EMPLOYMENT TRIBUNALS

Claimant: **L Henderson**

Respondent: **National Trust**

Held at: London South Employment Tribunals by video

On: 1 March 2022

Before: **Employment Judge L Burge**

Representation
Claimant: B Greenhalgh, CAB representative
Respondent: A Lloyd, Solicitor

JUDGMENT having been delivered orally on 1 March 2022 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

1. The Claimant worked as a Catering Assistant/Food and Beverage Team Member from April 2015 until she took voluntary redundancy on 9 September 2020.

2. The Claimant gave evidence on her own behalf and Stephen James (Property Operations Manager) and Jane Cecil (General Manager) gave evidence on behalf of the Respondent. A bundle of 288 pages was provided to the Tribunal. Both representatives gave oral closing submissions.

Issues

3. The issues were agreed at the start of the hearing:

    a. Was the Claimant dismissed or did her employment end by mutual consent?

b. What was the reason or principal reason for dismissal and was this a potentially fair reason? The Respondent says the reason was redundancy.

c. If the reason was redundancy, was the dismissal fair (s.98(4) ERA)?

Findings of Fact

4. The Claimant worked at the Birling Gap team of the National Trust (the Respondent), a large charity with 13,000 employees. The Claimant was contracted to work 30 hours.

5. All of the Respondent's properties were closed at the end of March 2020 as a result of the pandemic, and the frontline staff were sent home. When the furlough scheme came into existence many staff (including the Claimant) were put onto the scheme, and the Respondent topped up their salary to 100% despite suffering ongoing losses as a result of their properties being closed.

6. The Claimant returned to work as part of skeleton staff on 15 June 2020. There were reduced numbers of visitors at Birling Gap and the number of customers were significantly fewer than the previous year, before the covid pandemic.

7. As a result of the pandemic and the financial losses suffered because of it, on 29 July 2020 the Respondent's Director-General announced the "Reset Programme". The Respondent is Unionised and carried out a collective consultation procedure in addition to an individual consultation procedure.

8. Mr James notified the Birling Gap team that a redundancy consultation period would commence. 29 July 2020 was the start date for a 45-day consultation period. However, the Claimant received the email informing her that her job was impacted a little late. No decision had been taken on what the future structure would look like, and during this time there was an opportunity for affected individuals to discuss the proposals with the Respondent. There were many ways for employees to submit their feedback. One of the proposals was that work for the food and beverages team would be on an hourly basis (i.e. that no employee would have fixed hours and they would work on a flexible, 'zero hours' basis). This worried the Claimant significantly. She worked a 30 hour week and benefitted from tax credits for doing so.

9. The Claimant did not access the redundancy documents from her national trust email account. The parties are in dispute as to whether or not she had such an email account but it is agreed that Mr James, the Claimant's consultation manager, sent her emails and documentation to her personal email address which she did access. There was a lot of redundancy consultation information. The Claimant gave evidence that she thought that it was produced daily.

10. As part of the redundancy avoidance measures, the Respondent set up a Voluntary Redundancy ("VR") scheme. Employees had until 12 August

2020 to confirm to the Respondent whether they were interested in VR. The Claimant, and her colleague, asked Mr James for information about this and he provided it.

11. The Claimant and Mr James had her first consultation meeting on 10 August 2020. As well as the formal meetings, they talked informally relatively frequently, either through face-to-face meetings, on the phone or via email. In evidence the Claimant said ""Yes we had many conversations on the phone" and agreed he was prompt in replying to queries. In evidence the Claimant said Mr James went "above and beyond".

12. Mr James sent the Claimant the Redundancy "Instruction" which set out lots of information. In relation to suitable alternative employment it said :

> *"Suitable is defined as a post which provides similar earnings. status and working hours, has similar or acceptable duties, is within the employee's capability and does not involve unreasonable additional inconvenience to the employee".*
>
> And
>
> *"Alternative roles are subject to a statutory four week trial period which can only be extended for training purposes; Should a role prove unsuitable during this period and another role cannot be found the employee's redundancy will take effect from the original date. Employees who reject alternative employment without good reason may forfeit their entitlement to a redundancy payment. Such decisions can be appealed by employees."*

13. The evidence the Claimant gave to the Tribunal was mixed about whether she had seen this document. A contemporaneous email from Mr James said that he had already sent her the Redundancy Instruction. The Claimant gave evidence that "I didn't see the need to read about the redundancy procedure. I saw no need." She also said "I didn't do any research at the time, I put my trust in" Mr James. The Tribunal finds as a fact that Mr James sent her the Redundancy Instruction but she did not read it.

14. On 3 September 2020 Mr James emailed the Claimant in response to her questions about what would happen if she was offered a role and did not want to accept it:

> *"In general terms, if the NT offers a role that it feels is suitable for the individual then it's expected that the employee should accept the role. Failure to accept will mean resignation rather than a redundancy situation*
>
> *HOWEVER, the Trust needs to determine what is fair and reasonable in this respect and has yet to write what the parameters around this statement look like. After all, moving from a contract with high guaranteed weekly hours to a new zero hours contract feels a very big ask, therefore would this be reasonable or unreasonable?"*

15. The Claimant did not feel that this response gave her the guarantee that she was seeking. She wanted reassurance that she would be able to have a job with 30 hours minimum. The Claimant was worried that if she not take the opportunity for redundancy pay now, she would lose it.

16. The Claimant was told in a letter that she had until 9 September 2020 to accept VR. The letter confirmed that if the offer of VR was accepted then no redeployment opportunities would be offered to her

17. The Claimant submitted some further feedback on the consultation on 8 September 2020. She re-iterated that she wanted to keep her 30 hours per week and stated that she did not feel that the choice of whether to accept voluntary redundancy was clear.

18. On 9 September 2020 the Claimant accepted the offer of VR.

19. Mr James and the Claimant spoke on 12 September 2020. The Claimant told Mr James that she was really stressed and losing sleep over the decision of whether to accept VR or not. They discussed whether the Claimant wanted Mr James to speak to People Services to see if it was possible to reverse the VR decision. The Claimant went home because she was not feeling well. Mr James spoke to the People Services team about the possibility of reversing the decision to accept VR and was told that this, as an exception for her, was possible until 14 September 2020 because at that time, the central HR colleagues were going to start processing all the voluntary redundancies.

20. The Claimant called the Respondent on the morning of 14 September 2020 confirming that she had made her mind up and that, having slept on it, she definitely wanted to take VR. The Claimant received redundancy pay, pay in lieu of her notice period and pay in lieu of her holiday pay. The Claimant's employment with the Respondent ended on 14 September 2020.

21. The Respondent made 514 compulsory redundancies in the entire region, in addition to those who had elected to take VR. In the South Downs, nine people (including the Claimant) took VR, equating to five full-time equivalent (FTE) staff. After that, there were a further 17 people who were compulsorily made redundant, which equated to 9.4 FTE staff

22. The proposal to make the food and beverage team fully flexible was not implemented.

23. The Claimant submitted a grievance on 13 October 2020. Ms Cecil carried out a comprehensive investigation into these events and concluded that there was no wrongdoing.

The Law

24. Section 94 of the Employment Rights Act 1996 ("ERA") states that an employee has the right not to be unfairly dismissed by their employer.

25. Redundancy is one of the potentially fair reasons for dismissal listed in S.98 ERA:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee,*
>
> *(c) is that the* ***employee was redundant,*** *or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."*
>
> **[Tribunal's emphasis]**

26. S.139. ERA 1996 Redundancy states:

> *(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.***

[Tribunal's emphasis]

27. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) ERA must be applied which states that:

> *"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".*

Conclusions

28. There was a clear downturn in work for the Respondent as a result of the pandemic, with losses sustained and reduced customers. They launched a redundancy process and the Claimant applied for the VR scheme. The parties did not identify another potential reason for the Claimant's dismissal. The Tribunal concludes that the Claimant was dismissed by reason of redundancy in that there was a cessation or diminution in the requirement for employees to carry out work of the particular kind carried out by the Claimant. This is a potentially fair reason under s.98(2)(c) ERA.

29. Did the Respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and all the circumstances of the case, having regard to the Respondent's size and resources (s98(4) ERA).

30. The Respondent is a large employer. Nationally it has 13,000 employees. It is also Unionised and carried out a collective consultation procedure in addition to the individual consultation procedure. Voluntary redundancy is a valuable tool to avoid redundancies where people who are content to leave with a redundancy payment can put themselves forward. The Claimant asked her consultation manager for the detail of the VR scheme and was given it. Her major concern was not being able to keep her 30 hour contract which enabled her to claim tax credits. There were no guarantees at the time. It was envisaged that the workforce would move to a more flexible system where minimum hours would not be guaranteed.

31. The redundancy document was clear about what a suitable alternative post would look like:

> *"Suitable is defined as a post which provides similar earnings. status* ***and working hours****. has similar or acceptable duties, is within the employee's capability and does not involve unreasonable additional inconvenience to the employee".* ***[Tribunal's emphasis]***

32. The Claimant was sent this at the time but she didn't read it. She "didn't do any research at the time". This is a shame as the document is clear "suitable" included the same working hours. Instead, she asked Mr James who said:

> *"After all, moving from a contract with high guaranteed weekly hours to a new zero hours contract feels a very big ask, therefore would this be reasonable or unreasonable?"*

33. The Claimant did not feel that this gave her the guarantee she was seeking. She wanted reassurance that she would be able to have a job with 30 hours minimum. She was worried that if she not take the opportunity for redundancy pay now, she would lose it. She wanted certainty and she chose to take VR.

34. The Tribunal does not accept the Claimant's submission that she was steered into accepting VR. She asked for the details initially. Mr James was supportive to her, asked the questions that she asked and even obtained for a her a second chance to change her mind, although she did not. She chose not to wait to see what the other redundancy avoidance measures would be and what the new roles would look like. The choice was hers to leave at the stage that she did with a redundancy payment, pay in lieu of notice and holiday pay. In accordance with equity and the substantial merits of the case the Tribunal concludes that the dismissal was fair. The Respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant. The Claimant's claims are therefore dismissed.

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Employment Judge **L Burge**

Date: 23 March 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS