



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr John Johnson

v

Adcock Refrigeration and Air
Conditioning Limited

Heard at: Bury St Edmunds

On: 21 April 2022

Before: Employment Judge Bloom

Members: Ms S Elizabeth and Ms L Durrant

Appearances

For the Claimant: In person

For the Respondent: Mr John Ratledge, Counsel

JUDGMENT

1. The Claimant's claim of breach of contract is dismissed upon withdrawal by the Claimant.
2. The Claimant's claims of age discrimination and unfair dismissal both fail and are as a result dismissed.

REASONS

1. At the Hearing today the Claimant represented himself. The Respondents were represented by Mr J Ratledge of Counsel. The Tribunal had before it the Claimant's witness statement and statements from two witnesses called on behalf of the Respondent, namely, Ms Catherine Smith the Respondent's HR Manager and Mr P Brant the Respondent's Deputy Managing Director. The Tribunal heard their evidence. The Tribunal was also referred to and has considered in determining its Judgment, the content of a joint Bundle of documents consisting of some 159 pages.
2. During the course of the Hearing the Claimant accepted that there was no merit in his claim for breach of contract. He was alleging that he was

entitled to an outstanding bonus payment. However, he accepted after it was drawn to his attention, that the provision relating to the payment of a bonus (Clause 11) in his Contract of Employment made it clear that if for any reason he left the Respondent's employment prior to the end of the financial year, there was no entitlement to a bonus payment. Having accepted that position, the Claimant confirmed he wished to withdraw the breach of contract claim. As a consequence, it was dismissed.

3. The Claimant continued to proceed with his claims of age discrimination and unfair dismissal.

The Facts

4. The Claimant commenced his employment with the Respondent on 1 November 2000. He was employed as a Sales Engineer at their Cambridge branch. The Respondent is a supplier of heating and cooling services, including air conditioning units, refrigeration items and the subsequent maintenance and service of such equipment. They have a number of depots over the country. One of these depots is the depot where the Claimant worked, namely Cambridge. The Sales Department in Cambridge consisted of a Sales and Project Manager, another Sales and Project Manager who worked alongside his colleague, an Applications Engineer and three Sales Engineers. The Claimant was one of three Sales Engineers, the others being Mr Lee Carter and Mr Shaun Jenkins.
5. The volume of work and profitability of the site in Cambridge had been declining over a period of five years leading up to the Covid-19 pandemic in March 2020. The Tribunal accepts that the decline had seen a decrease of 96% of sales target per employee in 2015/2016 and this had further reduced to 65% of target per employee in 2019/2020. As a result of the Covid-19 pandemic a national lockdown began on 23 March 2020. The Tribunal accepts that not only had there been a steady decline in the sales at the Cambridge site in the preceding five years, the lockdown had a substantial adverse impact on the Respondent's business as a whole and the Cambridge site was particularly affected. As a result of the lockdown, offices and the like were closed resulting in an obvious lack of demand for items such as office air conditioning units.
6. The Respondent's Directors carried out a review and part of that review included an analysis of its staffing requirements looking into the future. The Respondents decided that there would have to be a reduction in staff at the Cambridge site.
7. The Respondents took the decision that there was no longer a requirement for three Sales Engineers within the Sales Department in Cambridge. Following an analysis of the volume of work, it was determined there was only a need for one Sales Engineer. That meant two would lose their jobs.
8. The Respondent considered ways to avoid compulsory redundancies and all three Sales Engineers were invited to consider voluntary applications

for redundancy. Mr Carter made such an application and his application was accepted. Neither the Claimant or Mr Jenkins applied for voluntary redundancy. This left the Respondent with a decision to proceed with compulsory redundancy of one of them.

9. On 5 June 2020 (pages 73 – 74), the Respondent wrote to the Claimant informing him that he was at risk of redundancy. The letter explained the decline in performance and the need to take such measures.
10. On 12 June 2020, a First Consultation Meeting took place between the Claimant and his Line Manager Mr Luke Chapman (Sales and Project Manager). The meeting explained the purpose of the proposed redundancies to the Claimant and explored the subject of whether or not there were alternative positions. There were no alternative vacancies and the Respondent had a recruitment freeze at the time in any event.
11. At this meeting the Claimant put forward his views to Mr Chapman. He thought that the Respondent needed more salesmen as opposed to less salesmen. He was entitled to his view, but the Tribunal accepts that ultimately the decision making process is one for the Respondent. The Respondent did properly consider, however, the Claimant's view. The Claimant went on to suggest that he remain on furlough for a period of time and expressed the view that he hoped the sales position would improve at some point in the future. No decision had been made at that time by the Respondent as to which of the two Sales Engineers would be made redundant.
12. Ms Smith was also at the meeting and she discussed with the Claimant the selection criteria to be used in the selection exercise. The pool for selection contained the Claimant and Mr Jenkins. Others within the Sales Department were not included within the pool. Roles were not at their risk. This was a decision which the Respondent was perfectly entitled to take and fell within the balance of reasonable responses.
13. Mr Chapman and Ms Smith subsequently carried out a scoring process using the relevant selection criteria. The selection criteria were, as far as was possible, objective. They fell under two substantive headings, namely: Sales Performance for the year 2019/2020; and Qualifications / Transferrable Skills. Each of those headings was split into sub-categories. These included items such as: consideration of the orders received by each Sales Engineer; how many orders were converted into contracts; and the number of new customers. Rather than individual scores being apportioned in respect of each sub-category, the Respondent through Ms Smith and Mr Chapman decided which of the two Sales Engineers scored most highly. The highest scoring employee would receive a score of one under each sub-category and the other would achieve a score of zero. Following this exercise, Mr Jenkins achieved a total score of seven points and the Claimant five points. As a result, following further consultation, the Claimant was informed that he would be made redundant.

14. During the Hearing, the Claimant complained about this process. He alleged that the Respondent manufactured the scores so as to arrive at a higher score for Mr Jenkins. He alleged there was an ulterior motive in the Respondent preferring to retain Mr Jenkins as an employee. Mr Jenkins had family connections with one of the Respondent's customers as well as a social friendship with the Respondent's Chairman. However, the Claimant's witness statement contained no such allegations. There was nothing to substantiate the allegations and they were rejected by the Tribunal. The Tribunal does not find that there was any ulterior motive in the process and eventual selection of the Claimant.
15. Throughout the process and throughout the Hearing, the Respondent confirmed that it always regarded the Claimant, who was a long serving employee, as a hard working individual. There was nothing personal in the decision taken against him. The Tribunal accepts that.
16. Mr Jenkins and the Claimant had identical attendance records which were good and both had no existing disciplinary sanctions imposed against them.
17. On 17 June 2020 (page 92), the Claimant submitted an email in which he asked for further information. The Respondent provided appropriate information by reply the following day (pages 93 – 96). On 19 June 2020, the Directors of the company met and decided to proceed with the redundancy. That same day a further meeting was held with the Claimant. The Claimant was informed that he had been selected for redundancy. The Claimant subsequently received a letter dated 19 June 2020 (pages 98 – 99) confirming his redundancy. He received his contractual / statutory entitlement to 12 weeks' notice and his statutory redundancy pay. The Claimant was offered the right of an Appeal against that decision.
18. The Claimant exercised that right of Appeal and submitted his Appeal on 23 June 2020 (pages 100 – 101). The Appeal was jointly conducted by the Respondent's Managing Director, Nigel Claydon and Mr Brant. The Appeal Hearing took place on 13 July 2020 (page 106).
19. The Tribunal accepts that Mr Brant who attended the Appeal Hearing in front of the Claimant, properly considered all of the Claimant's representations. Having done so he felt it more appropriate to arrange a re-scoring of the Claimant and Mr Jenkins. He thought a fairer process was for individual scores to be allocated in respect of a number of categories. Six objective criteria were identified. These were: Sales Performance; General Performance; Qualifications; Transferrable Skills; and Absence and Disciplinary Sanctions. A maximum score of five under each category was possible which could result in a maximum score of 30 points. Mr Brant requested that Ms Smith and Mr Chapman undertake the re-scoring exercise. The Claimant contends that that was wrong and that the re-scoring exercise should have been undertaken by Mr Brant and Mr Claydon. The Tribunal does not agree. Mr Chapman and Ms Smith had a greater day to day knowledge of the Claimant's work and his abilities and

skills, etc.. As Directors of the company which employed over 200 employees, Mr Brant and Mr Claydon inevitably would not have held such knowledge. It was therefore right and fair for the Respondent to instruct Ms Smith and Mr Chapman to undertake the re-scoring exercise.

20. Having done so, the Claimant was scored by Ms Smith with a total of 26 points and achieved a total score of 25 points when scored by Mr Chapman. Both Ms Smith and Mr Chapman gave the Claimant a maximum of 5 points under the categories of Sales Performance and Absence and Disciplinary Sanctions. Ms Smith gave the Claimant a maximum score of 5 under General Performance, 4 under Qualifications and 2 under Transferrable Skills. Mr Chapman gave the Claimant a score of 4 under General Performance, 4 under Qualifications and 2 under Transferrable Skills. Mr Jenkins was scored a maximum of 30 points by both Ms Smith and Mr Chapman.
21. The Claimant, during the course of the Hearing, is again critical of that process. He alleged there were ulterior motives behind the scoring, a suggestion which the Tribunal completely rejects. The Tribunal accepts that Mr Chapman and Ms Smith genuinely and quite properly considered all of the Claimant's appropriate skills, qualifications and performance issues. The sub-category of 'Qualifications' was slightly misleading. Not only were formal qualifications looked at (of which there were only a few), but each individual's level of experience, skill and the type of work they undertook. Over the many years of the Claimant's employment, he had almost solely concentrated on air conditioning units, whereas Mr Jenkins had wider experience in refrigeration units and prior to being involved in sales, had worked for approximately 10 years in Servicing and Maintenance. As a result of that, Mr Jenkins scored more highly both in relation to the criteria of General Performance, Qualifications and Transferrable Skills. In particular, Mr Chapman scored the Claimant at 2 under Transferrable Skills and under the same heading he received the same score by Ms Smith. Mr Jenkins, however, scored a maximum of 5 points. This was essentially the difference between Mr Jenkins retaining his employment and the Claimant being selected for redundancy. Mr Brant had also made enquiries with Ms Smith and Mr Chapman to see if there was any merit in the allegations of some ulterior motive for the Claimant's selection. They informed him that there were none.
22. Mr Brant subsequently reviewed the re-scoring matrix. He rejected the Claimant's Appeal. Mr Brant's decision was confirmed in writing to the Claimant on 21 July 2020 (pages 110 – 111).
23. The Claimant subsequently presented his claims to the Employment Tribunal on 11 November 2020.

The Law

24. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show that the reason (or if more than one the principal reason) for the dismissal was one of a number of potentially fair reasons set out in the provisions of Section 98(2) Employment Rights Act 1996. s.98(2)(c) of the 1996 Act confirms that a potentially fair reason for dismissal is redundancy. If the Respondent satisfies the Employment Tribunal that the reason for the employee's dismissal is a potentially fair reason, the Tribunal must then go on to determine whether or not the dismissal was fair or unfair having regard to the provisions contained in s.98(4) Employment Rights Act 1996.
25. Redundancy is defined by the provisions of s.139 Employment Rights Act 1996. S.139(1)(b)(ii) determines 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 in the place where the employee was employed by the employer, has ceased or diminished or is expected to cease or diminish.
26. Insofar as the claim for age discrimination is concerned, age is a protected characteristic pursuant to the provisions of s.4 Equality Act 2010. The allegation made by the Claimant is one of direct discrimination. S.13 Equality Act 2010 determines that 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.
27. The Claimant's allegation relating to age discrimination is that at the time his employment was terminated he was 56 years old. Mr Jenkins was in his mid 30s. The Claimant alleged that there was a desire of the Respondent to retain a younger employee. The Tribunal notes that that specific allegation was put to both Mr Brant and Ms Smith. They categorically denied that age had any bearing at all on the process or the decision to terminate the Claimant's employment.
28. The Tribunal reminds itself of the relevant burden of proof. Having made the initial allegation, the burden shifts to the Respondent.

Findings

29. In reaching its findings in this case, the Tribunal has not only considered the statutory provisions set out above, but has also considered the well established Authority of Williams and Ors v Compair Maxam Limited [1982] ICR156. In that case the Employment Appeal Tribunal laid down guidance relating to the expectations of a reasonable employer in making redundancy dismissals. This Tribunal reminds itself that it is not for us to impose our standards and to decide whether or not the employer should have behaved differently. We must ask ourselves whether the Claimant's

dismissal lay within the reach of conduct which a reasonable employer could have adopted.

30. Factors considered in the Compair Maxam case were:
 - 30.1 whether the selection criteria was objectively chosen and fairly applied;
 - 30.2 whether employees were warned and / or consulted about the redundancy; and
 - 30.3 whether any alternative work was available.

Conclusions

31. The decision taken by the Respondent following the substantial reduction in sales to reduce head count at the Cambridge branch, was one of which they were entitled to make. It is not something that which the Employment Tribunal can interfere with.
32. The reason for the Claimant's dismissal was redundancy. The Tribunal accepts the need for the Respondent to reduce its head count at its Cambridge branch as a result in a substantial reduction in sales. The decision taken by the Respondent to initially require volunteers for redundancy was a reasonable one. After only one employee volunteered, the Respondent undertook a fair process of selection. To include only the two Sales Engineers in a pool for selection was a reasonable one. Their roles were the ones substantially affected by the down turn in sales. The selection criteria chosen by the Respondent, both at the initial stage and subsequently at the Appeal, were objectively chosen and were fairly applied. The bona fides of the Respondent is emphasised by Mr Brant's decision to re-score the Claimant during the Appeal exercise. There is no evidence to suggest that the scores of Mr Jenkins and the Claimant were anything other than genuine. Sadly for the Claimant, he achieved a lower score than Mr Jenkins. The scoring was close, which in the Tribunal's view emphasises the fairness of the approach taken by the Respondent. The Tribunal rejects the Claimant's constant allegations that there was some ulterior motive behind the Claimant's selection. The Claimant had referred to a clique of employees within the Department which he often referred to as a "*golden triangle*". There is no evidence to support such an allegation and it is rejected.
33. During the course of his evidence the Claimant accepted that Mr Jenkins had greater mechanical knowledge than he did. The Tribunal also considered the Claimant's admission during the course of his evidence that,

"if it is a question of a pool of me alongside Mr Jenkins, I do not have a problem"

as significant.

34. The Tribunal accepts that the Respondent did consider the issue of suitable alternative employment and accepts that there were no suitable vacancies. Indeed, there were no vacancies. There was meaningful and full consultation throughout, both leading up to the Claimant's termination of employment and during the course of the Appeal process.
35. In all the circumstances the Tribunal considers that the Claimant's dismissal was fair. His unfair dismissal claim therefore is dismissed.
36. The Tribunal accepts, without hesitation, the evidence given by both Mr Brant and Ms Smith. Age was not a consideration at any time in the process and the fact that the Claimant was in his mid-fifties as opposed to Mr Jenkins in his mid-thirties was completely irrelevant for the purposes and played no part at all in the process or the final decision to terminate the Claimant's employment. As a consequence the Claimant's claim of age discrimination also fails and is dismissed.

Employment Judge Bloom
18 May 2022
Sent to the parties on:.....

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For the Tribunal Office