EMPLOYMENT TRIBUNALS

Claimant
Respondent

Mr Erfan Mallakin **v** **Designer M&E Services UK Limited**

Heard at: Watford by CVP **On**: 14, 15, 16 and 17 November 2022

Before: Employment Judge Alliott (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr Richard Oulton (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Mechanical Design Engineer on 4 Septemebr 2017. He was dismissed with effect on 17 August 2020. By a claim form presented on 8 October 2020, following a period of early conciliation from 9 to 10 September 2020, he presents a claim for unfair dismissal. The reason given for dismissal by the respondent is redundancy.

The issues

2. The issues were recorded by Employment Judge Cowen following a preliminary hearing heard on 25 January 2022; They are as follows:

   1) "What was the principal reason for dismissal and was it a potentially fair one in accordance with s. 98 (1) and s.98(2) of Employment Rights Act 1996? The respondents assert it was redundancy.

2) If the claimant was dismissed for redundancy, was the dismissal fair or unfair in accordance with s.98(4) ERA 1996 and did the First respondent act in the band of reasonable responses.

3) The parties refer to the following in particular:

3.1 Whether the claimant was fairly selected for redundancy.

3.2 Whether the respondent carried out a fair consultation process.

3.3 Whether the respondent considered and explored alternatives to redundancy.

3.4 Whether the respondent carried out a fair appeal process.

3.5 Was the respondent's reasoning that the Design Department had been dissolved valid and fair?

3.6 Was there any consideration regarding the inclusion of Mr Matt Dyer in the redundancy process?

3.7 Was the decision to dismiss the claimant predetermined ?

3.9 Was there a genuine redundancy situation?

3.10 Did the respondent act fairly in not offering the claimant the post of Revit Coordinator within the CAD Department?

3.11 Did the role have any impact on fairness?

3.12 Did the respondent continue to recruit other members or increase salaries after the claimant's dismissal?

4) Remedy…"

3. On 25 January 2022 Employment Judge Cowen made a deposit order in relation to issues 3.2 and 3.8 as a condition of being permitted to continue to advance those allegations. The claimant only paid the deposit as regard issue 3.2 and consequently cannot advance allegation 3.8, namely that there was not a genuine redundancy situation.

4. Further, on an application to amend, Employment Judge Cowen granted the claimant permission to amend in relation to pleaded allegations 9 to 12. The respondent did not oppose the application but only on the basis that they amounted to further information in relation to the previously pleaded allegations 1 to 8.

5. It is clear from the decision on amendment that allegations 9 to 11 were deemed to be already within the issues as identified.

6. Allegation 12 is more problematic; it relates to a failure to undertake collective consultation which is a potential claim under s.189 TULRC(A) as amended. Such a claim would be for a declaration and a protective

award. However, such a claim is not articulated in the proposed amendment.

7. Employment Judge Cowen dealt with the matter as follows:

> "29 Allegation 12 – This is a discrete point on the number of redundancies made within a 90-day period. The claimant says that the respondent in their reply to a discrimination questionnaire indicated that it was more than 20 people. This was new information to him and gives rise to an issue about whether a collective consultation should have taken place.
>
> …
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> 32. This is a relatively discrete point which is related to the overall fairness of the redundancy procedure and therefore could be considered to be part of the existing claim. The respondent has time to address this both in disclosure and witness statements and will not be placed at prejudice in doing so. As for all these amendments, if they were not to be allowed then the claimant's case would not be able to be considered in full and all aspects of the redundancy procedure considered. His amendment is allowed. This also lies within 3.2 of the list of issues."

8. The problem is that any alleged failure to undertake collective consultation was not then included in the list of issues other than in the context of the overall fairness of the consultation process.

9. There has been no exploration of the issue of appropriate representatives and little evidence relating to what establishments there may or may not have been. That is no doubt because the issue did not appear in the list of issues.

10. In my judgment the issue of collective consultation, if relevant, goes to the question of the fairness of the consultation process. In my judgment, there is no application for a declaration or for a protective award before me. Nevertheless, for the sake of thoroughness I have dealt with the issue in my reasons.

The law

11. Section 98 ERA 1996 provides as follows:

> "98(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-
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> (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."

12. Redundancy is a potentially fair reason.

13. Section 98(4) provides as follows: -

> "(4) Where the employer has fulfilled the requirements of sub section (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."

14. Redundancy is defined in s.139 of the ERA 1996 as follows:

> "139 Redundancy
>
> (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 –
>
> …
>
> (b) The fact that the requirements of that business –
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> …
>
> (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 cause or diminish".

15. In Williams v Compair [1982] ICR 156 EAT the EAT suggested the following factors that a reasonable employer might be expected to consider are:-

    - Whether selection criteria were objectively chosen and fairly applied.
    - Whether employees were warned and consulted about the redundancy.
    - Whether any alternative work was available.

16. Mr Oulton cited to me the case of Zeff v Lewis Day Transport Plc EAT 0418/10 in support of the proposition, as set out in the IDS Handbook on redundancy at 8.94:

> "Of course, there will be some redundancy situations where, because of the complete closure of the workplace, business or unit selection as such will not be necessary."

Bumping

17. As per the IDS Employment Law Handbook on redundancy at 8.103:

> "In the view of the EAT in Leventhal, whether or not such a failure [to consider bumping] is unfair is a question of fact for the tribunal, which should consider matters such as:
>
> - Whether or not there is a vacancy
> - How different the two jobs are.
> - The difference in remuneration between them.
> - The relative length of service of the two employees, and
> - The qualifications of the employee in danger of redundancy."

18. Further, at 8.105:

> "It would be wrong, however, to conclude on the basis of Leventhal that an employer must consider bumping to avoid a finding of unfair dismissal. Indeed, in another decision the EAT held that an Employment Tribunal had correctly concluded that a dismissal was not rendered unfair by an employer's failure to consider dismissing a well-established junior employee in order to retain a more highly experienced senior employee – Byrne v Arvin Meritor LVS (UK) Limited EAT 239/02. These cases suggest that the duty to act reasonably does not impose an absolute obligation to consider bumping as an option but that, in particular circumstances, the failure to do so may fall outside the band of reasonable responses."

Collective consultation

19. Section 188(1) TULRCA provides:

> "Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult …

20. 'Proposing to dismiss' is discussed in the IDS Handbook at length and involves considerable analysis of European case law. I have taken that proposing to dismiss encompasses contemplating dismissal and that the obligation to consult is triggered when a body or entity that controls the employer makes a strategic or commercial decision which compels the company to contemplate or plan for collective redundancies.

21. As regards the meaning of establishment, in the IDS Handbook at 12.43 reference is made to:-

> "The unit to which the redundant workers are assigned to carry out their duties. It is not essential for the unit in question to have a management which can independently effect collective redundancies."

22. Further, at 12.44:

> "The European Court confirmed, among other things, that:
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> - The term "establishment" is to be defined broadly so as to limit the instances of collective redundancy to which the directive does not apply.
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> - An establishment, in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which

is assigned to perform one or more given tasks, and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks.

- The entity in question need not have any legal, economic, financial, administrative or technological autonomy in order to be regarded as an establishment.
- It is not essential for the unit in question to be endowed with a management that can independently affect collective redundancies in order for it to be regarded as an establishment."

23. As per the case of Lyttle and another v Blue Bird UK Bid Co 2 Limited IT 2015 case number 555/12, 'establishment' can be defined as:-

> "A local unit where employees are assigned to carry out their duties."

The evidence

24. I was provided with a bundle of 771 pages.

25. I had written statements and heard oral evidence from the following:

    25.1 Ms Kerry Noblett (HR Director at the respondent)
    25.2 Mr Matthew Dyer (Head of Design and the claimant's line manager at the time, now Technical Director at the respondent)
    25.3 Mr Ben Gandee (Commercial Director at the respondent)
    25.4 Mr Nicholas Baish (Managing Director at the respondent)
    25.5 The claimant.

26. I heard evidence from Mr Tallal Ahmed (a graduate Mechanical Project Engineer at the respondent) who attended pursuant to a witness order requested by the claimant but who did not have a witness statement or summary.

27. I had a witness statement from Mr Chris Hunter (Graduate Mechanical Project Engineer at the respondent).

The facts

28. The respondent is a company that provides design and build services for the construction industry. Its accounts to January 2020 show turnover in excess of £100 million with £1.6 million profit.

29. The claimant is clearly a highly qualified and talented Mechanical Engineer. On 4 Septemebr 2017 he was employed as a Mechanical Design Engineer. By 2020 his salary package had risen to over £80,000 per annum.

30. As of March 2020, the claimant worked in the Design Team based at the London office. It was a team of four although the commissioning manager was not involved in design and did not report to the Head of Design.

31. The Design Team essentially consisted of the following individuals:

    31.1 Mr Matt Dyer, Head of Design.
    31.2 The claimant, Mechanical Design Engineer.
    31.3 Mr Bobby Fitzsimmons, Electrical Design Engineer.

32 The team was based at the London office along with the Computer Aided Design (CAD) Team and the Pre-construction Team. In my judgment, the London office was a distinct entity having a certain degree of permanence and stability which was assigned to perform one or more given tasks and which had a workforce, technical means and an organizational structure allowing for the accomplishment of those tasks. The respondent's main office was based at Watford.

33 The claimant's function can broadly be divided in two. Firstly, he would carry out design in-house. Secondly, he would scrutinise and validate designs from outside contractors.

34 Mr Matt Dyer had been a Project Manager prior to becoming Head of Design and he is currently Technical Director. He was the claimant's line manager and his role was more extensive than the claimant's in that he attended tender interview meetings, updated design deliverable schedules for Project Team client reports, reviewed and wrote sub-contract appointments for external design consultants and agreed payments/account values with project quantity surveyors for outsource design work.

35 As we all know, the national lockdown was announced by the Prime Minister on 23 March 2020.

36 The claimant worked from home until 1 April 2020. His function was suited to work from home as it was computer based.

37 On 1 April 2020 the claimant, along with about 100 others, was placed on furlough as there was no work for him to do.

38 It is clear to me and I find that the lockdown severely adversely affected the construction industry and projects were suspended or slowed down. Whilst the respondent had some work in hand, the last successful tender obtained had been in January 2020.

39 The respondent experienced an immediate decline in work.

40 Mr Baish told me and I accept that the respondent carried out a full review of its projected turnover and overhead costs. A projected decline in revenue of 50 percent was anticipated. An immediate need to reduce overheads was identified.

41 As it happens, the projected decline in revenue was borne out in fact. The respondent's turnover to 2021 fell to £56 million and it made a £2.7million loss. No new projects were secured until April 2021. Four

tenders that the respondent made in May and June 2020 were unsuccessful and, in any event, did not involve any design aspect as far as the respondent was concerned.

42 As well as furloughing many staff, an across-the-board salary reduction of 10 percent was agreed with the workforce to come into effect on 1 June 2020. Notwithstanding this, the respondent decided that redundancies were necessary. Redundancies were selected based on the 'criticalness' of work, workload and current business requirements.

43 A decision was made to disband the Design Department. Mr Matt Dyer was able to deal with legacy design issues and the decision was made that in future design work was to be outsourced to outside consultants.

44 It is clear to me and I find that there was a genuine redundancy situation.

45 As the Design Team was to be disbanded, so the claimant and Mr Bobby Fitzsimmons were put at risk of redundancy.

46 In total 22 employees were put at risk of redundancy. Three were at the London office and 14 at the Watford office. 5 were said to be site based but clearly reported to someone. I had little evidence on this issue but have assumed that they reported to Watford. Thus 19 were at Watford and 3 in London.

47 I find that the decision to put them at risk triggered the statutory obligation to consult if relevant.

48 I find that the London and Watford offices were different establishments. The unit the claimant was assigned to was the Design Team and this was based in London. As such, I find that there was no failure to undertake collective consultation as the threshold of 20 at risk employees at one establishment was not reached.

49 The later redundancies in September 2020 do not stand to be aggregated as at that time they were not contemplated and the consultation process on the claimant's wave of redundancies had begun.

50 In total 17 employees were made redundant in the first wave.

51 I find that the decision to disband the Design Department was a perfectly legitimate business decision taken in good faith. It is not for me to review a genuine management decision to make redundancies. I find that the reasoning to dissolve the Design Team was valid and fair. As such, I find the claimant's selection for redundancy was fair. As the whole department was to go, so neither a pool nor selection criteria are relevant.

52 On 1 June 2020 Mr Dyer spoke to the claimant who warned him he was at risk of redundancy. Mr Bobby Fitzsimmons was also placed at risk of redundancy.

53 The claimant complains that Mr Dyer said words to the effect that he had been told to deal with it. This is hardly surprising as he had been told to deal with the claimant's redundancy. Mr Dyer was his line manager. As is so often the case, there may be a confusion in the claimant's mind between two different concepts. Obviously, the fact that his job was potentially redundant was predetermined. What was not predetermined, in my judgment, was that his contract of employment would necessarily be terminated.

54 On 2 June 2020 a company bulletin was released informing the workforce of redundancies in eight support service departments including the Design Team.

55 Also, on 2 June 2020 the claimant was written to in order to confirm he had been placed at risk of redundancy and invite him to a consultation meeting.

56 As a matter of fact, Mr Dyer, as Head of the Department, was not put at risk of redundancy. I find that this was fair. Mr Dyer was a manager and multiskilled. His roles were more extensive than the claimant's and he was to be retained to deal with legacy issues before moving to a new role in management.

57 The first consultation meeting was held on 4 June 2020. At the time the respondent was contemplating the end of the furlough scheme and the fact that the respondent would have to start contributing to the claimant's salary again. It was not to know that the scheme would be extended. The claimant was informed he could not be kept on furlough any longer. Two alternative positions were offered but it was agreed that they were not suitable for the claimant.

58 At about this time the respondent engaged three agency workers to work as Revit (a software design system) coordinators in the CAD Department. At the time the respondent engaged such consultants for four weeks although, as it turned out, they were engaged for about nine months.

59 The claimant became aware of this and it clearly angered him. He raised the issue with Mr Dyer prior to the second consultation meeting on 12 June 2020. There were no vacancies in the CAD Department for the claimant to fill and the two employees in the department (excluding the Head of Department) were on salaries of £25,000 or so.

60 As agency appointments they were clearly not vacancies that the respondent could have offered to the claimant. Nevertheless, it could be put that the respondent could and should have created a role in the CAD Department of salaried Revit Coordinator for the claimant. I find there was no failure to do this. This is because:

60.1 The post needed filling immediately. The claimant accepted he did not have the required skill set and would have needed about four weeks training.

60.2 The post was scheduled to be limited in duration and so was unsuitable for a full-time employee.

60.3 The claimant is recorded as saying repeatedly in the second consultation on 12 June that he did not want the role.

61 The role would have involved a significant reduction in salary of at least £20,000 and possibly more for the claimant. Whilst he might say in retrospect that he would have taken the job as any money is better than none, I doubt he would have accepted the role. At best, before me, he said he might have done. In any event had he done so he agreed he would have been immediately actively looking for a higher paid role and, as such, any role would have been a "stop gap".

62 There were two further consultations on 22 June and 16 July 2020. In between the last two consultations the claimant's grievance was dealt with.

63 It is clear from the consultation meeting notes that a great deal of time was spent by the claimant seeking to negotiate a better financial package for his departure. I do not hold this against him in any way and it is only human nature that in these circumstances someone is going to look to see what they can best achieve.

64 I find that the consultations were a genuine attempt by the respondent to ascertain whether the claimant's contract of employment could be retained. Unfortunately, there were no viable options available. I find this was not just a tick box exercise. In fact, Mr Bobby Fitzsimmons was moved to a role as an on-site Electrical Engineer as the respondent had need of one. This illustrates to me that the respondent was prepared to consider viable alternatives to redundancy where possible.

Bumping

65 Quite apart from suggesting he could have a role in the CAD Department the claimant has produced a list of 21 younger and more junior employees whose jobs he says he could have done. These are on-site Project and Mechanical Engineer roles which varied in salary from a graduate starter at about £25,000pa to £55,000pa.

66 The respondent did not consider bumping as no roles were available and, in any event, any such role would have been unsuitable in their opinion. In my judgment the fact that the respondent did not consider bumping was not outside the range of reasonable responses of a reasonable employer. This is because:-

66.1 All the proposed employees would have had existing knowledge of the projects they were working on and had relationships with clients. Any change would have been disruptive.

66.2 There were no vacancies.

66.3 The jobs were different.

66.4 The pay was significantly different.

66.5 The claimant was not that much more senior in length of service (obviously he had more experience though)

66.6 The claimant would have been looking for alternative higher paid roles immediately and so probably would not have lasted had he taken the role.

67 The claimant was dismissed on 17 July 2020 with one months' notice, effective 17 August 2020.

68 I find that the reason for the dismissal was redundancy and that is a fair reason.

69 The claimant appealed and the appeal was heard by Mr Baish. The claimant's points were considered and addressed. Unfortunately, there was no viable alternative to the termination of the claimant's employment and the appeal was dismissed.

70 Between August and December 2021 seven members of staff were recruited. Two were the roles offered to the claimant. Two were trainee Project Managers and one Mechanical Engineer. These were not design posts, were not suitable for the claimant and did not cover work that the claimant had formerly done. Two were Construction Engineers who replaced the employees who subsequently left.

71 Salaries were restored to pre-lockdown levels in early 2021.

Conclusion

72 I find that the reason for dismissal was redundancy.

73 I find that the claimant was fairly selected for redundancy.

74 I find the respondent carried out a fair consultation process.

75 I find the respondent did consider alternatives to terminating the claimant's contract of employment, that there were none and that the decision not to keep him on furlough was reasonable in the circumstances.

76 I find that there was a fair appeal process.

77 I find that the decision to dissolve the Design Department was reasonable.

78 I find that not including Mr Dyer in the at risk of redundancy list was fair and reasonable.

79 I find that the decision to dismiss the claimant was not predetermined.

80 I find there was a genuine redundancy situation

81 I find that the respondent acted fairly in not offering the claimant any role as Revit Coordinator in the CAD Department.

82 I find that the respondent did recruit employees after the claimant was dismissed but not to do any work associated with his former role.

83 For the above reasons the claimant’s claim is dismissed.

Employment Judge Alliott

Date: 5 January 2023

Sent to the parties on: 10 January 23

For the Tribunal Office