



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103175/2022**

5

**Held in Glasgow on 21, 22 and 23 September 2022**

**Employment Judge L Doherty**

**Mr Alistair Ian Laird**

10

**Claimant  
In Person**

**Patrick Trinity Church of Scotland**

15

**Respondent  
Represented by: ,  
Mr D Di Paola -  
Solicitor**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgement of the Tribunal is that the claimant was not unfairly dismissed, and the claim is dismissed.

**REASONS**

25

1. The claimant presented a claim of unfair dismissal on 9 June 2022. The respondents resisted the claim on the grounds that the claimant was dismissed by reason of redundancy, and that his dismissal was fair.

2. A final hearing took place over two days. The claimant appeared on his own behalf, and the respondents were represented by Mr Di Paolo, solicitor.

**Issues**

30

3. The respondents accepted that the claimant was dismissed; their position is that the reason for dismissal was redundancy, and was fair. The claimant does not accept that there was a redundancy situation, and therefore the reason for dismissal is an issue for the tribunal.

4. In the event the Tribunal is satisfied that the claimant was dismissed for the potentially fair reason of redundancy, there is an issue as to the fairness of the dismissal in terms of the process adopted by the respondents. It is the claimant's position that the respondents failed to warn or consult with him prior to dismissing him.
- 5
5. For the respondent's evidence was given by the Rev Timothy Sinclair of Patrick Trinity Church of Scotland (the Church); Ms Janice Kemp, an Elder and trustee of the Church; and Mr Neil Murray and Elder and trustee of the Church.
- 10
6. The claimant gave evidence on his own behalf.
7. The parties joined a bundle of documents.

#### **Findings in Fact**

8. Rev Timothy Sinclair is the resident minister at the Church, which is a part of the Church of Scotland. His responsibilities include the spiritual direction and the organisation of worship of the Congregation. The Kirk of Session is a body comprising of Elders of the Church, who are also trustees of the Church, which has charitable status. The Kirk of Session oversees the operation of the Church, and is the court of the Church at the Congregational level.
- 15
9. The claimant, whose date of birth is 10 April 1960, was employed by the respondents as an Organist from April 1998. His contract provided that he would play the organ and piano as required at Sunday services. The claimant played both the piano and organ at church services. The organ was almost always played at Sunday services, although other music was also played. The claimant's income from that employment was agreed to be £49.37 per week.
- 20
10. The respondents have three employees in addition to the claimant. These are a Youth Worker; a Cleaner and an Administrator. They all perform different functions to the claimant, involving different skill sets.
- 25

11. There were ongoing discussions within the Church involving Rev Sinclair, and members of the Kirk Session about the future form of worship, and the church's purpose and vision.
12. At a Kirk Session meeting on 19 January 2022, the Kirk of Session passed a motion to make the post of organist redundant in the following terms:
- 5
- (1) *Make redundant the post of organist. In practice this means beginning a process that has various stages, in consultation with the post holder.*
- (2) *The Elders and members of the Finance Team ensure that this is handled fairly and properly consultation with CoS Law Department.*
- io 13. The reason for this decision was that while it was considered the post of organist had been an excellent fit for the Church for many years, it was no longer considered to be a good fit. This had emerged from a series of reflections in the leadership of the Church on how to respond to what it considered to be a post-Christian culture and the changes it was experiencing
- 15 in terms of declining numbers of attendees at the Church and the role and practice of worship. It was considered that in a modern environment going forward the Church had to be flexible and creative in its forms of provisions of the music and worship, and that the permanent post of organist and regular organ music at Sunday services was not consistent with this. It was
- 20 considered that there should be a variety of instruments and vocals at Sunday services, which should be provided by lay volunteers involved with the church, meaning they became more involved in the Church. There was also a financial consideration in that the Church was operating at a loss.
14. Responsibility for implementation of the redundancy process was allocated
- 25 by the Kirk of Session to their Finance Team, and to Rev Sinclair. Matters were initially left in the hands of Rev Sinclair and Ms Kemp.
15. Rev Sinclair emailed the claimant on 29 January 2022 (page 101) asking to meet him. The claimant was not advised of the purpose of the meeting or that Ms Kemp would also be in attendance.

16. The meeting took place on 31 January with the claimant, Rev Sinclair and Ms Kemp attending.
17. The claimant was the only person who was identified as part of the redundancy process, as it was not considered that he had the skill set required of the three other post holders, who all did different types of work. The work which the other three employees did was considered to be essential.
18. No notes were taken of the meeting, which lasted for around over an hour.
19. Rev Sinclair began the meeting by expressing sympathy for the fact that would be difficult for the claimant to hear this, but that the Kirk Session had taken the decision to begin the process of making the post of organist redundant. Rev Sinclair told the claimant that it was no longer felt that organ music was a good fit for the Church's worship. He told the claimant that there
- were no suitable alternative vacancies and that the respondents did not consider that there was any alternative to redundancy. Rev Sinclair told the claimant that he had a period of 7 working days to make any alternative suggestions in writing. He told the claimant that the next part of the process would be that he would receive a redundancy notice and he explained what would be paid by way of redundancy pay and notice pay. He told the claimant that he could appeal the decision to make him redundant.
20. The claimant told Rev Sinclair that he did not wish Mr Murray to be involved in the process as he believed that Mr Murry had made a false accusation against him to the effect that the claimant had told a member of the Parish that he had been stabbed in the back.
21. In October 2021, Mr Murray had been involved in a discussion with the claimant about changes in relation to worship music, which had become an issue with at least one other parishioner, which Mr Murry sought to resolve. This was not a conduct or disciplinary matter.
22. The meeting of 31 January 2022 was a very intense meeting and a very difficult one for the claimant, who had come to the meeting in anticipation of discussing music for the church. No notes of the meeting were taken and the

claimant did not receive any correspondence after it confirming what had been discussed.

23. The claimant did not make any written suggestions to avoid redundancy.

24. The claimant received a letter dismissing him as redundant, dated 10  
5 February 2022. The letter stated:

*'I am writing to confirm that Patrick Trinity Church of Scotland (Party Trinity) has decided to make redundant the role of Organist and terminate your employment as a result.*

10 *As you know, proposed changes mean that the role of Organist was being considered for redundancy and following consultation Party Trinity has decided to confirm the redundancy of the role. Party Trinity has explored ways in which redundancy could be avoided, and the possibility of alternative employment. Unfortunately we have not been able to identify any suitable alternative employment for you or any way which redundancy could be avoided'.*  
15

25. The claimant was advised that he had the right to appeal the decision dismiss him, which he did. His letter of appeal (page 64) identified the following basis of appeal:

20 (1) That and no time prior to the meeting of 31 st January was the claimant aware that his post was being considered for redundancy;

(2) That the no consultation; when the claimant went to the meeting of 31 January he thought it was to discuss church music. He did not know Ms Kemp will be there, and had he been aware of the purpose of the meeting he would arrange to have been accompanied; and

25 (3) The claimant's contract provided for him to play the organ and piano and understand how that was no longer a need for him to play the piano.

26. The claimant's appeal was dealt with by three of the Church Elders, Mr Murray, Ms Burnside, and Ms Roud. Advice was taken about whether Mr

Murray should be involved in the appeal, but the view was taken that there was nothing to prevent him hearing the appeal.

27. The appeal hearing took place on 24 February 2022. The claimant was accompanied by a family member and a friend.

5 28. Mr Murray produced a summary note of what was discussed at the appeal,  
• which was sent to the claimant on 27 February 2022.

29. At the appeal hearing, the claimant reiterated that he was unaware of the purpose of the meeting of 31 January 2022. He also stated that he did not know that he had a period until 9 February 2022 in which to suggest  
10 alternatives or to submit comments and proposals. The claimant advised that he understood that he was being told that he was being made redundant.

30. Further to the Appeal meeting, Mr Murray contacted both the Rev Sinclair, and Ms Kemp separately, asking for their account of the meeting. They both confirmed that they had told the claimant that he had a period of seven  
15 working days in which to make written representations. The appeal committee also looked at the advice which had been given prior to the meeting on 31 January 2022, which in their view supported the accuracy of what they were told had been said to the claimant.

31. The appeal committee decided to reject the appeal, that this was confirmed  
20 to the claimant in a letter dated 3 March 2022. The appeal committee concluded that at the meeting on 31 January 2022 the process was clearly communicated to the claimant and he was informed that he had until 9 February 2022 to make any suggestions for alternative to redundancy. The appeal committee also found there were no new roles planned in the music  
25 type such worship of the church.

32. • The claimant was given 12 weeks' notice of the termination of his employment, which came to an end on 5 May 2022. The claimant was also subsequently paid his statutory redundancy payment.

33. The Church has not played organ music since the claimant's employment came to an end. Music for Sunday services have been provided by volunteer members of the church since the termination of the claimant's employment.

34. After the termination of his employment the claimant took steps to find work, and managed to secure a number of assignments, from which it was agreed he earned £737.

35. The claimant has managed to secure a permanent job, starting on 1 October 2022, which means that he will not suffer an ongoing loss of income from that date.

36. The claimant did not claim benefits as he was not eligible to do so on account of the fact that he is retired and not looking for work, and his level of savings.

#### **Note on evidence**

37. A good deal of the evidence was not in dispute in this case. It was accepted that the claimant was invited to the meeting on 31 January 2022 without being given notice of its purpose and that he was not advised that the meeting would be attended by Ms Kemp. Nor is it in dispute that the claimant told Rev Sinclair at the meeting of 31 January 2022 that he did not want Mr Murray involved in the process because of alleged false allegation.

38. There was however a significant area of dispute in the evidence which the Tribunal had to resolve. That was whether Rev Sinclair told the claimant at the meeting on 31 January 2022 that he had a period of seven working days within which to make written representations or comments on how to avoid redundancy.

39. It was the claimant's evidence that no such information be given to him; it was the evidence of Rev Sinclair and Ms Kemp, that the claimant had told this.

40. The Tribunal did not necessarily find this an easy conflict to resolve, not least, in that he did not form the impression that any of the witnesses in this case set out to mislead the tribunal. On balance the Tribunal was persuaded that this information had been given to the claimant, albeit it had not been

\* identified to him as a consultation period. In reaching conclusions of the Tribunal attached particular weight to Ms Kemp's evidence as to what was said about the claimant having a period of 7 working days which to make written representations. Ms Kemp's evidence on this was clear and convincing, and it corroborated Rev Sinclair's evidence on the same point. In reaching its conclusion the Tribunal also take into account the date of issue of letter of dismissal by reason of redundancy is consistent with the claimant having been given a period of 7 working days which to make written representations, as are the terms of that letter to extent they refer to a period of consultation.

41. There was also a dispute as to what the Kirk of Session had decided with regard to the Organist post and what the claimant had been told. The claimant contended the decision had been made to make him redundant and he was told that at the meeting; the respondent's witness suggested it was a decision to make the post redundant which involved a process which had to be conducted fairly.

42. Having regard to the terms of the Motion passed by the Kirk of Session the Tribunal was satisfied that they took a decision to make the post of Organist redundant, with a recognition that the respondents would have to follow a redundancy process.

43. The Tribunal was satisfied that the claimant was told that the decision was made to make the post redundant, and that was told that this was the beginning of the meeting on 31 January. This conclusion was supported by Ms Kemp's evidence to the effect that what was communicated to the claimant was that that the decision had been made to make the post redundant

## **Submissions**

### *Respondent's submissions*

44. Mr Di Paola took the Tribunal to the relevant law, and submitted that dismissal was by reason of redundancy, the statutory definition of redundancy having been met in this case. He also submitted that dismissal was fair, applying the



principles in *Williams v Compair Maxim* 1982 ICR 156. In the event of the Tribunal found the dismissal to be unfair, then compensation should be reduced in line with the principles and *Polkey v AE Dayton Services* 1989 ICR 42.

5 *Claimant's submissions*

45. The claimant took the Tribunal to the salient points in evidence and submitted in summary that there had been inadequate warning and consultation; in particular, the decision had been made to make his post redundant; he did not know in advance of the purpose of the meeting and was not given the  
10 opportunity to suggest alternatives or information on which to do so. Had he been given that opportunity he would have made proposals.

**Consideration**

46. Section 94 of the Employment Rights Act 1996 (the ERA) creates the right not to be unfairly dismissed.

15 47. Section 98 provides:

*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*

20 (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—*

25 (c) *is that the employee was redundant,*

48. Section 98(4) provides:

*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) —*

- 5 (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.*

10 49. The burden of proof rests for the respondents to establish the reason for dismissal. In considering the application of Section 98(4) the burden of proof is neutral.

15 50. In determining whether the respondent had established the reason for dismissal was redundancy the Tribunal had regard to the definition of redundancy contained in Section 139 of the ERA which 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 —*
- 20 (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—*
- 25 (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.

51. The first matter which the Tribunal considered was whether the respondents had established the reason for dismissal. That firstly involved considering whether it had been established by the respondents that the post of organist was redundant as defined by Section 139 of the ERA.

52. Mr Di Paola submitted that Section 139(1) (b) (i) applied. That definition of redundancy requires the Tribunal to consider whether the requirements of the respondents' business for employees to carry out the work which the claimant was carrying out (the provision of music for the Sunday Service) had ceased or diminished, or were expected to cease or diminish.

53. The Tribunal found that the claimant played both the organ and the piano at the Sunday service. It was also satisfied that the respondents no longer play organ music and that they now rely upon the services of unpaid lay volunteers to provide music for their Sunday service. These volunteers are not employees of the respondents, and therefore the need for the respondents for employees to carry out work which the claimant was performing, playing organ, piano, or providing music for the Sunday Service has ceased. In these circumstances the Tribunal was satisfied that the definition of redundancy in Section 139 (1) (b) (i) had been met.

54. The Tribunal also considered whether that redundancy was the reason for dismissal, and it was satisfied that it was. The respondent's evidence on this point was convincing, there was no evidence to support the contention that the claimant was dismissed for any reason other than redundancy.

55. The Tribunal then considered whether dismissal was fair or unfair in terms of section 98(4) of the ERA. In doing it obtained guidance from the case of *Williams v Compare Maxam (1982) ICR 156*. What was said in that case is that a reasonable employer would be expected to consider the following factors:

- a. whether the selection criteria were objectively chosen and fairly applied;

- b. whether the employees were warned and consulted about the redundancy;
- c. if there was a Trade Union, whether its views were sought; and
- d. whether there was any alternative work available.

- 5 56. In the *Williams* case, the Employment Appeal Tribunal stressed that it was not for the Tribunal to impose its standards in deciding whether an employer acted reasonably or should have acted differently. Instead, the question Tribunal has to ask itself whether dismissal lay with the range of conduct which a reasonable employer might have adopted.
- io 57. It was open to respondents acting to take the decision to make the post of organist redundant. It is not for the Tribunal to investigate the reason behind such a situation. The Tribunal did however consider whether, applying the objective standard of reasonable employer, in taking the decision to dismiss the claimant for the reason of that redundancy, the respondents had acted  
15 reasonably. In conducting this exercise, it is the objective standard of a reasonable employer which has to be applied, even if the Tribunal itself consider that matters could have been handled better. For example, the respondents could be criticized for not giving the claimant advance notice of the purpose meeting, or who would be attending the meeting or providing him  
'20 with information following it
58. However not all deficiencies in process are capable of rendering a dismissal unfair and applying the objective standard of a reasonable employer, the Tribunal was satisfied that the respondents inviting the claimant to the meeting on 31 January 2022 and advising him the post had been selected for  
25 redundancy amounted to a warning, of what in reality was a very high likelihood, of impending redundancy. Further the respondents advising the claimant that he had a period of 7 working days within which to make for written suggestions as to how to avoid his redundancy, amounted to a consultation as to how his redundancy might be avoided. That is so even  
30 although this was not identified as a consultation period, or that the reality of the situation was that there was effectively there was little or nothing which

could be done to avoid dismissal where the services provided by the claimant were to be provided by unpaid volunteers, going forward.

59. Applying the same standard, it was reasonable for the respondents to put the claimant into a pool one for redundancy selection. It was his post which was going, and the respondent's three other employees all carried out completely different roles to the claimant, which required different skill sets. Beyond these three posts there was no other jobs, and the respondents had no plans to create any new jobs or any new musical roles, and in these circumstances, it was not unreasonable for the respondents to conclude that there was no alternative work available in order to avoid the claimant's dismissal.

60. The claimant was given the right of appeal which he exercised. It was not unreasonable for the respondents to have Mr Murray deal with the appeal in circumstances where he had dealt with an issue in October 2021 involving the claimant and music in the Church. The Tribunal accepted Mr Murray's evidence that this had not been a conduct issue, and applying an objective standard the information disclosed to Rev Sinclair by the claimant on 31 January would not have caused the respondents to remove him from the appeal panel.

61. Lastly, his cross examination the claimant made reference to the lack of a written reason for his dismissal. The respondents did confirm the reason for dismissal to the claimant in their letter of 10 February 2022, which was redundancy and met their obligation in this regard.

62. In these circumstances, while the Tribunal had a good deal of sympathy for the claimant, it concluded that dismissal by reason of redundancy did not fall out with the band of reasonable responses and the claim is dismissed.

63. Finally, the Tribunal would note that even if it had found the dismissal to be procedurally unfair, in the circumstances of this case, where the claimant's post was genuinely redundant and that was the reason for his dismissal, applying the principles in *Polkey v AE Dayton Service*, any compensation would have been reduced to reflect the fact that the claimant would

unfortunately have been dismissed, even if a fair procedure had been followed.

**Employment Judge: L Doherty**  
**Date of Judgment: 29 September 2022**  
**Entered in register: 7 October 2022**  
**and copied to parties**