Case Numbers: 3302803/2021
3302597/2021
3302611/2021

EMPLOYMENT TRIBUNALS

(England and Wales)
Watford Region

Claimants: Miss Sonja Singels, Mr Edward Rowland, and Mr Richard Lowndes

Respondent: Cobalt Ground Solutions Ltd

Heard by CVP on 3 and 4 May 2023
Before: Employment Judge J S Burns

Representation
Claimants: in person
Respondent: Ms A Esmail (Solicitor)

JUDGMENT

1. The Claimants were unfairly dismissed by the Respondent.
2. The Respondent must pay the Claimants the following compensation for unfair dismissal: Miss S Singels £3676 payable by 18/5/23; and Mr E Rowland £3648 and Mr R Lowndes £3028, - balances payable in both Mr E Rowland's and Mr R Lowndes' cases when the Recoupment Regulations have been complied with - see paragraph 56 of the Reasons.
3. Ms S Singels' claims for breach of contract/unlawful deductions from wages are dismissed.

REASONS

1. The Respondent ("R") contended that the Claimants ("Cs") had been fairly dismissed for redundancy as a consequence of restructuring. Cs contended that the process was unfair and, in any event, that there had been no proper attempt to redeploy them. In addition Ms Singels claimed breach of contract/wages in respect of (i) bonus and (ii) overtime hours. An agreed list of issues had been set out in a CMO dated 24/8/22.

2. I heard evidence from the Cs and then from the R's witnesses Rebecca Cooper-Jones ("RCJ") (Head of HR), and Mr R Baker ("RB") (Head of Finance). I decided to deal with liability and Polkey only at first. The documents were in a bundle of 349 pages. I received a R's skeleton argument and oral closing submissions from both sides.

Findings of fact

3. The R is a company specialising in the provision of ground-handling services for airlines operating out of Heathrow airport.

4. Ms Singels was employed by the R from 12/12/1988 to 31/12/2020. Mr E Rowland was employed by the R from 1/1/1996 to 31/12/2020. Mr R Lowndes was employed by the R from 12/8/1997 to 31/12/2020. They were all employed as full time Passenger Services Duty Officers (PSDOs) at Terminal 4 alongside a fourth PSDO namely Ms N Collin.

5. In 2019 the R lost customers, (China Southern and Jet Airways) at Terminal 4 and so had a reduced need for passenger service work. Furthermore, the launch of an HR self-service portal in June/July 2018 had relieved part of the PSDO administrative burden. The R's service level agreement with its customers did not require it to have PSDOs. As a consequence of these operational and economic factors, R's General Manager Harminder Kullar ("HK") decided in 2019 to dispense with all the PSDOs and in addition a Baggage Duty Officer namely Mr A Spragg. This proposal was explained to the Cs at a meeting on 13/3/2020.

6. Initial consultation meetings took place with the Cs on 16 and 19 March 2020 followed by a letter of 20/3/20 which identified one available alternative vacancy namely the role of Operational Support Administrator. (This role was withdrawn following the Covid pandemic lockdowns). No large-scale collective consultation took place in March 2020 because, prior to the Covid pandemic, R was considering making only 5 redundancies.

7. On with the onset of the Covid pandemic lockdowns, in late March 2020 the proposed redundancies affecting the Cs were put on hold and the Cs were placed on the Coronavirus Job Retention Scheme ("furlough"). This was confirmed by letter dated 27/3/20. This continued until the end of their employment.

8. In June 2020, in response to the negative impact of the pandemic on its business, R proposed a much larger redundancy process to significantly reduce its workforce, and started discussing this with the Unite Union (of which the Cs were not members). The Redundancy Selection Process document which was produced as a result of these discussions did not refer to the PSDOs as their proposed redundancies were not the subject of the Unite consultation.

9. Ultimately the R made 300 staff redundant out of a workforce of 800.

10. On 17/7/2020 a letter (which was intended for the general workforce and which referred to the process agreed with Unite) was sent in error to the Cs. The letter referred to selection criteria being used to select candidates for dismissal from within pools which procedure however was not apt for the Cs (because in their case the whole class of PDSOs was being removed by way of a restructure and no question of selection within a pool arose). This caused some confusion on the part of the Cs.

11. By August 2020 R had decided it was not tenable to continue retaining the PDSOs on furlough and the individual consultation process with them resumed. RCJ met with the Cs on 6/8/20 and explained to them that the letter dated 17/7/20 had been sent to them in error.

12. The Cs presented grievances about the redundancy process. The redundancy was therefore stayed pending the determination of the grievances which were considered together by HK at a meeting on 28/8/2020 attended by the Cs and their GMB trade union representative Mr T McCleod, and dismissed by letter on about 14/9/20.

13. The Claimant joint appeal against HK's decision re the grievance was itself dismissed by Mr D Moloney on 9/11/20 following a meeting (again attended by the Cs' rep Mr McCleod) on 28/10/2020. That brought the first grievance to an end.

14. The much-delayed process then restarted in December 20 and the Cs attended final redundancy consultation meetings with RCJ on 16 and 17 and 8 12 2020. R's decision to dispense with the PSDO roles had not changed. Due to the significant downsizing across the R organisation, no alternative roles were available. The Operational Support Administrator role which had been identified earlier in the year as a possible alternative had been withdrawn in the meantime.

15. During the December 20 redundancy consultations the Cs discovered that Mr A Spragg, who had been a Baggage Duty Officer also placed at risk of redundancy in March 2020, had been offered (by RCJ) and had accepted demotion to Baggage Supervisor at a reduced salary as a means of retaining his employment. This role had not been offered to the Cs so they raised another group grievance (the second grievance) about this on 18/12/20 which RCJ referred to but which had not been dealt with when she issued dismissal letters on 23/12/20 terminating the Cs' employment with pay in lieu of notice and full statutory redundancy payments on 31/12/20.

16. The Cs appealed their dismissals. RB held meetings with the Cs on 9/2/21 to consider the appeals and the second grievance. In his outcome letter dismissing both, RB offered the Cs an appeal against his decisions. The Cs appealed RB's decisions by letter dated 21/2/21 and on 24/2/21 this was acknowledged by an HR advisor P Shah, who wrote "*I am in the process of organising a meeting with a senior manager and will be in touch with details".* However, no details were ever provided and no appeal by hearing or otherwise in relation to the second grievance ever took place.

17. The R's formal grievance procedure contains provisions that formal grievance decisions will be subject to the employee having a right of appeal, that "*every effort will be made to hear the appeal*

within 5 working days" and that "*Until the matter is resolved or the procedure is exhausted, normal working conditions will continue to be carried out prior to the issue being resolved ("Status Quo")"*.

18. By the time of the meeting with RB, and in January 2021, as a consequence of the R gaining a contract with Qatar Airways, the R needed a part-time passenger services agent working 18.75 hrs per week. The Cs were notified about this but chose not to apply.

19. In October 2021, shortly after the withdrawal of furlough by the UK Government in September 2021, R appointed a Duty Manager to focus on the Qatar contract. As the Cs had long since been dismissed they were not considered for this.

Relevant law

20. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

    "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 –

    the fact that his employer has ceased or intends to cease –(i) to carry on the business for the purpose 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

    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"

21. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows: *"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) depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.'*

22. Where redundancy is established, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.

23. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. R v British Coal Corp ex parte Price 1994 IRLR 72 at para 24.

24. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. Thomas Betts

Manufacturing Ltd v Harding 1980 IRLR 255 CA. However, in choosing the pool the employer must act reasonably and must have a justifiable reason for excluding a particular group of employees from the selection pool where the excluded category do the same or similar work to those who are up for selection. British Steel PLC v Robertson EAT 601/94.

25. Where an employee at senior management level who is being made redundant is prepared to accept a subordinate position he ought in fairness make this clear at an early stage so as to give his employer an opportunity to see if this is a feasible solution Barratt Construction v Dalrymple 1984 IRLR 385

26. The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to bump or even consider bumping. The issue is, what a reasonable employer would do in the circumstances, and whether what the employer did was within a reasonable band of responses of a reasonable employer. Burton J in Byrne v Arvin Meritor LVS Ltd EAT 239/02/MAA

27. It is not the function of the (Employment) Tribunal to decide whether it would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

28. The Tribunal has discretion as to whether the employer can lead evidence as to damages to show that breach of procedure would have made no difference and employee would have been dismissed anyway. Can one sensibly reconstruct the world as it might have been or would this mean embarking on a sea of speculation? This depends on whether omission is merely procedural or more fundamental and substantive. King v Eaton Ltd no 2 1998 IRLR 686

Conclusions

Re unfair dismissal claims

29. I accept that by March 2020 R's need for employees to carry out PDSO work had ceased or diminished.

30. Following the redundancy dismissals, the PSDO role remains absent from R's structure. The work which the PDSOs used to do has reduced in amount and has been absorbed by others.

31. A genuine redundancy situation existed and was the genuine reason for the dismissals.

32. R adequately warned and consulted the Cs: in the 13/3/20 meeting, consultations in March 2020, on 6/8/20 and in the final further consultations with RCJ on 16, 17 and 18/12/20 prior to termination of employment.

33. I reject the Cs' submission that the R was obliged to pool them with Duty Managers. DMs were at a higher grade that the Cs and, unlike them, they had oversight of the full range of ground handling services. I also reject C's submission that the R was obliged to pool them with other Duty Officers

outside the department of passenger services – the latter being in different areas of the business. I accept R's evidence that these roles were neither interchangeable or sufficiently similar to make this a viable option

34. I accept that it may have been possible for R to decide to restructure in a different way so as to delete the Passenger Service Supervisor roles rather than the PSDO roles. However, the restructuring and how it should be done was a genuine business decision, which the R was best placed to make and furthermore entitled to make without subsequent interference from the Tribunal.

35. I reject the Cs' submission that the R was obliged to pool them with Passenger Services Supervisors who were at a more junior level and not redundant in the restructured organisation. Furthermore, at no time during the process did the Cs tell the R's managers that they would be willing to be demoted and take the lower Supervisor pay.

36. The Cs' submissions that they should have been pooled with other non-redundant employees rely on the untenable premise that the R was obliged to bump those employees out of their existing different roles.

37. For the same reason I reject the Cs' submission that the R was obliged to train them so they could compete for the roles not affected by redundancy. In any event the R's ability to carry out training during the pandemic lockdowns was restricted.

38. R adopted a basis for selection within the band of reasonable responses.

39. I also reject the Cs' submission that they should have been offered the Baggage Supervisor role, or given notice so they could apply for it. This was reasonably allocated to Mr A Spragg in the light of his long service and proven experience in the baggage department which the Cs did not have.

40. I reject the submission that inadequate attempts were made to redeploy the Cs. There were no other suitable vacant roles during the period prior to dismissal and they did not want the part-time Qatar agent role which became available in January 21.

41. I accept that the R made an error in sending the 17/7/20 letter to the Cs and that this caused them some temporary confusion. However, the matter was clarified by 6/8/2020 and caused no prejudice to their own redundancy consultation process. The procedure agreed with Unite was not applied to the Cs for the good reason that it was never intended to apply to them nor would it have been appropriate for them.

42. I reject the C's submission that they should have been retained on furlough until the final withdrawal of the schemes (which occurred in September 2021). This would have been a questionable use of the scheme, which was intended primarily to help employers retain employees who were required by employers under normal circumstances rather than those who were already redundant prior to the pandemic. Also, at a time of financial difficulty for the R, this would have cost it tax and NI against a background where there were no viable alternative roles for the Cs and no likelihood of any in the foreseeable future. In any event, I accept RCJ's evidence that even if this had been done, the C's would not have been considered suitable for the Qatar contract Duty Manager role which was filled in October 2021.

43. I have considered the R's processes as a whole in the light of all the complaints made by the Cs, (including those mentioned above and other points made in their ET1s and witness statements) and, in the absence of what I refer to next, nevertheless would have found that their dismissals were fair.
44. R's grievance policy status quo clause states that "*Until the matter is resolved or the procedure is exhausted, normal working conditions will continue to be carried out prior to the issue being resolved"*. The natural meaning of these words is that where an employee has an outstanding grievance or grievance appeal, the employee's normal working conditions should not be changed. The grievance policy does not say that it does not apply to redundancy processes - and where the status quo clause is applied to a grievance about a proposed redundancy, the natural meaning is that that the redundancy dismissal cannot take place until the grievance process has been exhausted.

45. That this is an unwise and inappropriate clause for an employer to include, without appropriate qualification, in a grievance policy, is illustrated by the facts of this case.

46. The ACAS code on handling grievances expressly does not apply to redundancy situations. The reason for this is so as to avoid grievances delaying or preventing redundancy processes. The proper way for an employer to permit employees to challenge a redundancy is through the redundancy consultation process and/or by appealing the final dismissal, and not by raising a grievance under a separate grievance policy.

47. Furthermore if an appeal against a redundancy dismissal is allowed, it is usually the case and sensible practice to allow the appeal to take place after the effective date of termination, so that the dismissal does not have to wait for the appeal to be disposed of.

48. The Respondent however in this case has by their own grievance policy (i) not excluded its application to its redundancy processes and (ii) stated in terms that no change in working conditions will be made until any formal grievance process is exhausted or resolved.

49. Having created and made available such a policy to its employees, it was incumbent on the R to comply with it. However, the R did not comply but instead breached it by dismissing the Claimants before dealing with or exhausting the formal grievance process in relation to the second grievance.

50. By so doing it acted unfairly from a procedural point of view.

51. Hence the Cs unfair dismissal claims succeed.

52. Applying the Polkey principle, I find that if the R had applied its grievance policy correctly the Cs would still have been fairly dismissed for redundancy because their appeal against RB's dismissal of their second grievance would itself have been dismissed, bringing the grievance process to an end, and then there would have been no other impediment to procedurally and substantively fair dismissals.

53. If the R had complied with its own grievance policy before dismissing the Cs, this would have delayed the dismissals to the expiry of 5 working days after the date they lodged the second grievance appeal which they did on 21/2/21. Hence acting fairly under its own procedure, the R would have had to delay the dismissals until the end of February 2021.

54. I therefore award the Cs as compensation for unfair dismissal the take home (ie net of all proper deductions) furlough pay which they would have received had they remained in the R's employment for the period 1/1/21 to 28/2/21 only, subject in the case of Mr Lowndes to deduction for the mitigating sum he was able to earn from another employer during that period. All claims for further or other compensation for unfair dismissal are dismissed.

55. The sums awarded are calculated as follows:

    Miss S Singels 2 x £1838 = £3676
    Mr E Rowland 2 x £1824 = £3648
    Mr R Lowndes 2 x 1892 = £3784 - other earnings from agency employment during Jan/Feb 21 (£756) = £3028

56. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations apply in relation to the awards in favour of Mr E Rowland and Mr R Lowndes.
    Mr E Rowland: NI number N2451411A. Prescribed amount is £3648. Prescribed period is 1/1/21 to 28/2/21. Balance of total award over prescribed amount is nil.
    Mr R Lowndes: NI number NX326821B. Prescribed amount is £3028. Prescribed period is 1/1/21 to 28/2/21. Balance of total award over prescribed amount is nil.

Ms Singels' wages/contract claims

57. Ms Singels complained that she did not receive a bonus. However she agreed that the effect of the furlough scheme which she accepted at the end of March 2020 and which continued until the end of her employment was to cap her pay and substitute that capped pay for other entitlements. She also agreed that she was paid her bonus pro-rata for the period January to March 2020 (ie before furlough) and for her notice period.

58. She also complained that on termination she should have been paid at overtime rates for a period of 72 hours overtime which she worked earlier in 2020. However she had elected to take the time off in lieu - ie to bank the time - rather than to claim payment for it. By so electing she had converted her entitlement to days off in respect of which the R was entitled to make a severance payment at the ordinary rate.

59. She has received her full entitlements under both heads and these claims are dismissed.

J S Burns Employment Judge
4/5/2023
N Gotecha - For Secretary of the Tribunals
Date sent to parties 7/6/2023