EMPLOYMENT TRIBUNALS

Claimant: **Mark Bennett**

Respondents: **Derby City Council**

Record of an Open Preliminary Hearing heard at the Employment Tribunal

Heard at: **Nottingham** **On:** **14 June 2022**
In chambers: 17 June 2022

Before: **Employment Judge M Butler (sitting alone)**

Representation

Claimant: **In person**
Respondent: **Ms K Temple-Mabe, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Judge is that the claim of unfair dismissal is not well founded and is dismissed.

RESERVED REASONS

Adjustments for the Claimant

1. On 7 June 2022, the Claimant emailed the Tribunal requesting adjustments he required during the hearing. The first adjustment requested was due to the Claimant being electromagnetic hypersensitive requiring that all microphones, laptops, Wi-Fi routers, video links, tv screens, tablets and mobile phones be

turned off in the hearing room. This is because electrical devices and non-ionising radiation are triggers resulting in a variety of symptoms which could adversely affect the Claimant. The second request was that he did not see two of the Respondent's witnesses, Diane Whitehead and Lisa Melrose, due to the stress he had experienced during the redundancy process.

2. In order to clarify these adjustments, I met with the Claimant and Ms Temple-Mabe at 9.30am to discuss them. Certain equipment in the Court Room was queried by the Claimant but I explained what they were and confirmed that they were all turned off. I directed that during the hearing all mobile phones would be switched off and laptops and tablets could not be used. Ms Temple-Mabe agreed to depart from her usual practice of making notes on her laptop and made handwritten notes instead. The only significant issue arising from our discussion was the fact that there was a Wi-Fi router in the Court Room on a shelf attached to the wall at a height of approximately 9 feet. The Claimant had equipment which he used to confirm that the router was still functioning even though no one was using Wi-Fi in the Court Room. He suggested the ethernet cable be disconnected from the router, but I explained I would need to take advice from the appropriate IT helpdesk and, if it was possible to disconnect the ethernet cable, would then have to locate someone who could do this with a ladder to reach the shelf. I further explained that I was not prepared to disconnect the ethernet cable myself for fear of the router being part of a system which would be compromised by so doing. I instructed the Tribunal Clerk to make appropriate enquiries. Unfortunately, no progress could be made with these enquiries for some time and, indeed, until the hearing had started. The advice we received from the IT helpdesk was that the ethernet cable could not be disconnected because the router served other rooms in the building. Whilst a little frustrated by this, the Claimant proceeded with the hearing and raised no issues with that router which was approximately 30 feet away from him and located high up on the wall of the Court Room.

3. As far as not seeing two of the Respondent's witnesses was concerned, this was achieved by the use of screens. Various attempts to effectively locate the screens were made and eventually I arranged for the Claimant to conduct his case from the witness stand and by using a folding screen he was only visible to me. When he was cross-examined by Miss Temple-Mabe she sat on one of the chairs usually taken by non-legal members so that she could see the Claimant and he could see her. Other witnesses gave evidence out of site of the Claimant from the desk that would usually be used by the Respondent. Ms Temple-Mabe conducted the Respondent's case from the seat usually occupied by the Claimant.

4. Further to this, I arranged for the parties to leave and return to the Court Room during the lunch adjournment and rest breaks on a staggered basis so the parties would not come into contact with each other in the Tribunal building. I am grateful to Ms Temple-Mabe for her appreciation of the Claimant's difficulties and her co-operation and flexibility in achieving the required adjustments.

Background

5. The Claimant was born on 14 June 1979 and worked for the Respondent, a local authority, as a Contract Safeguarding and Compliance Officer from 9 October 2005 until 10 June 2021 when his role was made redundant.

6. By a claim form submitted on 8 September 2021, after a period of early conciliation, the Claimant claimed unfair dismissal broadly alleging that there was an agenda to dispense with his role and that of three others in his team after his department merged with another department. Further, he argued that the resulting Lean Review and the slotting and matching process for newly created posts were followed in a way designed to achieve the redundancy of the Claimant's team of four.

7. The Respondent denies the claim saying that the restructuring of the Claimant's team and the subsequent Lean Review resulted in a better and more economic service in the transport of mainly vulnerable children from home to school and back each day and helped to redress the one million pound overspend in that service. The Respondent argues that there was no agenda to dispense with the Claimant's role or that of others in his team and the process followed was open, transparent and fair.

The Issues

8. There was no agreed list of issues, but the issues appear to me to be to determine whether the requirement of the Respondent for employees to no longer carry out work of a particular kind was satisfied in this case, whether the Claimant's dismissal by reason of redundancy was the reason or principal reason for the dismissal and whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant.

The Law

9. Section 139 of the Employment Rights Act 1996 (ERA) 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)……

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

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

(ii) ……..

have ceased or diminished or are expected to cease or diminish."

10. Section 98 ERA provides; -

"(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) ……

(b) ……

(c) is that the employee was redundant, or

(d) ……

(3) …….

(4) 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."

11. Ms Temple-Mabe referred to the following cases which I considered and refer to in this Judgment as appropriate.

- ***Moon v Homeworthy Furniture (Northern) Limited [1976] IRLR298***
- ***Berkeley Catering Limited v Jackson UK EAT/0074/20***
- ***Williams v Compair Maxam Limited [1982] IRLR83***
- ***Langston v Cranfield University [1998] IRLR172***
- ***Earl of Bradford v Jowett (No2) [1978] IRLR16***
- ***N C Watling v Richardson [1978] IRLR255***
- ***British Aerospace Plc v Green [1995] IRLR437***
- ***Bascetta v Santander [2010] EWCA Civ351***
- ***Polkey v A E Dayton Services Limited [1987] 3 All ER 974 HL***
- ***Mugford v Midland Bank [1997] IRLR208***
- ***R v British Coal Corporation and Secretary of State for Trade and***

Industry, Ex-parte Price [1994] IRLR72

- ***Vokes Limited v Bear [1973] IRLR363***
- ***Quinton Hazell Limited v Earl [1976] IRLR296***
- ***Byrne v Arvin Meritor LUS (UK) Limited UKEAT/0239/02***
- ***Labour Party v Oakley [1987] IRLR79***
- ***Octavius Atkinson and Sons Limited v Morris [1989] IRLR158***
- ***Harper v National Coal Board [1980] IRLR260***
- ***Ellis v Brighton Co-operative Society Limited [1976] IRLR419***
- ***Kerry Foods Limited v Lynch [2005] IRLR680***

The Evidence

12. There was an agreed bundle of documents amounting to 622 pages supplemented by a transcript of a telephone conversation provided by the Claimant which took place between the Claimant and Thomas Hay, Home to School Transport Manager, of the Respondents. References to page numbers in this judgment are to page numbers in the bundle.

13. I heard oral evidence for the Respondent from Ms Diane Whitehead, Head of School Organisation and Provision, Mr Gurmail Nizzer, Director of Children's Integrated Commissioning, People's Services Directorate, and Ms Lisa Melrose, formerly Head of Integrated Commissioning - Children and Young People. I also heard evidence from the Claimant. All witnesses provided witness statements as their evidence in chief and were cross-examined. The Claimant also provided a written but unsigned statement from Ms Helen Marsden, who was a member of the Claimant's team. I explained to the Claimant that since Ms Marsden did not attend the hearing, I could only attached to it such weight as I deemed appropriate. Since the statement was not signed and Ms Marsden did not attend, I attached little weight to her statement which, in the main, in any event did not address the issues before me.

The Oral Evidence

14. I found the evidence of the Respondent's witnesses to be straightforward, credible and honestly given. They were faced with some unusual questions from the Claimant such as how they thought he was able to predict that all four members of his team would be made redundant when this was a question they simply could not answer. They did not seek to justify the decision to make the Claimant's role redundant on any basis other than it being a purely business and logistical reason. If they did not know the answer to one of the Claimant's questions, they said so without hesitation and did not seek to embellish their answers in any way.

15. By contrast, the Claimant's evidence centred around his redundancy being a sham, a view he maintained throughout based, at times, on his emotional attachment to his role and his feelings about losing that role. Further, his evidence was often based on assumptions he made which were without foundation. For example, he did not consider there was a genuine business reason for the decision to make the roles within his team redundant despite the fact that he did not challenge the Respondent's evidence that the service he and his team

provided was delivered at a cost of over one million pounds in excess of its budget and the service did not meet the expected level. He also attributed the fact that his new Manager sat on a different floor to his team after the two teams were merged to mean the Manager had no interest in the team. The reality of that situation was that the Manager had a desk on a different floor where he had always undertaken his role. Again, the Claimant attributed a reason to Ms Melrose attending weekly meetings which could not be supported by any evidence. The fact that she attended meetings did not mean his role and that of his team was discussed at each one as the Claimant assumed.

The Facts

16. In relation to the issues, I find the following facts:

16.1. The Claimant commenced employment with the Respondent on 1 April 2009. He was promoted to Contract, Safeguarding and Compliance Officer sometime later, a post in which he remained until his dismissal by reason of redundancy on 10 June 2021. The Respondent is a local authority. The Claimant worked in a team of four and was involved, inter alia, in all aspects of transporting vulnerable children from their homes to school, ensuring contracts for transportation were carried out in accordance with the appropriate service levels and by properly qualified personnel and in roadworthy vehicles.

16.2. In March 2020, the service in which the Claimant operated, the Transport and Procurement and Operations Service, moved from the Communities and Place Directorate to the Respondent's Peoples Services Directorate. This was seen by the Respondent as an opportunity to improve the service in which the Claimant worked and to consider how pressures on the home to school transport budget might be alleviated. This was prompted by the Transport Service being over one million pounds over budget and falling below expected service levels.

16.3. In accordance with these objectives, the Respondent's Demand Management Board commissioned a Home to School Travel Lean Review in June 2020.

16.4. Ms Whitehead was the Head of School Organisation and Provision. Prior to the merging of the Claimant's team as noted above, she spoke to all members of the team to try to understand its function and how it undertook its role bearing in mind that she had been briefed by Mr Nizzer as to the budget and service issues within the team. In attempting to discuss these issues with the Claimant's team, she met some resistance to change and specifically the changes she considered were necessary to alleviate those budgetary and service issues.

16.5. Ms Whitehead played no part in the Lean Review and was not a member of the Respondent's Demand Management Board which commissioned the review. It was Ms Whitehead's responsibility to ensure the actions and

recommendations of the Lean Review Report, which she received on 9 June 2020, were implemented.

16.6. The Lean Report made 39 recommendations and Ms Whitehead was tasked with reviewing the team structure, safeguarding compliance and reducing the cost of providing the service. She drafted the initial achieving change document (ACD) which proposed removing five full time posts and making five new full time posts. A consultation period of 30 days was arranged from 8 January to 8 February 2021 and the skill sets of the team members needed to be identified and aligned in such a way as to have a positive impact on the service's budget and service delivery. A skills matrix exercise, as recommended in the Lean Review, was undertaken (page 107). Each member of the team completed their individual skills matrix forms and they met with the Team Manager, Mr Ben Lysavczenko to discuss the outcome. This process took place in October 2020.

16.7. At this time, although the staff concerned were aware of a restructure of the service, no one had been put at risk of redundancy, but they were all given a copy of the Lean Review. All members of the Claimant's team were aware of the rationale behind the proposed restructure of the service. Consultation began on 8 January 2021 and weekly thereafter. The staff were accompanied by their Trade Union representative at these meetings.

16.8. At one of the weekly consultation meetings, it was noted that three temporary members of staff were to be recruited at a lower grade to the Claimant's, and I accept Ms Whitehead's evidence that this was necessary to support the delivery of the service in order to implement the Lean Review recommendations.

16.9. As part of the ACD restructuring process, a slotting and matching exercise was undertaken to see which, if any, of the new roles the Claimant and his team could take up. Employees could be slotted into a new post where the new post was substantially the same as the former post which arose when more than 75 per cent of the duties and responsibilities of the new role being the same as the former role. A comparable match occurred where those duties and responsibilities were between 51 and 74% similar to the previous role.

16.10. The Claimant participated in the slotting and matching exercise but was told by letter dated 11 February 2021 (page 279) that the result of his slotting and matching process had resulted in there being no match to a post in the new structure. By email of the same date (page 277), the Claimant indicated he was going to challenge this outcome. Ms Whitehead had been responsible for completing the slotting and matching exercise and found that the Claimant achieved a 15.6% score of similarity to one role in the new structure and a 40.7% score for another role, neither of which were a match to enable the Claimant to be slotted into a new role. Ms Whitehead used job information questionnaires provided by employees themselves to assist in the slotting and matching process and in order to

fully understand the existing roles of the employees including the Claimant. Ms Whitehead considered that the Claimant met very few of the requirements for the new roles particularly in relation to the necessary skills required in Contract Management, Compliance, Financial Management and Safeguarding.

16.11. The Claimant was then placed on the Respondent's Redeployment Register since he was placed at risk of redundancy (page 25). On 15 February 2021, the Claimant emailed Ms Whitehead asking not to be placed on the redeployment list until his appeal against the slotting and matching process had been heard as "it looks like you're predicting the result of my appeal already…." (page 287). Ms Whitehead replied to the effect that the redeployment process would run regardless of the outcome of his appeal and asked the Claimant to confirm whether he wished to remain on the redeployment register. He did not reply. He remained on the redeployment register.

16.12. Ms Whitehead met with the Claimant on 16 February for an informal discussion about the slotting and matching exercise and held an individual consultation meeting with him on 24 February. After this meeting, Ms Whitehead emailed Dawn Bower of the Respondent's HR Team to seek answers to matters raised by the Claimant in relation to working his notice or being paid in lieu of notice (page 310). On the same day, the Claimant emailed Ms Whitehead to ask how long she had worked with Helen Clarke (page 312). The Claimant's insinuation was that Ms Clarke had been given preferential treatment in being appointed to a role in the new team because of her relationship with Ms Whitehead in that they had previously worked together. Ms Whitehead confirmed to the Claimant that Ms Clarke had been appointed on merit by an interview panel which did not include her (page 311).

16.13. In continuing to assist the Claimant in finding a new role within the Respondent, Ms Whitehead gave him information about a vacant role in the Respondent's Bereavement Service. Although the Claimant at first seemed enthusiastic about this role he ultimately decided he did not wish to pursue it. Ms Whitehead continued to look for other roles which the Claimant might be suitable for and had a further consultation meeting with him on 8 March 2021 when he was accompanied by his Union representative (page 412).

16.14. The Claimant was then invited to a potential redundancy dismissal meeting to be chaired by Ms Melrose (page 415). Ms Whitehead attended the meeting to provide background to the restructure, the slotting and matching exercise and the redundancy consultation process which had been followed.

16.15. Ms Whitehead had a Skype call with the Claimant on 20 May 2021 which he covertly recorded without her knowledge or consent. This was principally about questions the Claimant had raised of the audit report of

his team in connection with which he had directly contacted the external auditors.

16.16. As a result of the redundancy dismissal meeting heard before Ms Melrose on 18 March 2021, the Claimant was advised that his employment would be terminated on the ground of redundancy. He was given 12 weeks' notice and placed on garden leave with the effective date of termination being 10 June 2021. The Claimant did not appeal his dismissal.

16.17. One of the issues the Claimant had raised was the fact that three temporary members of staff had been slotted into three of the new roles created as part of the restructuring process. The Claimant was of the view that they had been recruited specifically for this purpose but there is no evidence to support this. They were slotted into lower level roles at a salary considerably less than that paid to the Claimant at the time of his dismissal.

16.18. The Claimant also queried the appointment of Commissioning Officers for the new team in September 2021 some 2 months after his dismissal. I find no evidence that these roles were comparable to that carried out by the Claimant.

Submissions

17. Both parties made oral submissions. The Claimant's were brief and concentrated on his allegation that the redundancy process was a sham and he also took issue with Ms Melrose saying that he claimed to know more about the meetings she attended than she did (even though he did not attend them). Ms Temple-Mabe summarised her written argument which was essentially that the Claimant was made redundant after a fair and transparent process and he had not been unfairly dismissed. I do not rehearse those submissions further here but confirm that I considered them in detail and took account of them in reaching my conclusions.

Discussion and Conclusions

18. I took full account of the fact that the Claimant is a litigant in person with very limited knowledge of the law. However, as I have already remarked, a number of his assertions were not supported by evidence and were based purely on his own assumptions.

19. Ms Temple-Mabe rightly reminded me that I must not fall into the trap of substituting my own principles of selection for those of the Respondent and should only interfere if the criteria adopted are such that no reasonable employer could have adopted or applied them in the way the Respondent did (***Earl of Bradford v Jowett (No2)***). In this case, the restructuring, slotting and matching process and the redundancy process itself were predicated on a report setting out that the Home to School Transport Service was running at a million pounds or more over budget and there were issues with the level of service provided. At no time throughout the hearing did the Claimant challenge these assertions. The

service in which the Claimant worked transported vulnerable children from home to school. Safeguarding was a very important issue, and it was the responsibility of the Respondent to ensure as far as possible that the service was provided efficiently, economically and safely. The Respondent sought to achieve these objectives by abolishing five roles within the service and replacing them mainly with lower level posts. Again, the Claimant did not challenge this and it must be concluded that the Respondent had every good reason to embark on the exercise which took place.

20. Ms Temple-Mabe also reminded me that, following the Judgment in ***British Aerospace Plc v Green***, I should not undertake "an over minute investigation of the selection process" but I do have to determine whether the process "can reasonably be described as fair" and is applied "without any overt signs of conduct which mars its fairness". Further, she points out that in ***Bascetta v Santander,*** I am not entitled to embark on a reassessment exercise but must determine whether the employer has shown that they set up a "good system of selection, that it was fairly administered" and that "ordinarily there would be no need for the employer to justify the assessments on which the selection for redundancy was based".

21. The Claimant asserts that the appointment of three temporary members of staff, one of whom who knew Ms Whitehead from her previous role, was done with the sole intention of slotting them into roles in the new structure. I find no evidence that this is the case. The Respondent justifies its decisions on the requirement for lower level employees to undertake some of the work at reduced cost in relation to the budgetary issues which had beset the service previously. The Claimant also asserts that his role as Contracts Safeguarding and Compliance Officer, as set out in his job information questionnaire at page 368, was the same as the Commissioning Assistant being recruited in September 2021 after his dismissal. Ignoring for the moment the fact that the new role was not in the mind of the Respondent at the time the Claimant was made redundant, I have nevertheless undertaken a comparison of the two roles. The Claimant asserts that the two roles are a 100% match. I do not agree. It is clear to me that the Commissioning Assistant has far less responsibility than that which the Claimant says he had in his role. In that role, the Claimant was responsible for the development, implementation and maintenance of systems to ensure that required safeguarding standards were fulfilled for all types transport contracts managed by the Respondent. The Commissioning Assistant has no such functions and provides what is essentially a support role. The Claimant's role, he says, included acting as an expert practitioner in transport safeguarding matters but there is no such duty for a Commissioning Assistant. The Claimant was required to monitor submissions from transport providers, coordinate and undertake regular proactive checks on drivers, escorts and vehicles and, in cases of non-compliance with safeguarding measures, lead any appropriate enforcement action including the removal of individuals or companies from procurement frameworks. He was also required to participate in the recruitment, selection, training, discipline, performance appraisal and employee development of staff within the team. The Commissioning Assistant undertook none of these duties. With the best will in the world, therefore, the Claimant's assertion that the new Commissioning Assistant

role was, in effect, his former role, is totally misconceived.

22. I also note that the Claimant argues that there were ulterior motives in many aspects of the process followed by the Respondent. With respect to him and bearing in mind the emotional impact his redundancy had on him, there is no evidence to support these allegations. For example, the three temporary members of staff who were given roles in the new structure were not recruited for that purpose. They were lower level employees required to carry out duties which were necessary for the service on a cost and service level basis. Additionally, the Claimant argues that the fact that his new Line Manager not sitting with the Claimant's team was due to the Line Manager's lack of interest in the Claimant and his colleagues. With respect to the Claimant, there is no evidence to support this other than the Line Manager, for most of his time, continued to undertake his own duties at his workstation which was on a different floor to that occupied by the Claimant's team. I also note, however, that the Claimant himself moved to the same floor as the Line Manager albeit in a different location, in order to remove himself from the impact his electromagnetic hyposensitivity had on his own work.

23. It is essential that in any redundancy process an employer engages in adequate and comprehensive consultation. In this case, there was a plethora of consultation meetings. The Claimant was given the ACD review, his Union was consulted, his own meetings were taken when he was accompanied by his Trade Union representative. In **R v British Coal Corporation and Secretary of State for Trade and Industry, ex-parte Price**, it was held that fair consultation means:

    "(a) Consultation when the proposals are still at a formative stage;
    (b) Adequate information on which to respond;
    (c) Adequate time in which to respond and conscientious consideration by an authority of the response to consultation".

    With due respect to the Claimant, all of these boxes are ticked by the Respondent. The Claimant was given every opportunity to participate in the consultation process and had the benefit of advice from his Union. As is often the case with public authorities, the consultation process involved a number of stages and the Claimant was able to engage with the Respondent and the proposals at every one of those stages. It is not possible to conclude anything other than the consultation process followed by the Respondent was fair, reasonable, transparent and comprehensive.

24. As part of the redundancy process, an employer is under a duty to consider alternative employment. In ***Burn v Arvin Meritor LVS (UK) Limited,*** the key question was defined as whether "what the employer did do was within the reasonable band of responses of a reasonable employer". The Respondent is thus only under a duty to take reasonable steps and not every conceivable step to find alternative employment for its employee. The evidence of Ms Whitehead was that the Claimant was placed on the redeployment register and she drew his attention to what she considered would be suitable roles within the Respondent for him. It has to be said that on that evidence, and the evidence of the Claimant himself, his response to these prompts was lukewarm at best. I concluded that his

desire was to remain where he was rather than to take up an alternative rols which suited his skill set.

25. The Claimant has also raised the issue of the role of Commissioning Assistant which was recruited in September 2021 some 2 months after his dismissal. But in ***Labour Party v Oakley,*** a failure to consider alternative employment after the date of dismissal does not render the dismissal unfair, nor following ***Octavius Atkinson & Sons Ltd v Morris,*** can a failure to offer an employee alternative employment which became available after his dismissal affect the fairness of that dismissal. Having said that, in this case, the Claimant does not even reach that stage because the role of Commissioning Assistant bore hardly any resemblance to the role he carried out and from which was made redundant.

26. It follows that I can find no fault with the process followed by the Respondent. The requirement to act as a reasonable employer was satisfied throughout that process. The Respondent had genuine reasons for the restructure and its witnesses have given straightforward evidence of the failings of the Home to Transport Team from a budgetary and service level perspective. The Claimant was fairly selected for redundancy following comprehensive consultation and being given redeployment opportunities which he chose not to pursue. Whilst I understand and appreciate the emotional distress caused to the Claimant, his own assumptions alone do not amount to unfairness on the part of the Respondent. They are assumptions and nothing more and, on the evidence before me, they cannot be substantiated. There was clearly neither a conspiracy or sham redundancy process pursued by the Respondent. Further, the Claimant at no time challenged the basis for the restructuring process which in itself puts him at an immediate disadvantage.

27. For the above reasons, I find the decision to dismiss the Claimant by reason of redundancy was fair.

_____

Employment Judge M Butler

Date: 30 June 2022

JUDGMENT SENT TO THE PARTIES ON

18 July 2022

FOR THE TRIBUNAL OFFICE

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.