Neutral Citation Number: [2022] EAT 171

Case No: EA-2021-000027-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 December 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mr Archie Teixeira	**Appellant**
- and -	
1) Zaika Restaurant Limited 2) Mr Hector DaSilva	**Respondents**

- -
- -

Anna Dannreuther (instructed by Atkinson Rose LLP) for the **Appellant**
Sam Stevens (instructed by Tim Russell, Solicitor) for the **Respondents**

Hearing date: 27 October 2022

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JUDGMENT

SUMMARY

Unfair Dismissal

The employment judge erred in law in reducing the compensatory award to zero on the basis that the respondent could reasonably have decided on a pool of selection of one, and so there was a 100% chance the claimant would have been dismissed on the same date that the unfair dismissal took place.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Norris after a hearing on 25 and 26 January 2021. The judgment was sent to the parties on 8 March 2021.

2. The employment tribunal dismissed the claim of the second claimant, Mr Da Silva, who has not participated in this appeal. The employment tribunal upheld complaints brought by the first claimant, Mr Teixeira, who I shall refer to as the claimant.

3. The employment tribunal held that the claimant had been unfairly dismissed. The claimant appeals against the decision that if a fair procedure had been applied by the respondent, there was a 100% chance that he would have been fairly dismissed at the same time.

4. I take the facts from the decision of the employment tribunal. The respondent is part of the Tamarind collection that operates three Indian restaurants in London [5]. The claimant commenced employment with the respondent in August 2015 with a job description in which he was given the title "tandoor chef".

5. At the relevant time there was a "team of ten chefs" [65]. EJ Norris recorded that "both parties agree that the First Claimant was not working for the Respondent as a "speciality" chef" [67]. EJ Norris accepted the evidence of Mr Dhaliwal and his "assessment of the situation" [73], that included his evidence that:

    5.1. the claimant was a "helper" in all five departments but could not run any of them [69]

    5.2. the other chefs had "up to twelve or thirteen years' service" [69]

    5.3. the other tandoor chef was much more senior than the claimant [71]

6. On 1 April 2020, the claimant was told by telephone that he was being dismissed, which was confirmed the following day [37]. The claimant was the only chef to be dismissed [37]. EJ Norris held that the effective date of termination of the claimant's employment was 29 April 2020 [50].

7. There was no real dispute that the claimant was dismissed by reason of redundancy [14]

because of a very significant reduction in work because of the Coronavirus pandemic [29-33]. The respondent accepted it did not operate any procedure before the claimant was dismissed and, therefore, that his dismissal was unfair, at least procedurally [12]. EJ Norris identified that she would have to decide "whether, and if so, when," the claimant "would have been dismissed if a fair procedure had been followed" [15]. EJ Norris noted that neither party had dealt properly with this issue in their witness statements. She permitted the claimant to provide some further information and the decision maker, Mr Dhaliwal, to provide a statement between the first and second days of the hearing, and to give evidence by video link on the second day [17].

The decision

8. EJ Norris concluded:

> It was **not**, in those circumstances, **objectively unreasonable to determine that the First Claimant was in a pool of one** (of non-speciality chefs) and that he should be dismissed for redundancy. [74] …
>
> **even if the Claimant had been pooled with all the Respondent's other chefs**, they had all been placed at risk of redundancy and (for example) a matrix had been drawn up by Mr Dhaliwal, **the irresistible conclusion is that the First Claimant would have been the lowest scorer** and that Mr Dhaliwal would have proceeded to individual consultation with him and him alone. [75] …
>
> Overall, then, I consider that while quite clearly no procedure was followed in conducting the redundancy exercise, there is 100% likelihood that if the Respondent had followed a fair procedure, the outcome would still have been the First Claimant's redundancy. Accordingly, while the dismissal was procedurally unfair, the outcome would have been the same in any event. **Further, given that I have accepted that the First Claimant could reasonably have been placed in a pool of one had Mr Dhaliwal put his mind to it, I consider that the redundancy would still have occurred when it did**, i.e. that the First Claimant would have been given notice on 1 April to terminate on 29 April 2020. [79] [emphasis added]

The appeal

9. The appellant appeals on three grounds, that the employment tribunal:

   9.1. erred in law in its approach to determining that there was 100% chance that the claimant would have been fairly dismissed at the same time as his actual dismissal if a fair process had been adopted

9.2. was perverse in determining that the claimant could have been placed into a pool of one

9.3. was perverse in determining that if the Claimant had been pooled with all the other chefs and a matrix drawn up "the irresistible conclusion is that the First Claimant would have been the lowest scorer"

The Law

10. It was conceded that the claimant was unfairly dismissed. The employment tribunal was required to determine the remedy to which the claimant was entitled. Section 123 **Employment Rights Act 1996** ("**ERA**"):

> (1) Subject to the provisions of this section and …, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

11. This provision is the basis for a **Polkey** reduction in compensation to reflect the chance that a person would have been fairly dismissed had a proper procedure been applied: **Polkey v A. E. Dayton Services Ltd. Respondents** [1988] A.C. 344.

12. An award consisting only of a redundancy payment would generally only be appropriate where there was a 100% chance that if a fair process had been applied the employee would have been fairly dismissed by the employer on the same date as the unfair dismissal took place. If a fair procedure would have taken some time there would be some compensation to cover the period that the consultation would have taken even if dismissal was inevitable.

13. Determining the chance that a fair dismissal would have occurred absent any unfairness involves a degree of speculation because the employment tribunal has to recreate the world as it would have been for the employer and employee, had a fair procedure been applied. In **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691 Langstaff J (President) held [24]:

> A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not)

> though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done.

14. While the determination necessarily involves a degree of speculation, it must be based on evidence. The assessment is what the employer would have done if it had acted fairly, not what some other hypothetical fair employer would have done. The evidence should be considered with some circumspection, as a learning of experience is that employers are almost always adamant that dismissal was inevitable, while employees are equally certain that a fair procedure would have resulted in their retention in employment.

15. Assessment of any **Polkey** reduction requires consideration of the circumstances in which a dismissal by reason of redundancy will be fair. Section 98 **ERA** provides that:

> (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.

16. Warning and consultation are generally necessary components of a fair redundancy procedure. This was first considered in the context of redundancy in unionised workplaces: **Williams and others v Compair Maxam Ltd** [1982] ICR 156 at 162:

> The two lay members of this appeal tribunal hold the view that it would be impossible to lay down detailed procedures which all reasonable employers would follow in all circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:
>
> 1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected

> to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
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> 3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> 4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
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> 5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.
>
> The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.

17. The process should generally start with some warning. In **Williams** two potential reasons for warning employees who are at risk of being dismissed by reason of redundancy were identified: the first to ensure that effective consultation can take place, including about the possibility of alternative work with the employer, and the second to give employees an opportunity to seek alternative employment with another employer. The importance of the former was considered in **Elkouil v Coney Island Ltd** [2002] IRLR 174 at [14]:

> The warning, the giving notice of risk, that is spoken of there is an essential prerequisite of the consultation process, because without it the representatives of the employee will not be able to formulate a strategy or consider what

> suggestions they can put to the employer. In this case it is true that a single person was being made redundant and no union was involved, but the principles are exactly the same.

18. The nature of fair consultation was considered in **R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others** [1994] IRLR 72 at [24]:

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
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> 'Fair consultation means:
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> (a) consultation when the proposals are still at a formative stage;
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> (b) adequate information on which to respond;
>
> (c) adequate time in which to respond;
>
> (d) conscientious consideration by an authority of the response to consultation.'

19. In the end, the key question is that of whether the dismissal is fair for the purposes of s98(4) **ERA** and the case law can only provide guidance. The statute specifically requires that consideration be given to the size and administrative resources of the employer. Nonetheless, some consultation will generally be required even for very small employers: **De Grasse v Stockwell Tools Ltd** [1992] IRLR 269 at [12]:

> In our judgment while the size of the undertaking may affect the nature or formality of the consultation process, it cannot excuse the lack of any consultation at all. However informal the consultation may be, it should ordinarily take place.

20. In **Williams** the EAT noted the importance of objective criteria to prevent selection for redundancy being used as an opportunity to get rid of employees who are unwanted for some reason other than redundancy: see p166:

> The purpose of having, so far as possible, objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some

> manager wishes to get rid of for quite other reasons, e.g. for union activities or by reason of personal dislike.

21. There is a similar risk where a pool of one is chosen, as it could be used to get rid of an unwanted employee. Accordingly, there is good reason to examine a decision to choose a pool of one employee with worldly-wise care.

22. That said, it is not for the employment tribunal to substitute its decision as to the appropriate pool for selection for that of the employer: **Capita Hartshead Ltd v Byard** [2012] ICR 1256.

23. The authorities do establish that generally one will expect an employer to warn and consult to some extent before dismissing by reason of redundancy and, if this is not done, for an employment tribunal to give some explanation if it decides that the dismissal was fair notwithstanding the lack of such basic procedural safeguards.

24. The possible requirements for consultation where there is a pool of selection of one was recently considered by HHJ Wayne Beard in **Mogane v Bradford Teaching Hospitals NHS Foundation Trust** [2022] EAT 139, in which the importance of consultation was stressed in circumstances in which the selection of a pool of one means that the claimant is effectively certain to be dismissed as redundant.

Analysis

25. I consider that the key conclusion of the employment judge was where she stated "given that I have accepted that the First Claimant could reasonably have been placed in a pool of one had Mr Dhaliwal put his mind to it, I consider that the redundancy would still have occurred when it did". Regrettably, I consider that reasoning did not properly apply the relevant legal principles. The reasoning involved a non-sequitur because the possibility of a pool of one being fairly chosen does not mean that the dismissal was bound to have taken place when it did. On a proper application of the law the employment judge needed to consider what this particular employer would have done had it acted fairly. The employment judge's reasoning fails to take into account the general requirement for some warning and consultation, even in the case of a small employer, and even where a pool of selection of one might be determined upon. If the employment judge considered that dismissal would

have been fair absent any consultation some further explanation was necessary to demonstrate a proper application of the relevant law. Some warning and consultation could have resulted in the selection of a pool of more than one, and might have affected the choice of any selection criteria. Even if dismissal would have been inevitable, it might well have been delayed to some extent, which would result in some additional compensation for the claimant, unless there was some compelling reason why the dismissal would have been fair absent any consultation.

26. In the circumstances, I consider that the appeal should be allowed. My key determination is that it could not be said on a correct direction as to the law that a fair dismissal would necessarily have taken place at the time it did, because some warning and consultation would likely have been necessary, absent some unusual circumstances that have not currently been identified by the employment tribunal. It is also possible that consultation might have resulted in some change to the pool or even the outcome. I consider all three grounds of appeal should be allowed as they all rest on the erroneous analysis that dismissal would necessarily have occurred and that any consultation could have made no difference, without adequately reasoning as to how this could be the case on a proper direction as to the law.

27. It cannot be said that there is only one possible outcome. There might be some compelling reason why a pool of one would fairly have been selected absent any warning or consultation, though I struggle to see what it might have been, as the business did continue and the other chefs were retained in employment. It is likely that the employment judge will have to consider what the outcome would have been had there been warning and genuine consultation with the claimant about the pool. If a pool of selection of more than one would have been chosen, the employment judge will need to consider what criteria would have been applied and the chance that the claimant would have been fairly dismissed. The employment judge would need to consider, in broad terms, what selection criteria would have been adopted and what would have been the outcome of their application. The employment judge will need to consider how long any necessary consultation would have taken, even if the conclusion remains that dismissal would have been inevitable.

28. I consider it is appropriate that the matter be remitted to the same employment tribunal. There are significant findings of fact that are unlikely to require reconsideration. Remission to the same employment judge will avoid unnecessary expense. The employment judge was hampered by the fact that the parties had not properly prepared to deal with the **Polkey** issue. The employment judge will approach the matter with professionalism. It will be for the employment judge to determine whether any further evidence should be permitted.