EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100144/2022

Held by Cloud Video Platform (CVP) on 3 and 4 May 2022

Employment Judge: Mrs M Kearns (sitting alone)

Mr G Swinton	**Claimant** **In Person**
Texo Group Limited	**Respondent** **Represented by:** **Mr R Phillips - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant, who is aged 61 years was employed by the respondent as a plater until his dismissal for redundancy on 5 January 2022. On 7 January 2022, having complied with the early conciliation requirements he presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair.

Issues

2. The issues for the Tribunal were:-

    (i) Whether or not the respondent's dismissal of the claimant was fair;

    (ii) If it was unfair:

        a. the percentage or other chance that a fair procedure would have reached the same result;

b. Whether the claimant contributed to his own dismissal to any extent;

c. Whether the claimant took appropriate steps to mitigate his loss; and

d. Remedy if appropriate.

The respondent admitted dismissal.

Evidence

3. The parties lodged a joint bundle of documents and referred to them by page number. The respondent called the following witnesses: Mr Stewart Kerr, their Fabrication Team Leader; Mr Graeme Rae, Workshop Manager and Ms Samantha Csorba, Group HR Director. The claimant gave evidence on his own behalf.

Findings in Fact

4. The following facts were admitted or found to be proved:-

5. The respondent is a company engaged in largescale construction and fabrication work. The claimant was employed by the respondent in its fabrication division workshop at the Port of Dundee between 12 March 2019 and 5 January 2022. The workshop makes large steel items such as steel beams for bridges and pipework. The claimant is a plater. The work of a plater involves accurately tacking together pieces of metal for the welders to weld, ensuring the gaps and measurements are correct and allowing for shrinkage during the welding process.

6. The respondent's workshop at the Port of Dundee had 23 metal or steel workers (platers, welders, fabricators), plus managers and office staff. It is a small business unit. Of the 23 employees, 5 were permanent and 18 (including the claimant) were on temporary contracts. From time to time during busy periods, the respondent also uses agency workers supplied by a sister company, Texo Recruitment Limited.

7. One of the challenges faced by the respondent is the fluctuation in their workload which depends on the level of orders received. When the workload drops it can be a struggle to keep everyone employed.

8. In September 2021, the respondent entered a quiet period and its managers thought employee numbers may have to be reduced. Accordingly, the respondent contemplated commencing a redundancy exercise, constructed a pool of the 18 "temporary employees" and made some preparations. The respondent carried out a provisional redundancy selection and scoring in September 2021. The scoring involved managers from the shop floor using 7 criteria which were modified to the Fabrication division. The criteria included competence, safety, range of skills, flexibility, general conduct, attendance and length of service. The criteria were weighted according to their importance to the business, with competence and safety given the highest weighting.

9. The managers who undertook the scoring were appropriately skilled and qualified to make an assessment of the competence, range of skills and flexibility of the pool and had regard to available documents and records. The initial scoring took place on 10 September 2021 and was done by a group of four managers: the plating supervisor, the operations engineer, the workshop manager and Mr Kerr, the Fabrication Team Leader. The score for safety was divided into two parts, each marked out of five. The first part was ‘attitude to safety’. The claimant, along with most of the pool was scored 4/5 for this. The second part was for contribution to safety and involved the employee being given additional points for being a safety rep, fire warden or first aider. The claimant did not hold any of these roles. Along with most of the pool, he was therefore awarded 0/5 for the second part. In total, 15 employees scored 4/10; one scored 5/10; one scored 6/10 and one scored 8/10. The basis for this scoring (68) was that if an employee held one of safety rep; fire warden or first aider they would be scored 7 – 8 and if they held two of those posts, they would be scored 9 – 10.

10. Later in September 2021, after new work orders were received, the respondent became busy again and the redundancy process was shelved as not necessary at that time.

11. However, in mid-December, the respondent became aware of delays in significant orders (including one order for HCS Frames and another for a Harland & Wolff Access Tower). Other expected orders had not materialised. They considered that there was insufficient work to keep all the temporary employees productively occupied and that their requirement for fabrication workers had diminished. Accordingly, they again began a proposal to reduce the number of "temporary employees" in the core crew in Dundee by 6, from 18 to 12.

12. On Monday 13 December 2021, an announcement (page 55) was made to all temporary workers, including the claimant that due to a delay in significant orders coming on stream, the Company was having to consider its headcount and had identified that one possible solution would be to reduce the number of temporary staff at Dundee Port. It was explained that a number of large work orders had been delayed until 2022, including the HCS Frames and Harland & Wolff Access Tower, and others had not materialised. The announcement stated that whilst there was still some work coming through, following a review of the business and orders, there was not enough work to keep all temporary workers productively occupied. It was stated that there would therefore be a consultation on a proposal to reduce the number of temporary workers from 18 to 12 – a reduction of 6 positions across all disciplines (welders, fabricators, platers and labourers). The announcement made clear that a final decision had not been made.

13. On Monday 13 December 2021, the claimant received an "at risk" letter (56) with his provisional score under the 7 selection criteria. A copy of the claimant's scoring assessment was enclosed with the letter. In this letter, the respondent explained the next steps, including actions for the claimant to take, the consultation meetings to be held, the process of finalising the scores and steps taken to find alternative employment. The letter stated that at the second meeting the respondent would be contemplating redundancy. The claimant's score and how it had been calculated was explained in detail. His overall score was 332 (67). The letter stated: "*We wish to consult with you about this proposal, your provisional selection and receive your input. Please also review your scores and the criteria and let me know by Thursday 15th December 2021 if you would like any further information on your provisional score or to discuss your score."* The claimant did not take any of the actions

referred to in the letter until the first consultation meeting on Friday 17 December 2021.

14. On Friday 17 December 2021, the claimant attended an individual consultation meeting. A minute was taken (60). The claimant did not mention at this meeting that his start date as shown on the scoring sheet was incorrect. Nor was this communicated to the respondent at the subsequent consultation meeting. At the time, the claimant only raised his safety score and his competence score – saying he didn't believe Mr Robertson would have scored him like that. With regard to competence, the claimant's score was 6 which is "good". Mr Kerr explained the scoring methodology for the safety score as it was applied to all 18 "temporary employees". The claimant asked for his safety and competence scores to be reviewed. The respondent agreed to review the scoring (including competence scores) at a second scoring review. At the meeting, Mr Kerr told the claimant that if there was anything that he wanted to discuss or share with the respondent regarding demonstrating competency he should feel free to meet with them or provide them with further information to consider.

15. The claimant scored 8 which is "very good" for range of skills. At the tribunal hearing he argued that his scores for competence and range of skills were inconsistent. However, he did not raise this argument at the consultation meetings, or otherwise at the time.

16. On Monday 20 December 2021, four managers/ supervisors met to review the scores of the "at risk" employees. Although, following the review, the scores of some employees were altered, the alterations did not change the six people at risk of redundancy. The claimant's score was not altered at or following that meeting. After discussion, all the reviewed scores were confirmed as final.

17. On Tuesday 21 December 2021, the claimant attended a second consultation meeting. Notes had been prepared for the discussion (71). An explanation of his scores was provided and Mr Kerr and Ms Csorba followed up with him on the points he had raised on 17 December regarding his safety and competence scores and how they had been calculated.

18. There was no alternative employment. Although the respondent notified the claimant that he could work as an agency worker via Texo Recruitment Limited, a sister company in the Group, the claimant did not apply to do so.

19. The claimant was issued with a letter of dismissal dated 21 December 2021 from Ms Csorba (79). The letter stated:

> *"I confirm that proposed redundancy has now been scored against the set criteria as previously advised in our letter dated 13th December 2021, and I confirm the scores have been shared with you and during the consultation meeting on 17th December 2021, you were given the opportunity to discuss the scores and put forward any explanation or evidence in support a change a in scoring. I also confirm that any points you raised with regards to the scoring have now been addressed.*
>
> *First assessment your overall score: 332*
>
> *Second review your overall score : 332".*

20. The letter reminded the claimant: *"We are offering you the opportunity to be signed up to Texo Recruitment Limited, they will be providing our temporary resource support moving forward as and when required. Texo Recruitment also provide resource to external clients. We will ask Texo Recruitment to contact you direct to discuss."*

21. The claimant served two weeks' notice. His last day of employment was 5 January 2022. He received a redundancy payment of £1,632 in his final pay.

22. The claimant complied with the early conciliation requirements and presented an application to the Employment Tribunal on 7 January 2022 in which he claimed that his dismissal was unfair.

23. The respondent had asked the employment agency who had originally signed up and employed the claimant to provide the respondent with the start dates of the employees in the redundancy selection pool. Unfortunately, the agency made an error in the claimant's start date. His start date as provided to the respondent was shown as 3/12/2019 instead of 12/3/2019. Thus, the claimant's score for 'start date'

(length of service) was 6, when it should have been 10. As 'start date' had a weighting of 3, the claimant received 18 points, when he should have received 30, so he was underscored by 12 points. The claimant did not report this error to the respondent until March 2022, some weeks after the dismissal had already taken effect. Had the claimant been scored correctly, he would have had more points, but he would still have been in the lowest six, so the outcome would have been the same.

Discussion and Decision

The reason for dismissal

24. Section 98 of the Employment Rights Act 1996 ("ERA") indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. Redundancy is a potentially fair reason under Section 98(2).

25. Section 139 of the ERA 1996 defines redundancy as follows:

139.— Redundancy.

(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—

(i) to carry on the business for the purposes of which the employee was employed by him, or

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

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) 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.

26. On behalf of the respondent, Mr Phillips submits that a redundancy situation had arisen on the facts of this case due to a diminishing need for employees, including the claimant, to carry out work of a particular kind and that six of the 18 so-called "temporary employees" were affected by the redundancy situation. He states that the respondent had a diminishing need for employees following its headcount review.

27. As Mr Phillips submits, the correct test for establishing a redundancy dismissal is set out in Safeway Stores plc v Burrell [1997] ICR 523. It is a three stage test:

a. Was the employee dismissed?

b. If so, had the requirements of the employer's business to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

28. Mr Phillips submitted and I accepted that following a review of orders and work load and the fact that some large orders were delayed or had failed to materialise, the respondent was entitled to decide that it required fewer "temporary employees" in Dundee and specifically that it no longer needed six of the 18 temporary employees.

29. Accordingly, I was satisfied that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal under s 98(2)(c) of the ERA 1996.

Reasonableness

30. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply Section 98(4) which provides:

"…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."

31. As Mr Phillips submits, in the case of Polkey v AE Dayton Services Ltd 1988 ICR 142, Lord Bridge set out the features of fairness in the context of dismissal for redundancy:

"In the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employee 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 his own organisation."

32. In considering the points above, the issue for the tribunal is whether dismissal lay within the range of conduct which a reasonable employer could have adopted in the circumstances. The Employment Tribunal is not permitted to substitute its view for that of the employer. Mr Phillips quotes Mr. Justice Browne-Wilkinson (as he then was) in Williams v Compair Maxam [1982] ICR 156 at 161:

"[It] is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted."

Warning and consultation

33. I have considered the facts of the present case under each of the headings in Polkey. (See paragraph 31 above). Looking first at whether the claimant was warned and consulted, an announcement was made to all temporary employees

on Monday 13 December 2021 in which the respondent explained that it was having to consider its headcount and had identified that one possible solution would be to reduce the number of temporary staff at Dundee by six employees. The reason for this was said to be that a number of large work orders had been delayed until 2022 and others had not materialized. On the same date, the claimant received an 'at risk' letter with his assessment and provisional scoring under the redundancy selection criteria.

34. I concluded that meaningful consultation then took place with the claimant at two meetings at which he was given the opportunity to put forward any suggestions he might have about ways to avoid redundancy or mitigate the impact. He was given the chance to discuss the selection criteria and to challenge his provisional scoring and he did so in relation to his scores for safety and competence. His provisional score was then reviewed. As a result of erroneous information from a third party, a mistake had been made by the respondent in relation to his length of service. He should have received 12 more points for this. Unfortunately, he did not challenge his length of service score at either of the consultation meetings or, indeed, until after his dismissal had taken effect. This point is considered further under 'basis of selection' below.

Basis of selection for redundancy

35. I turned to the issue of whether the respondent had adopted a fair basis on which to select for redundancy. The question for the tribunal is whether the selection process used by the respondent was within the range a reasonable employer might have used. The claimant challenged the fairness of the redundancy selection process in three ways. Firstly, he challenged his score for competence; secondly, he challenged the safety score; and thirdly he challenged the score for length of service, which was in fact wrong.

36. The claimant's first argument was that the respondent's management had altered his competence score. He accepted that he had not produced any evidence to this effect. In cross examination, the claimant said that the basis for this allegation was that he had heard that no one had been scored under 7/10 for competence, though he could not prove this. He accepted that from the records (81), one person had

scored a 5/10 and two others in addition to himself had scored 6 (which suggested that what he had heard was incorrect). As the claimant did not provide any evidence for this allegation and as it was not consistent with the documentary evidence in the bundle, I concluded that the allegation that the claimant's competence score had been altered was unfounded.

37. The claimant also submitted that his competence score was inconsistent with his score for 'range of skills'. The claimant had scored 6, which is "good" for competence and 8 which is "very good" for range of skills. He did not raise this argument at the time, according to the minutes of the consultation meetings at pages 60 to 66 and 70 to 78, so it is not strictly relevant. However, it seemed to me that a person could have a very good range of skills and still score 'good' for competence. Range is concerned with the breadth of tasks a person can do. Competence is concerned with how well they are able to perform each task, so they are measuring different things. In this case, where supervisors and managers from the shop floor were making the assessments, it seemed to me that the workers in the selection pool were being assessed by people who had the appropriate knowledge and experience to conduct the assessment. (Indeed, the claimant accepted this for the most part, in cross examination.) Furthermore, the assessments were made by a team of four supervisors/managers, which was likely to have made the process reasonably objective.

38. Turning to the claimant's second argument, his challenge to the safety score was that it was unfair that he had only scored a 4/10 and that he was being made redundant because he had not volunteered to be a safety rep. He suggested in his evidence in chief that safety had been laid out in this way deliberately in order to give him fewer points. However, he accepted in cross examination that the overwhelming majority of employees in the pool had scored 4/10 for safety on the same basis (81). Indeed, 15 employees scored 4/10; one scored 5/10; one scored 6/10 and one scored 8/10. The basis for this scoring (68) was that if an employee held one of safety rep; fire warden or first aider they would be scored 7 – 8 and if they held two of those roles, they would be scored 9 – 10. This appeared reasonably objective. Wishing to retain employees with additional skills or training was a consideration within the range of reasonable considerations a reasonable

employer might apply. The claimant's argument that this had been a device to single him out could have no basis when it had affected most of the rest of the pool as well.

39. With regard to the claimant's length of service, as a result of erroneous information from a third party, a mistake had been made by the respondent in relation to this. As stated, the claimant should have received 12 more points for 'start date'/ length of service. Unfortunately, he did not challenge his length of service score at either of the consultation meetings or, indeed, until after his dismissal had taken effect. As the result would have been the same, I did not conclude that this issue rendered the dismissal unfair. The respondent took its decision in good faith on the basis of the information provided to them at the time. The claimant had the opportunity to challenge it and he did not do so. Had the error been spotted and corrected, it would not have changed the outcome. Although the claimant's ranking in the group of at risk employees would have risen, he would still have been in the final six.

40. In his evidence, the claimant said that the respondent should have adopted a 'last in, first out' ("LIFO") basis for redundancy selection. There is a conflict in the evidence about whether the claimant raised this argument during consultation. I accepted the claimant's evidence that he had said to Mr Kerr at the end of the consultation meeting on 21 December 2021: "*You're breaking my time here paying me off out of turn".* I thought it likely that he would remember this and that Mr Kerr might not recall it. However, I did not conclude that the failure to adopt LIFO as their basis for redundancy selection rendered the process the respondent did adopt outside the range of the reasonable employer. As set out above, it is not the function of the employment tribunal to decide whether it would have thought it fairer to act in some other way, or here, to adopt some other basis for redundancy selection. The question is whether the redundancy selection method which the respondent did adopt lay within the range which a reasonable employer could have adopted. I concluded that the method of redundancy selection adopted by the respondent was one which a reasonable employer could have adopted. I did not accept the claimant's submission that it was a sham which had been used to get rid of him. There was no evidence of this at all.

Consideration of alternative employment

41. There was no alternative employment as such, but a possible opportunity with Texo Recruitment Ltd was brought to the claimant's attention, which could have mitigated the effect of the redundancy. The claimant's evidence on this was that he did not enroll with the recruitment company because that would involve him accepting the fact of his redundancy and he did not accept it. He did, however, accept that he had been offered the opportunity to enroll. I accepted the respondent's evidence that there was a genuine diminution in their requirement for employees to do work of the kind the claimant was employed to do at the relevant time in Dundee and that they did not have vacancies into which the claimant could have been redeployed.

42. In all the circumstances, whilst acknowledging the very real distress that dismissal for redundancy has caused to the claimant, I concluded that the dismissal was genuinely due to a downturn in work and that it was within the range of conduct a reasonable employer could have adopted in the circumstances, which include the size and administrative resources of the respondent set out in paragraph 6 above.

Employment Judge : Mary Kearns
Date of Judgment : 20 May 2022
Date sent to parties : 23 May 2022