

EMPLOYMENT TRIBUNALS

BETWEEN

MRS GEORGINA SPOOR

Claimant

AND

THE GOVERNING BODY OF ST ANDREW'S CE HIGH SCHOOL

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD by VHS

ON

27th and 28th June 2022

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: In person

For the Respondent: Mr A Peck of 12 CP Barristers

JUDGMENT

The judgment of the tribunal is that the claimant was fairly dismissed by reason of redundancy and the claim for unfair dismissal is dismissed.

REASONS PURSUANT TO A REQUEST FROM THE CLAIMANT

1. In this case the claimant Mrs Spoor, who was dismissed by reason of redundancy, claims that she has been unfairly dismissed. The respondent contends that the reason for the dismissal was redundancy, and that the dismissal was fair.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 248 pages, the contents of which I have recorded. I also received and considered witness statements from the claimant, and from Susan Whatley and Victoria Read, the claimant's

- witnesses, and from Mia Lowney and Claire Foot, who were the respondent's two witnesses. Mr Peck also supplied a chronology which was also agreed by the claimant and an opening statement, which I have noted.
3. I have heard from the claimant, and I have heard from Mr Peck of 12CP Barristers on behalf of the respondent. I have also heard from each of the four witnesses.
 4. The order made is described at the end of these reasons.
 5. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in giving evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

6. The respondent is the governing body of St Andrews' CE High School. It is a secondary school which became co-educational in September 2021. The head teacher, Mia Lowney, took up post in January 2021.
7. The claimant began employment with the respondent on 1st January 2000, carrying out a number of roles. From July 2012 she focused on SEN provision within the school, gaining a range of relevant qualifications.. In May 2018 she was formally offered the role of SENCO, with her grade set at UPS3 and TLR1a. Ms Lowney has described this as a teacher with a 0.9 Full Time Equivalent with a Teaching and Learning Responsibility for the SENCO role, which I accept. She also taught four hours of geography a week.
8. It is agreed that the claimant was an employee and has over two years continuous service for the purposes of the Employment Rights Act 1996.
9. The school was facing financial difficulties caused at least in part by falling roll numbers. This may have been exacerbated by below average results in GCSEs and a 2018 Ofsted report which identified that all categories assessed required improvement. In January 2021 an end of year budget deficit was expected of £107,059. This was expected to worsen over the next two years to £452,221 for 2021/22 and £697,390 for 2022/23. At that point 108% of the school budget was projected to be spent on staffing. The roll number projections going forward were made on reasonable assumptions.
10. In recent years, two redundancy rounds had already occurred. The head concluded that a further reorganisation was required for the school to become financially viable, to address academic under performance and broaden the curriculum for students' holistic education. It is clear that the head wished to introduce new ways of working within the school to help address the issues it was facing. As a result, a further redundancy round was necessary.

11. Accordingly, a restructure proposal was approved by the governing body on 28th January 2021, with an estimated cost saving of £303,352 in the SEND provision over two years. This proposal would greatly reduce the level of SEND provision within the school, with a reduction from of 5405.4 hours from 11,547.9 to 6,142.5. This would be achieved by teachers taking responsibility for in class provision instead of 1:2:1 provision. All staff were invited on 1st February 2021 to an online briefing on 5th February 2021 where the proposal would be announced. The claimant was on 4th February 2021 invited to an online meeting the next day (prior to the staff meeting) where she was informed of the proposals.
12. These proposals were set out in a consultation document which was emailed to all staff on 5th February 2021 together with the school's redundancy policy. It was also sent to union representatives.
13. The proposed reorganisation included the transfer of the SENCO role to a member of the Senior Leadership Team, the outsourcing of Access Arrangements to external contractors and a substantial reduction in the size of the SEND team, with the claimant's post removed. Ms Lowney justified these changes by reference to the Code of Practice on SEN provision which suggests that responsibility for this should sit within the Senior Leadership Team. The person who would take over the role, Mrs Stuart, did not have the qualifications and experience the claimant had; however she did have qualifications in training other teachers and in relation to mental health, which was felt to be of assistance with SEND provision being passed increasingly to teachers within the classroom.
14. There were clear reasons given for the restructure, including the changes to SEND provision, and there is no basis to question the reasons themselves or the motivations behind them. Legitimate reasons were put forward which would certainly lie within the band of reasonable actions an organisation could take. The claimant and others clearly had concerns about this new approach but it is for the school to decide how to address SEND provision. It is not the Tribunal's place to question this or to consider whether these were appropriate, provided they were in accordance with the law. There is no evidence to suggest they were not in accordance with statutory requirements.
15. The consultation period lasted until 5th March 2021. Comments from affected staff were put forward collectively by the unions at the end of this period. These were considered by the governors on 10th March 2021 and a detailed response provided. Changes were made to the restructuring proposal as a result, including in relation to pastoral roles; however, none of these affected the SEND proposal.
16. Meanwhile, advertising and interviewing for one new role – the head of STEM – had begun and was challenged by the unions. However, it was clarified that no appointment would be made until after consultation concluded, which was what happened. I do not consider this affected the fairness of the process.
17. Overall, I do find the consultation process to have been fair.

18. The revised proposal was sent to staff on 12th March 2021, the same day that the response was sent to the unions on the points raised. The revised proposal contained various options, including an ability to apply for voluntary redundancy. Having previously got an estimate of her likely payment, the claimant applied for voluntary redundancy on 16th March and this was approved on 25th March 2021. This entitled her to a large payment in excess of statutory redundancy.
19. The Tribunal heard from the claimant on her motivations for applying for voluntary redundancy. It is clear that she felt the outcome was certain in any event and she received advice from her union that, given the state of the school, she should take the opportunity to leave. Taking voluntary redundancy would also give her the opportunity to find new employment before the start of the next school year.
20. She made various job applications but understood that certain jobs would mean she would need to repay her redundancy money. On 10th May 2021 she was invited to an interview at Worthing High School and on 12th May 2021 had an interview with EducateU, who offered her a job as a primary teacher on a lower salary. She was able to clarify that this role would not lead to the loss of the redundancy payment, which would be the case with the Worthing High School role. She also preferred the work in the EducateU role, which reflected her interests, unlike the Worthing High School role and so she withdrew from that application.
21. On 24th May 2021 the claimant's employment was formally ended by reason of redundancy, with the employment terminating on 31 August 2021.
22. Two days later, a geography teacher at St Andrews School resigned. An advertisement was issued for a replacement, seeking a Geography/History teacher. The claimant states that this would have been a suitable alternative to her role and so she should have been given this with a trial period. She was already teaching geography at the school, had been observed and had received no negative feedback. She had also taught history in a previous role at another school but there is no evidence that the school had current awareness of this.
23. The school did not bring this role to the claimant's attention and Ms Lowney agreed she could have forwarded details to her. She claims that she was after a history teacher for the role, which was the eventual hire and so says the claimant would never have got the role. She claims that it was for the claimant's line manager to notify her of the role but could not do so as the claimant was not attending meetings with her line manager.
24. The claimant did not apply for that role, deciding that she would not have got it in any event for various reasons.
25. I do find that the process here could have been dealt with better and the school could have done more to draw it to her attention. The role might have been a suitable alternative; indeed, it seems to have been the only suitable alternative that was available. Other roles had been suggested, although in practice there were none other available that were suitable. However, recruitment into this role was a forward-looking approach with the shift to

history over geography and so I find the school was entitled to advertise it and seek the best candidate after an interview process and trial period. There was a failing by the school in not bringing it to her attention, but it was within the band of reasonable responses not to offer her role ahead of a recruitment process. In addition, the fact that she did not apply for the role mitigates against that failing.

26. I therefore find that this does not render the process unfair and that there was not a failure to offer a suitable alternative.
27. The claimant's employment ended on 31st August 2021, with a substantial enhanced redundancy payment being made. She started work at Educate U on 6th September 2021.

Claim

28. The claimant claims that she has been unfairly dismissed by reason of redundancy and is claiming compensation.
29. More particularly, her case is that the decision to make her position redundant was unfair dismissal as this was not a genuine redundancy situation, as the role of SENDCO still exists. She also argues that she was not offered a suitable alternative, rendering the process unfair.
30. She had also ticked the relevant box in her Form ET1 for a recommendation if claiming discrimination. However, she has confirmed that there is no claim for discrimination and so this has been disregarded, by agreement.
31. The respondent's case is that she was fairly dismissed by reason of redundancy.

Law

32. Having established the above facts, I now apply the law.

Redundancy

33. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
34. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) 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"
35. The issue here is whether this a redundancy rather than simply a business reorganisation. Just because there is a reorganisation and people lose their jobs does not necessarily mean that the definition of redundancy in section

- 139 has been fulfilled. The claimant's loss of her job was part of a wider redundancy exercise. However, this is not relevant, it is this part of the redundancy exercise we need to focus on. Section 139 refers to the "requirements...for employees to carry out work of a particular kind". Here this is the work of the SEND team. The claimant has argued that as the role of SENCO continues and has merely been re-assigned, there cannot be any cessation or diminution of this area of work.
36. In reaching my conclusion, I have considered the three stage test set out by His Honour Judge Peter Clark in the case of Safeway Stores plc v Burrell 1997 ICR 523, EAT, which was subsequently affirmed by the Court of Appeal.
 37. The test was first whether the employee was dismissed. The answer is clearly in the affirmative in this case.
 38. Secondly, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? As set out above, a diminution in SEND provision was expected, mostly as a result of the move to in class provision. In addition, the amount of SENCO provision would also reduce, as a result of the new SENCO carrying out 20 hours of teaching and other responsibilities in addition to the role. There was still a SENCO but the school had totally changed the way it would provide this service, as it was entitled to do. The result was a substantial diminution for the purposes of section 139.
 39. Finally, was the dismissal of the employee caused wholly or mainly to that state of affairs? The answer to this is also yes. The substantial reduction in the level of SEND provision, the transfer of the SENCO role to the senior leadership team, the reduction in line management, the outsourcing and the absorption by others of SEND responsibilities taken with the substantial cost savings together amount to this.
 40. Accordingly, I find that the claimant's role was redundant for the purposes of section 139(1) of the Act.

Fairness

41. I have next considered section 98(4) of the Act which provides "... 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".
42. In considering section 98(4), I have considered whether there has been fairness in selection, fairness in consultation and consideration of suitable alternatives. The application for voluntary redundancy means that selection is not relevant here. I have set out my findings on the questions of fair

consultation and suitable alternatives above and found that on balance both were fair, albeit with some shortcomings on suitable alternatives.

43. Accordingly, I have found that the process here was fair.

44. As a final word even if I am incorrect in any of my conclusions, I do consider that the actions of the claimant, and in particular her application for voluntary redundancy and actions to preserve her payment, would have resulted in any damages awarded had she been successful being the subject of a large reduction, especially in the context of the enhanced redundancy payment received by her.

Decision

45. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 27; a concise identification of the relevant law is at paragraphs 33, 34, 41 and 42 ; how that law has been applied to those findings in order to decide the issues is at paragraphs 35 to 40 and 43.

46. My decision is the claimant was fairly dismissed by reason of redundancy and the case is dismissed.

Employment Judge H Lumby
Date: 28 June 2022

Judgment sent to Parties on
27 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE