Neutral Citation Number: [2023] EAT 68

Case No: EA-2021-SCO-000039-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 02 May 2023

Before :

THE HONOURABLE LORD FAIRLEY

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Between :

MRS SINEAD CAMPBELL	**Appellant**
- and -	
TESCO PERSONAL FINANCE PLC	**Respondent**

- -
- -

Mrs Sinead Campbell, the **Appellant,** in Person
Mr David Hay, Advocate (instructed by Pinsent Masons LLP) for the **Respondent**

Hearing dates: 25 August 2022 and 22 March 2023

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JUDGMENT

SUMMARY

TOPIC: REDUNDANCY / UNFAIR DISMISSAL; circumstances in which a redundancy situation exists.

The appellant was employed by the respondent as a risk manager within one of the respondent's three teams carrying out such work. In 2018, the respondent undertook a review of its business and decision was taken to consolidate the three teams together into two. The appellant was treated by the respondent as being at risk of redundancy and was ultimately dismissed by the respondent for that reason. Before the Employment Tribunal, the appellant contended *inter alia* that there was no genuine redundancy situation because the number of risk managers remained the same after the re-structuring as it had been before. The Tribunal ultimately found that the two risk manager posts under the old structure had been replaced by two new risk manager posts within the new structure, one of which had a leadership function. In those circumstances, the Tribunal held that there was a redundancy situation, that the reasons for the dismissal of the appellant was redundancy and that the dismissal was fair.

Held: the Tribunal did not correctly consider or apply the test set out in section 139 **ERA**. The fact that three risk teams became two did not, of itself, assist in answering the question whether the requirements of the respondent for employees to carry out risk management work had ceased or diminished. The Tribunal had made no finding in fact that the requirements of the employer for employees to carry out risk management work (or risk management work of a particular kind) had ceased or diminished. The addition of a leadership role to one of the two risk manager positions in the new structure was not directly relevant to the question posed by the statute. In these circumstances, the Tribunal's Judgment dismissing the claim of unfair dismissal was set aside, and the unfair dismissal claim was remitted to a differently constituted tribunal for a re-hearing.

THE HONOURABLE LORD FAIRLEY:

Introduction

1. This is an appeal against a decision of an Employment Tribunal at Glasgow dated 29 January 2021. The Tribunal dismissed the appellant's claims of unfair dismissal (section 98 of the **Employment Rights Act, 1996**); direct discrimination (section 13 of the **Equality Act, 2010**); and indirect discrimination (section 19 of the **Equality Act, 2010**).

2. Lengthy grounds of appeal were presented. Following consideration under Rule 3. only two grounds were ultimately allowed to proceed to a full hearing. Both of those grounds related to the claim of unfair dismissal.

3. The first of the two grounds of appeal that were allowed to proceed is in the following terms:

> **"There was no genuine need or valid reason for the redundancy and hence the incorrect conclusion has been reached on whether I was redundant. The Tribunal made an error in law in relation to s 98 of the Employment Rights Act 1996"**

The second ground, read short, was that the selection process applied to the appellant was procedurally unfair because there was unchallenged evidence before the Tribunal that the respondent had departed from a collectively agreed scoring matrix.

Summary of relevant facts

4. The appellant was employed by the respondent between March 2010 and August 2019. Her job title was Risk Manager. Prior to 2019, the respondent operated three risk teams, Commercial Risk, Customer Risk and CIO Risk. The appellant worked within the respondent's Commercial Risk team.

5. In 2018, the respondent undertook a review of its business with a view to making cost savings. A decision was taken to consolidate the respondent's three risk teams together into two. The effect

of this reorganisation was that the appellant and another risk manager, Mr Binnie were both treated by the respondent as being at risk of redundancy. At paragraph 14, the Tribunal found that the reorganisation:

> **"…effectively meant that the claimant's role and that of Mr Binnie would be merged into a new role".**

6. The re-structuring as described by the Tribunal at paragraph 12, however, showed that the new structure, insofar as it affected the appellant and Mr Binnie, created a new Centralised Controls Testing Team, with one new position of Lead Risk Manager and one post of Risk Manager to be filled within that team. At paragraph 15 of its findings in fact, the Tribunal recorded:

> **"The claimant understood her role (and that of Mr Binnie) was at risk of redundancy because of the restructure which meant only one person was required to lead the team, and there would be a vacancy for the other person as a Risk Manager"**

7. A redundancy selection process was undertaken which involved the appellant and Mr Binnie each being scored on a scoring matrix. The criteria of "performance" was scored out of 10 and two other criteria ("leadership" and "technical competencies") were each scored out of 50. The respondent scored Mr Binnie higher than the appellant, with a total score of 95 out of a maximum score of 110. The appellant scored 87. The appellant was advised by the respondent that she had "come second". She attempted, without success, to challenge the scores she had been given. On 25 June 2019, she was given a letter which confirmed that her role was formally at risk of redundancy. Following further consultation, her employment with the respondent ended on 2 August 2019.

The claim of unfair dismissal

8. Both in her claim form (ET1) and at the resultant proceedings before the Tribunal, the appellant's criticism of her dismissal seems to have been focussed upon the fairness of the redundancy selection process and, in particular, on the scoring exercise. Understandably, therefore, when an attempt was made by an Employment Judge in pre-hearing case management to identify the issues for determination by the Tribunal, the issue of whether there was a genuine redundancy situation did not feature[1].

9. Within the claim form, however, the appellant submitted that the redundancy was not "procedurally fair, genuine, adequate or effective". In pre-hearing correspondence produced as part of the core bundle for this appeal, the appellant made clear that she disputed that there was a "genuine need for redundancy". Finally, at paragraph 165 of its reasons, the Tribunal noted that:

> **"The claimant did not challenge the reason for her dismissal, beyond asserting that there was no genuine redundancy situation…"**

10. Having regard to these matters, it is reasonable to conclude that whilst there may have been a much greater level of attention paid to the issue of selection, the existence of a genuine redundancy situation was not an agreed fact in the proceedings before the Tribunal. Accordingly, the onus of establishing that fact still rested upon the respondent in terms of section 98 **ERA**. The Employment Tribunal proceeded upon that basis.

The Tribunal's findings in fact and reasons

11. The Tribunal's factual findings about the effect of the re-structuring are difficult to follow. At places within those findings, the Tribunal appears to have concluded that the re-structuring resulted in a reduction in the number of risk managers required by the respondent. At paragraph 11, for example, the Tribunal described the impact of the restructuring being that "the number of Risk

[1] Note of Preliminary Hearing on Case Management Issues dated 27 January 2020, para 11

Managers would reduce from three to two". As I have already noted, at paragraph 14 it stated that the restructuring "effectively meant the claimant's role and that of Mr Binnie would be merged into a new role". At paragraph 15, however, it found that the new structure, so far as it affected the appellant and Mr Binnie, was:

> **"a new Centralised Controls Testing team, with one post of Lead Risk Manager, and one post of Risk Manager to be filled"**

12. The Tribunal's analysis of whether or not a redundancy situation existed is found at paragraph 166, and is in the following terms:

> **"We accepted [the respondent's] evidence that there had been a review of the business in 2018, which had looked at the structure of the business and opportunities for bringing parts of the business together to make cost savings. A decision was made to bring the three Risk teams together into two teams"**

13. Whilst the Tribunal refers (at paragraph 164) to the definition of redundancy contained in section 139 **ERA**, nowhere in its reasons does it expressly seek to apply that definition to the facts of the case. In particular, there is nothing in the Tribunal's reasons which explains how it came to the conclusion that the requirements of the respondent for employees to carry out risk management work had ceased or diminished. Having regard, in particular, to paragraph 15 of its findings in fact, such an analysis was important.

14. Faced with that lack of clarity, I made a **Burns / Barke** order on 4 October 2022 which invited the Tribunal to respond to the following three questions:

> 1. **What was the basis for the Tribunal's finding that the impact of the re-structuring exercise was a reduction in the number of Risk Managers from three to two?**
>
> 2. **On what basis did the Tribunal conclude that a redundancy situation existed within the part of the restructuring process that involved the claimant and Mr Binnie?**
>
> 3. **Specifically, since the selection 'pool' under consideration comprised only Mr Binnie and the claimant, and two risk manager vacancies existed in the new structure, on what basis did the Tribunal conclude that a redundancy situation (in terms of section 139 ERA) arose?**

15. The Tribunal responded to the three questions on 28 October 2022. I have set out the responses in full, as they are important to an understanding the Tribunal's process of reasoning. The responses were as follows:

> 1. **Mr Roger Wilson gave evidence regarding the background to the redundancy programme following a review of the business in 2018, which looked at structures and opportunities to bring parts of the business together and make cost savings.**
>
> **Mr Wilson explained that there were three Risk teams in three areas of business (Technology, Commercial and Customer) and that the number of teams would reduce from three to two. This was the basis of the tribunal's finding.**
>
> 2. **The Tribunal concluded there was a redundancy situation because the "old" structure of two teams (one each in Commercial and Customer) was deleted. The claimant and Mr Binnie were placed at risk of redundancy because of the deletion of their posts.**
>
> 3. **A redundancy situation existed because the old structure of two teams was deleted and the claimant and Mr Binnie were placed at risk of redundancy (that is, they would be made redundant unless suitable alternative employment could be found).**
>
> **The new structure put in place by the respondent replaced two teams with one team. Suitable alternative employment existed within that new structure, with one role of Lead Risk Manager and one role of Risk Manager.**
>
> **This was not a situation where the claimant and Mr Binnie could be matched into the new posts because the two posts in the new structure were not the same as the old ones. The Lead Risk Manager role was shown above the Risk Manager role**

> **in the new structure. The key element of the Lead Risk Manager role was for the post-holder to 'lead the team' (Mr Lawson's evidence).**
>
> **The claimant was made redundant because her post was deleted from the structure: she was at risk of redundancy and she elected not to accept suitable alternative employment (being either the Risk Manager role or the role in Mr Leighton Jones' team).**

Analysis and decision

16. The basis of the first ground of appeal is that the Tribunal did not correctly apply its mind to the statutory test under section 139 **ERA** when considering whether or not the respondent had proved that a redundancy situation existed.

17. In **Murray v. Foyle Meats Ltd** [1999] ICR 827, the House of Lords emphasised the importance of applying the unvarnished words of the statute to the issue of whether or not a redundancy situation exists. The relevant question for the purposes of section 139 **ERA** is whether the requirements of the employer *for employees to carry out work of a particular kind* have ceased or diminished.

18. It follows that a reorganisation may or may not end in redundancy. Much will depend upon the nature and effect of the reorganisation (**Robinson v. British Island Airways Ltd** [1978] ICR 304; **Shawkat v. Nottingham City Hospital NHS Trust (No 2)** [2001] IRLR 555).

19. It is not always essential that there should have been a reduction in headcount. A reduction in a requirement for total working hours may suffice (see, for example **Packman v. Fauchon** [2012] ICR 1362). Clearly, however, where there has been a reduction in the number of employees, the Tribunal may often be able properly to conclude that the reason for that is a diminution in the requirement for employees to carry out work of a particular kind. Similarly, it is not always essential that the amount of work should have diminished. A redundancy situation can arise from a re-organisation which enables the same amount of work to be performed by fewer employees or (per **Packman**) within a shorter number of working hours.

20. It is, however, essential, for a Tribunal considering a dismissal said to be by reason of redundancy carefully to analyse the facts and match that analysis to the words of section 139 **ERA**.

21. In this case, the Tribunal's Reasons and **Burns / Barke** response suggest that it did not correctly consider or apply the statutory test. The fact that three risk teams became two does not, of itself, assist in answering the question whether the requirements of the respondent for employees to carry out risk management work had ceased or diminished. Similarly, the fact that the appellant's post as a Risk Manager in the Commercial team ceased to exist (because the Commercial team had itself ceased to exist) does not assist in addressing the statutory test. In its **Burns / Barke** response, the Tribunal referred to the two new posts within the new structure being "not the same as the old roles". The only difference identified by the Tribunal, however, was that one of the new positions - the Lead Risk Manager role – had a leadership function.

22. On a careful examination of the Tribunal's findings in fact and reasons, as supplemented by its **Burns / Barke** responses, it appears to have concluded that the effect of the reorganisation was that two Risk Manager posts in the old structure (the appellant's and Mr Binnie's) were replaced in the new structure by a Risk Manager position and a Lead Risk Manager position. Nowhere, however, does the Tribunal make any finding in fact that the requirements of the employer for employees to carry out risk management work (or risk management work of a particular kind) ceased or diminished. The addition of a leadership role to one of the two positions in the new structure is not directly relevant to the question posed by the statute (*cf* the facts in **Shawkat**).

23. The Tribunal focussed inappropriately upon the reduction in the number of teams and failed to consider whether that truly gave rise to a redundancy situation. It made no finding that there was a reduction in the need for employees to carry out risk management work. Its finding in fact at paragraph 15 suggested that there had not been such a reduction.

24. For these reasons, I have concluded that the appeal succeeds on the first of the appellant's two grounds.

25. That being so, it is not necessary for me to say very much about the appellant's second ground of appeal. That was also the subject of a **Burns / Barke** order, the Tribunal's response to which made clear that, on the evidence presented to it, the Tribunal had not been prepared to make the finding in fact contended for by the appellant. Had the second ground of appeal stood alone, therefore, it would not have succeeded.

Disposal

26. Since the first ground of appeal succeeds, however, I will set aside the Tribunal's Judgment to the extent that it dismissed the claim of unfair dismissal, and remit that aspect of the appellant's claim to a differently constituted tribunal for a re-hearing.