EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4100349/2021 & 4100350/2021

Hearing Held in Glasgow on 6 December 2021, 20 and 21 September 2022

5 **Employment Judge Jones**

Mr M Ritchie	**First Claimant** **In Person**
Mr N Findlay	**Second Claimant** **In Person**
Macrobert Art Centre Ltd	**Respondent** **Represented by:** **Mr A McCormack - Solicitor**

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20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claimants' claims of unfair dismissal are dismissed.

REASONS

Introduction

25 1. The claimants both lodged claims of unfair dismissal. The respondent's position was that the claimants were dismissed by reason of redundancy and that a fair procedure had been followed in that regard. The hearing was adjourned during the first day due to a medical emergency which resulted in a significant delay before the hearing was reconvened.

30 2. Ms Ellen, the respondent's chief executive officer and artistic director gave evidence on behalf of the respondent as did the Chairman of the Board of

Trustees, Mr Simpson, The claimants gave evidence on their own behalf. Mr Findlay led the claims on behalf of both claimants and the respondent was represented by Mr McCormack, solicitor.

3. A joint bundle of documents was produced. A request was made at the commencement of the reconvened hearing by the claimants to lodge additional documents. That request was granted only in part in relation to the public accounts of the respondent for the year in which they were made redundant.

Findings in fact

4. Having heard the evidence and considered the documents to which reference was made together with submissions of the parties, the Tribunal made the following findings in fact.

5. Mr Ritchie commenced employment with the respondent in October 2009 and remained employed until his dismissal on 31 October 2020. His position as the time of his dismissal was that of Technical and Production Manager.

6. Mr Findlay was employed from February 2009 and was dismissed on the same day as Mr Ritchie. He was employed as a technician.

7. The respondent is a charitable company limited by guarantee which provides theatre, film and outreach arts services in the central belt of Scotland. It obtains funding from Creative Scotland and the University of Stirling and further income from ticket sales and other minor sources of income. The respondent is governed by a Board of Trustees.

8. In around July 2020, the respondent reviewed its financial situation as there was a concern that the impact of the ongoing pandemic on the respondent's ability to operate would result in it becoming insolvent by mid-November 2020.

9. Ms Ellen produced a paper called 'Rational for potential redundancies/restructure on 6 July 2020'. The paper (pp79-84) reviewed staffing levels and identified posts at risk of redundancy. It was proposed that

staff who were only paid for hours worked would be advised that their hours may go down to zero. A number of roles were identified as being at risk of redundancy on the basis that no live performances were likely to take place in the near future. This included the claimants' positions and two other roles in their team. The paper also identified two pools where roles were at risk of redundancy because there was not enough work. This included a creative learning officer, live programme co-ordinator and venue and projects officer. A new temporary post of programme coordinator had been identified as an alternative available role. The second pool which was identified involved three marketing roles. A new temporary post of Marketing and Communications Coordinator was identified. The paper also outlined that discussions would be necessary in relation to a number of other roles where there was still a requirement for the role, but the requirement had diminished. The paper set out steps which would be taken to mitigate against redundancies, including an immediate ban on non-essential recruitment, consultation on voluntary redundancy and consultation regarding alternatives to redundancies. A proposed timetable was set out.

10. As a result of the COVID 19, the respondent closed its doors around 20 March 2020 and cancelled all productions. The claimants together with most of the respondent's staff were placed on furlough when the Job Retention Scheme was introduced.

11. Ms Ellen wrote to both claimants on 8 July advising them that their roles were at risk of redundancy and inviting them to separate meetings to consult with them in that regard.

12. A meeting took place on 10 July between Mr Ritchie and Ms Ellen at which Ms Rochford who had been engaged to provide HR advice took notes. Mr Ritchie indicated that he would put forward a plan which would allow the respondent to keep the technical team in its current state. Ms Ellen indicated that she had also spoken to BECTU the trade union in relation to the redundancy situation.

13. A similar meeting took place with Mr Findlay on 10 July.

14. Following consultation meetings with other staff, Ms Ellen produced a FAQ document around 14 July which sought to set out responses to questions she had been asked during the consultation meetings with staff.

15. A further consultation meeting took place with Mr Findlay on 16 July. He was accompanied at that meeting by Mr McGill, a representative of the trade union, BECTU. By this time, Mr Ritchie had provided Ms Ellen with a document outlining a proposal whereby the claimants and other members of the technical team would go down to part time hours, setting out savings this would make in relation to redundancy payments. Mr Findlay confirmed that he was 'on board' with the proposal. By this time another colleague who was known as 'Saint' (Mr Paul) had also worked with Mr Ritchie to provide Ms Ellen with a list of over 70 activities which could be performed by the technical team during the period when the theatre was closed to the public. Ms Ellen stated at that meeting, that 'There is always work that could be done, however we need work for staff that generates money'.

16. A similar meeting took place with Mr Ritchie on 16 July. He too was accompanied by Mr McGill. Mr Ritchie was asked to talk Ms Ellen through the spreadsheet he had produced showing proposed reduced working hours and work which could be done during the time the Centre was not open. Ms Ellen also indicated that emergency funding might be available through Creative Scotland.

17. The respondent applied for funding through Creative Scotland from the Scottish Government from a newly created 'Performing Arts Venue Relief Fund'. Part of the purpose of the fund was to 'remove the threat of insolvency; allow for specialist/core staff to return from furlough or avoid redundancy, to work on future sustainable activity plans, and to increase commissioning and employment opportunities for freelance artists and creative practitioners. The application submitted by the respondent made reference to staff who were at risk of redundancy.

18. The respondent was successful in its application for funds but advised staff that this did not mean that the respondent could save all of the current posts at risk of redundancy.

19. Following the conclusion of all second redundancy consultation meetings, Ms Ellen produced a further paper on 6 August called ‘Redundancy Plan Conclusions and Outcomes’. The paper noted that in relation to the proposals made by the technical department, while there would be a short term saving of redundancy costs, there ‘is a considerable risk to the business in keeping staff on contract when there is no Live Performance, no Hires and no other live group events: I.e. no income generating work for them and no current indication when business will pick up again in these areas.’ The paper went on to say that funding had been obtained for a 0.5 FTE Maintenance technician role and that a pool would be created whereby the technician staff currently at risk of redundancy could apply for this role. A job description was produced for this role which was said to be an interim post from 1 November 2020 for 6 months.

20. Neither claimant applied for the interim role.

21. Both claimants were advised by letter dated 14 August that their roles would be made redundant and that their employment would terminate on 31 October 2020. They were informed that they could appeal against the decision by 31 August in writing to the respondent’s finance manager.

22. Mr Findlay appealed against the decision by email dated 31 August. He sought to argue that the financial situation had now changed, given the recent grant and that there was work for the technical team to do.

23. Mr Ritchie sent an email to the respondent on 30 August indicating that he had 'been denied information that would allow me to form a robust appeal against dismissal’. He therefore indicated that he was unable to pursue an appeal hearing.

24. Mr Ritchie sent a further email on 31 August requesting information regarding the make-up of the appeal panel. When he was informed it would be made up of Mr Simpson, Mr Roden and Mr Doyle (who were other board members) together with support from Ms Rochford, he indicated that none of these individuals were impartial. In particular, he highlighted that he had recently agreed a COT3 settlement with the respondent and that all three Board members had been involved in that process. He stated 'I therefore think that anything relating to me should be considered by others'. The COT3 agreement arose out of the respondent having failed to allow Mr Ritchie to have a trade union representative present at a disciplinary hearing.

25. Mr Simpson sent a letter to Mr Findlay on 1 September inviting him to an appeal hearing on 7 September to be conducted by zoom.

26. Mr Simpson also sent a letter to Mr Ritchie on 2 September indicating that in response to his emails and concerns raised by him they wanted him to attend an appeal hearing on 8 September. The letter also stated that in an effort to address the issue regarding impartiality raised by Mr Ritchie, Ms Lawson, who was the Deputy Direct of HR and OD at the University of Stirling would also be present at the meeting.

27. On 4 September, Mr Ritchie sent Ms Rochford an email saying he could not add any additional information to support an appeal as he had been denied the information by the organisation. Mr Ritchie had asked for copies of board's minutes. However, this request had been refused on the basis that such minutes were confidential to the Board.

28. An appeal hearing took place in relation to Mr Findlay's redundancy on 7 September. Mr Findlay was again accompanied by Mr McGill at that meeting. Messrs Simpson and Roden were at the meeting and were assisted by Ms Rochford who also took notes of the meeting. A letter dated 17 September was sent to Mr Findlay rejecting the appeal and setting out the basis on which the grounds of appeal which were both procedural and substantive had been rejected.

29. Mr Ritchie continued to engage in email correspondence with Ms Ellen during which he asked questions in relation to funding and other matters. The meeting originally scheduled for 8 September did not take place and Mr Ritchie was invited to a further meeting on 28 October convened to consider an appeal against the decision to make him redundant. Mr Ritchie informed Ms Rochford in an email of 27 October that he would not be attending the meeting and that he intended to pursue a claim of unfair dismissal.

30. A hearing took place in Mr Ritchie's absence on 28 October by zoom. Messrs Simpson and Roden and Ms Lawson were in attendance and were assisted by Ms Rochford who took notes. The panel considered the concerns raised by Mr Ritchie in his correspondence together with the procedural issues of the redundancy process. Mr Ritchie was advised that his appeal was unsuccessful in a letter dated 30 October. The letter set out the basis for the panel's decision in relation to each of the issues raised by Mr Ritchie. Around' that date Mr Ritchie's access to the respondent's email system was withdrawn.

31. Mr Paul, being the only applicant, was appointed to the 0.5 FTE technician role.

32. Mr Ritchie sent an email to the respondent when the government announced that staff who had been made redundant could be reemployed and placed on furlough as part of the Job retention scheme for a period asking if they would follow the advice of the government.

33. Both claimants were advised by letter dated 12 November from Mr Simpson that the respondent would not re-employ them following the announcement by the government that staff who had been made redundant could be re-employed in terms of the Job Retention Scheme.

34. Mr Findlay obtained alternative employment after around 3 months of unemployment during which he received benefits. Mr Ritchie has set up a

business as a greengrocer but has not received any income from that venture as yet. He had received job seekers allowance for a period.

Observations on the evidence

35. All witnesses gave their evidence in a straightforward manner and were both credible and reliable. There was in truth little dispute on the facts, the dispute between the parties turned on the reasons for the actions taken by the respondent.

Issues to determine

36. The Tribunal was required to determine the following issues:

a. Was there a redundancy situation in terms of section 139 (1)(b) Employment Rights Act 1996 ('ERA')? That is to say, were the requirements of the respondent such that there was a diminishing need for employees to do work of a particular kind. Essentially the question to be addressed is whether there was a genuine redundancy situation.

b. Were either or both of the claimants dismissed by reason of redundancy?

c. If so, did the respondent follow a fair procedure in relation to those dismissals.

Relevant law

37. Section 139 of ERA sets out the definition of redundancy and provides that:

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

5 *(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. '

io 38. Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair - or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with section 98(4) ERA which states that:

15 *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

20 *for dismissing the employee, and*

(b) shall be determined in accordance with equity and the substantial merits of the case'.

Submissions

39. Parties made brief oral submissions. The respondent's position was that the

25 claimants had been dismissed fairly in terms of section 132 ERA. It was submitted that there was no real dispute as to whether there was a redundancy situation. There had been a diminution for the requirement of

technical and maintenance staff including the claimants' roles to the bare minimum following the closure of the Centre on 20 March 2020. There had been no live performances at all for some considerable time up to the dismissal of the claimants. It was highlighted that through this period there 5 was considerable uncertainty as to what would happen.

40. Mr McCormack indicated that the real element of dispute was whether redundancy was reasonable in the circumstances. He made reference to **Polkey v AE Dayton Services 1988 ICR 142** and highlighted the requirements for a fair procedure in a redundancy dismissal as being where 10 the employer should warn the employees of the potential for redundancies; consult in relation to the issue; have a fair basis for selection of individuals for redundancy and consider suitable alternative employment. It was said that the fact that the claimants are aggrieved at the outcome of the process doesn't change its fairness. The respondent's position was that there was consultation 15 as a result of which a part time role was created. This meant that alternative employment was available but this was a process of self-selection as neither claimant applied for the role. The Tribunal was cautioned against interfering with the management decision taken that this role was sufficient for the respondent's purposes.

20 41. It was said that there was full and sufficient consultation and that the claimants were given written reasons for their dismissals and the right of appeal. The * process was conducted appropriately and while Mr Ritchie did not engage in the process, an appeal hearing still took place. So far as the allegation made by Mr Ritchie that the appeal panel was not impartial due to involvement of 25 individuals in a previous matter concerning him, it was said that an independent person was brought in to alleviate Mr Ritchie's concerns. The respondent accepted that Mr Ritchie genuinely felt that the panel would not be impartial, but it was submitted that there no basis for him to form that view.

42. It was accepted that the respondent could have taken a different strategy and 30 adopted the plan put forward on behalf of the claimants to avoid redundancy,

however the action taken by the respondent was within the reasonable latitude available to the employer. It was also said that events which took place after the termination of the claimants' employment were not relevant to the issue of the fairness of the claimants' dismissals. Reference was made to Mr Simpson's evidence where he said that business plans are not made just in hope. It was also said that if the Tribunal was of the view that the dismissals were not fair due a procedural flaw, then the same outcome would have been arrived at in any event.

43. In terms of remedy, it was said that Mr Findlay should not be compensated beyond the date on which he secured alternative employment. It was suggested that Mr Ritchie had not taken sufficient steps to mitigate his losses and that if any award was made, this should be restricted.

44. Mr Findlay made submissions on behalf of both claimants. He said that they contested that the pandemic and the finances of the respondent were the real reason for their dismissals. He highlighted the funds held by the respondent at the end of the financial year in which they were dismissed and said that these funds could have been used to maintain the skilled workforce of the respondent. He criticised the respondent for not pausing the process once funds were received from Creative Scotland and that the successful award of these funds had not changed the respondent's plans. He suggested that the plan put forward by his team which was fully costed was not properly considered. He criticised the respondent for changing the rationale for the redundancies in that they were initially said to be because there was no work to be done, but then that any work had to be income generating. He highlighted that the respondent had spent £178,000 on freelancers to carry out work which was not income generating. He also criticised the respondent for failing to bring back redundant staff when the government altered the Job Retention Scheme to allow redundant staff to be brought back and placed on furlough even though the respondent was in a better financial position by that stage. The makeup of the appeal panel was criticised in relation to Mr

Ritchie's position and the addition of an extra member did not address the concerns.

45. Mr Findlay also highlighted concerns had been raised by both claimants and their BECTU representative in relation to health and safety issues of having only one member of the technical team given the dangers of lone working in such a role. While the appeal panel indicated that they would take advice on the matter, they only consulted the CEO who had taken the decision. Mr Findlay said that the respondent had taken the opportunity conduct an ideological restructure of a team with significant experience and service

Discussion and decision

46. The Tribunal first considered whether there was a genuine redundancy situation in relation to the claimants' roles. It had no hesitation in concluding that there had been a diminution of work in relation to the roles carried out by both claimants. The respondent's operations were brought to an immediate halt when they closed their doors on 20 March 2020. There were no productions taking place at all and therefore while there would still no doubt have been a requirement for some maintenance work to be carried out over time, there was a clear diminution of the type of work carried out by the claimants.

47. The next question to consider is whether redundancy was the reason for the claimants' dismissals. Although in submissions it was suggested that the respondent had conducted an 'ideological restructure', this was not put to the respondent's witnesses in terms. Moreover, there was no evidence at all that the respondent's redundancy plans were ideological in nature. While it was implied by the claimants that they or at least Mr Ritchie had been dismissed because of his vocal challenging of management decisions, there was no evidence to support this position. It was clear that there was a redundancy situation, all members of the technical staff were put at risk of redundancy (other than the member of staff who was on maternity leave at the time). Other members of staff, in particular in the marketing department and in co-ordinator

roles were put at risk of redundancy and some were ultimately made redundant. Therefore, the suggestion that the claimants' department was in any way targeted was rejected.

48. Therefore, the Tribunal was satisfied that the reason for the claimants' dismissals was redundancy.

49. Consideration was then given to whether the dismissals were fair and whether the requirements of section 98(4) ERA had been met. There was no dispute that there were consultation meetings with both claimants. Proposals were put forward by and on behalf of the claimants. Ms Ellen readily accepted that she could have adopted the proposals but chose not to do so and instead decided to create a 0.5 FTE role. The claimants emphasised that the approach taken by the respondent was different to that taken by other theatres in Scotland. However, the question as to whether an employer has followed a fair procedure will not generally be determined by the extent to which it adopted a different strategy from other companies or employers in the same sector. The question to be addressed is whether the employer acted reasonably in all the circumstances. It is not for an employment tribunal to interfere with business decisions taken by employers unless the decision is so unreasonable that no other employer acting reasonably could take that decision.

50. It seemed to the tribunal that it would have been reasonable to have adopted the claimants' suggestions or at least engaged in further discussions with them regarding alternatives to redundancy. However, that did not mean that the decisions taken by the respondent were unreasonable. There are many different courses of action which might be available and so long as the course of action adopted by an employer is within that band of reasonableness, a dismissal will generally be fair.

51. The Tribunal was certainly surprised that the respondent did not engage in further discussions with the claimants regarding the proposals put forward which would avoid the need for redundancies, particularly given the sector in

which they operate, the funding obtained and the charitable nature of the respondent's organisation. However, it could not conclude that the failure to do so was unreasonable. There was uncertainty throughout 2021 and into 2022 amongst employers given the pandemic, the changing nature of restrictions on activity and support being offered by the government, particularly through the Job Retention Scheme.

52. The respondent consulted with the claimants and followed a fair procedure in relation to the redundancies. The Tribunal did have some concern regarding the way in which the member of staff who was on maternity leave was excluded from the exercise and that it appeared she had now returned to her former role, however there was no evidence led in relation to the facts around this matter and the claimants did not seek to argue that this rendered the procedure unfair. In the absence of evidence on the matter, the Tribunal could not say that this rendered the claimants' dismissals unfair and indeed even if this did amount to a procedural flaw, the tribunal is of the view that the claimants were likely to have been dismissed in any event.

53. The claimants sought to rely on the apparently healthy cash situation of the respondent at the end of the financial year in which they were dismissed as pointing to unfairness in their dismissals. The failure of the respondent to reengage the claimants when the government made changes to the Job Retention Scheme was also relied upon. While the Tribunal was again surprised that the respondent did not take steps to re-engage the claimants after additional funding was obtained or after the changes to the Job Retention Scheme, it could not conclude that either approach was outwith the reasonable courses of action open to it.

54. The Tribunal also considered whether there was merit in the argument that the appeal panel was not impartial. There was however nothing in the minutes of the appeal hearing which took place in Mr Ritchie’s absence to substantiate the allegation that the makeup of the panel either together with other factors or of itself rendered his dismissal unfair. There was no merit in this argument.

55. In all these circumstances, the Tribunal concluded that the claimants were dismissed by reason of redundancy and that their dismissals were fair. Their claims are therefore dismissed.

Employment Judge:	**A Jones**
Date of Judgment:	**26 September 2022**
Entered in register:	**27 September 2022**
and copied to parties	

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