the claimant's claim and would have been aware of the importance of those documents.

22. In absence of the scoring system, interview notes and a satisfactory explanation as to why no feedback was provided, I conclude that this supports the claimant's assertion that there was not a genuine redundancy in this case and that Alison Mills was unable to give feedback or provide the supporting evidence for that reason.

23. Following the claimant's date of termination, a job advert was placed by the respondent at page 114 of the bundle. It is not known the exact date that the advert was placed, however both parties agreed that it was on or around 28th January 2021, 4 days after the claimant's termination date.

24. This is an advert for a full time 'Sage Accounts Clerk/funeral Admin.' It was accepted by both of the respondent's witnesses during cross examination that this advert is the same as the job description of the claimant at page 37 of the bundle, save for the addition of 'funeral duties'. On viewing the advert, it is clear that it is a role that the claimant would have deemed herself suitable for as advertised

based on her existing job description. For those reasons, I find that the advert does appear to be one for the claimant's previous role.

25. Carole Daniels, who placed the advert states that the reason the advert reflected the role of the claimant, was because she did not wish to be inundated with applications from funeral arrangers because they needed someone with accounts experience and so that part of the job description was deliberately left out. The requirement for funeral arranging services was then communicated to the applicant during the interview process. I do not accept that explanation as credible.

26. Both Carole Daniels and Alison Mills expressed how important it was for the person who would be taking on the new 50/50 role to have the skills and qualities required for a funeral arranger. Indeed, that is the reason why they state they rejected that claimant after her interview as she did not demonstrate those qualities. Those skills and qualities were therefore clearly important to have included in the job description in the advert in order to secure the right person.

27. Further, if they wished to ensure that they did not get applicants from funeral arrangers alone, the job description could have specified that the accounts experience was a necessary requirement or that experience in accounts was essential, in addition to the funeral arranging duties, as is often the case with job advertisements.

28. It is understood that the role has now been filled by an individual called Liz. The respondent did not provide a job description for her and on being questioned, Carole Daniels confirmed that she did not have a job description. It is therefore not known what role Liz is carrying out and based on the advertisement and in absence of job description to the contrary, it appears to have been an accounts role.

29. In terms of the consultation process itself, I find that the decision to make the claimant redundant was made at the end of November prior to any discussion taking place with her. This is based on the evidence given by both of the Respondent's witnesses that that is when the decision was made.

30. When the respondent did consult with the claimant on 18 December it was done so as a purported proposal, however the decision had already been made. In addition, the view was that her role would be made redundant and she was to apply for the new role should she wish. The respondent did not discuss possible alternatives such as a reduction of the claimant's hours, or giving her the funeral

arranging tasks as an additional job role on a trial basis or otherwise. Whilst I accept that the respondent is entitled to determine how it organises its business with regards to choosing to have a 50/50 role, I consider such discussions to be in the band of reasonable responses by the respondent in considering redundancy in this situation.

31. I do accept that the claimant was given an opportunity to ask questions following the meeting and that this amounted to a consultation throughout the process as a whole. I do not, however, consider this was meaningful because the decision had at that point been made.

32. I also accept the respondent's submissions that the subsequent interview process would have been a largely subjective one. However, the interview for the new role was part of the redundancy process as a whole and I would expect to see how she was judged subjectively, by way of sight of the scoring system and feedback in order to demonstrate the fairness of the process.

Failure to provide written particulars

33. The claimant states that she was not provided with a contract of employment. The respondent states that she was, it being the document at pages 30 to 31. This document is an offer of employment and is signed by the claimant. It refers to terms of conditions which appear at page 32-39 of the bundle. The claimant says she signed the document at page 30 to 31 of the bundle but did not receive the terms and conditions and raised this with the respondent.

34. The respondent said that these should have been sent, however given the lapse of time they could not be sure of this. I therefore find that the claimant did not receive the terms and conditions because she is the only party who can be certain of this fact.

35. In any event, had the claimant received the terms and conditions, I do not accept that these accord with what is required by Section 1 of the Employment Rights Act 1996. I therefore find that the claimant was not provided with written particulars of her employment.

The Law

36. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the

Tribunal under section 111. The employee must show that he was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act) on 24 January 2021.

37. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

38. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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.

39. In a case of dismissal for redundancy this involves a consideration of the redundancy process and specifically whether there was a fair process involving (i) warning and consultation (ii) a fair basis for selection, (iii) consideration of alternative employment and (iv) an opportunity to appeal (Polkey v A E Dayton Services [1987] IRLR 503).

40. On appeal in that case Lord Bridge said that 'the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within its own organisation.'

41. In Williams and ors v Compare Maxam Ltd 1982 ICR 156, EAT the Appeal Tribunal set out 5 principles that employers should act in accordance with, namely, i) early warning ii) consultation with union iii) fair selection criteria iv) fair selection in accordance with criteria and v) consideration of alternative employment.

42. In Langston v Cranfield University 1998 IRLR 172, EAT, the Appeal Tribunal considered that the principles of law relating to unfair redundancy dismissals were 'encapsulated', in the words of Lord Bridge in Polkey. In the EAT's view, it was therefore 'implicit' that unless the parties had agreed otherwise, an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, whether or not each of these issues was specifically raised before the employment tribunal. Furthermore, an employment tribunal could normally be expected to refer to these three issues on the facts of the particular case in explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy.

43. In Morgan v Welsh Rugby Union [2011] IRLR 376 it was stated that 'Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process.'

44. Dyke -v- Hereford & Worcester County Council [1989] ICR 800 states that consultation is necessary where a) the overall need for redundancy is considered and b) upon the giving of notice and during the notice period.

45. The fairness of a dismissal for redundancy will be judged not simply at the date on which notice is given but also with regard to events up to the date on which it takes effect as in Stacey -v- Babcock Power Ltd ICR 1986.

46. Section 139(1) Employment Rights Act 1996 (ERA) provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed

by the employer, have ceased or diminished or are expected to cease or diminish.

47. Section 1 ERA 1996 states that an employee must be provided with written particulars of their employment and sets out what those particulars should include.

48. Section 38 of the Employment Act 2002 states that where an employer fails to provide written particulars, the tribunal must make an award of two weeks' pay. If just and equitable the tribunal can consider awarding a higher amount of four weeks.

Conclusion

49. For the reasons stated above the respondent failed to provide the claimant with written particulars as set out in section 1 ERA 1996. There is nothing on the facts that persuades me that it would be just and equitable to impose the higher amount of four weeks' pay. The respondent did have a set of terms and conditions that it issued to its employees and believed it had done so. These were not received and did not comply with section 1 ERA 1996, however it was not a complete failure or deliberate disregard of employment law. The basic award of two weeks' pay is therefore appropriate and I have calculated this as follows:

    Gross pay £1634 per month x 12 months divided by 52 weeks gives weekly figure of £377.08.

<u>Unfair dismissal</u>

50. The parties agree that the claimant was dismissed on 24 January 2021. It is for the respondent to show that this was for a fair reason and they assert this was redundancy.

51. The claimant placed emphasis on the fact that the evidence before the tribunal was that the Send branch was the busiest site of the respondent's and that the business was growing. Funeral services during the pandemic had clearly increased and it was their submission that it was inconceivable that a redundancy situation could be made out in those circumstances. The respondent asserted that whilst the business may have been growing there was a diminution to the work of the claimant because of the re-organisation decision.

52. It is not for this tribunal to decide whether the business decision of the respondent was a wise one. The question is whether it was a genuine one.

53. Whilst I accept that the reallocation of the claimant's role to one of 50/50 accounts and funeral arranging, would have resulted in a diminution of the type of work of a particular kind that the claimant was required to carry out, and therefore meets the definition of section 139 (1) ERA, I am not satisfied that this was a genuine redundancy situation. I consider that the explanation of changing the role to one of 50/50 has been given as an attempt to justify the claimant's dismissal which was done for some other reason.

54. I find that the advert that was placed on or around 28 January 2021, was for the role of the claimant. In comparing the terms of her job description to that advert, together with the list of duties that the claimant gave in her witness statement, it is clear that the role was the same as the role that the claimant had been employed in.

55. I find that the placing of the advert 4 days after the claimant's effective date of termination demonstrates that there was not a genuine redundancy situation since the company had to recruit for the claimant's role. I was not satisfied with the explanation given by the respondent's witnesses in relation to the job advert for the reasons explained above and therefore can only conclude the advert was indeed for the claimant's replacement.

56. I find that the fact that no scoring system, notes form interview or feedback was provided supports the fact that this was not a genuine redundancy situation. I find that Alison Mills knew the importance of these documents in the tribunal process and the fact that they were not provided is because there was no genuine scoring system. I do not find Ms Mills explanation credible regarding the lack of feedback and can only conclude as a result that the reason no feedback was provided is because there was no genuine feedback that could be given. The whole process amounted to a sham and was some other way of removing the claimant from her employment.

57. The interview with the respondent lasted 12 minutes. On Alison Mills evidence an interview would usually last 20-30 minutes. This again evidences that the respondent was not seriously considering keeping the claimant on in her employment; if she had been I would have expected the interview to have lasted much longer. This is particularly so given the emphasis that both the respondent's witnesses placed on having the right person for the role of funeral arranging. Whilst I recognise that the claimant had worked for the respondent company for a period of 2 and a half years, Alison Mills in her statement said that she did not work closely with the claimant and therefore could not have known her qualities or skills well. I therefore do not find that these could have been properly explored in 12 minutes. This supports the fact that the respondent had no intention to retain the

claimant because the interview was not a proper one to establish her suitability for the role.

58. As I have found that the reason for dismissal was not one of genuine redundancy, I find that the claimant's dismissal was unfair. Her claim for unfair dismissal is therefore well-founded and is upheld.

59. In any event, had the reason been one of genuine redundancy, I find the dismissal was still unreasonable and therefore unfair under the provisions contained in s98(4) of the ERA 1996. Applying the guidelines in Williams and ors v Compare Maxam Ltd 1982 ICR 156, EAT I note that there is no evidence of any selection criteria used by the respondent. Although, there was a degree of consultation, namely the meeting with the claimant on 18th December and 4th January and email discussions with her, I do not consider that this was meaningful because the decision to make the claimant redundant had already been made. I also find that whilst the claimant was interviewed for alternative work, this was not firstly offered or discussed on a trial basis by way of additional tasks being added to the claimant's current role. If interview for the new role was required, this process was flawed because the interview itself was too short for Ms Mills to have established the claimant's suitability. Whilst I accept the decision is a largely subjective one, we do not know on what criteria the claimant was assessed and given Ms Mills refers to having a set scoring system, fairness would have involved knowledge of that.

60. I consider that these steps would have been in the range of reasonable responses open to the respondent. Whilst the guidelines in Williams are not principles the respondent must have followed, the standard of behaviour assists with determining reasonableness. Having regard to all of the circumstances, the decision was unreasonable.

61. Owing to time constraints, the tribunal dealt with liability only at the hearing on 24th March 2022. Quantum for the unfair dismissal will be determined at the remedy hearing to be fixed in due course, in absence of the parties being able to reach agreement on the issue.

Case number: 3301319/2021

_____

Employment Judge French

13 April 2022

Sent to parties on:

26 April 2022

For the Tribunal: