Case Number 1302710/2021
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss K McKinnell		**Birmingham Metropolitan College**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
RESERVED DECISION
REMEDY HEARING

HELD AT Birmingham **ON** **14 June 2023**
7 July 2023
24 July 2023
(Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mrs I Fox**
Mr J Reeves

Representation
For the Claimant: **Ms K Moss (Counsel)**
For the Respondent: **Mr P Bownes (Solicitor)**

JUDGMENT

The unanimous Judgement of the tribunal is that:

1 Pursuant to Section 122(4)(b) of the Employment Rights Act 1996 the claimant's entitlement to a basic award for unfair dismissal is fully extinguished by the payment of a statutory redundancy payment paid to her on dismissal.
2 Pursuant to Section 123 of the Employment Rights Act 1996 the tribunal makes no compensatory award.

REASONS

Introduction

1 Following a four-day hearing in November/December 2022 and a further day of deliberation by the panel without the parties, a liability judgement was issued in this case on or about 14 February 2023. The claimant was partially successful in her claims. The panel found that the claimant had been unfairly

dismissed by reason of redundancy. But we dismissed all of the claimant's claims for discrimination and unpaid holiday pay. Over two separate days on 14 June and 7 July 2023 together with a day for deliberation on 24 July 2023, we have considered the question of remedy.

2 The claimant was dismissed by reason of redundancy and she was paid a statutory redundancy payment. It is common ground between the parties that this payment extinguishes her right to a basic award for unfair dismissal.

3 In addressing the question of a compensatory award it is important to keep in mind the precise and limited basis upon which we found the dismissal to be unfair. This is set out at Paragraph 59(e) of our liability judgement dated 14 February 2023:

> (e) **Ordinary unfair Dismissal – ss.94, 98 ERA**
>
> (i) We find that the sole reason for the claimant's dismissal was redundancy this is a potentially fair reason pursuant to Section 98 ERA.
> (ii) However we find that the respondent did not fulfil its duties in relation to consultation prior to the claimant's dismissal. There should have been a greater explanation as to how the situation had arisen including explaining to the claimant the various steps which had been taken during her absence to deal with the effect on the respondent's business of the COVID-19 pandemic and the national lockdowns. There should also have been discussion as to the pool for selection: consideration should have been given to pooling the claimant on a fractional time basis (especially in the light of her indication of a wish to return on a fractional basis). And if the decision had then been that the claimant was pooled with others there would have needed to be a transparent and fair selection procedure.
> (iii) On the basis of this failure, but on no other basis, we find that the claimant's dismissal was unfair.

We found the dismissal to be unfair for want of adequate consultation. In particular there was a need for consultation around the decision to locate the claimant in a pool of one; and to consider an appropriate pool on the basis of fractional rather than full-time working. Our finding does not equate to a finding that there should have been different decision on pooling - simply that there was inadequate consideration of it and inadequate consultation regarding it.

4 Ms Moss presented the claimant's case on remedy essentially on the basis that she should have been placed in a pool of one or more other lecturers working on a 0.7 or 0.6 FTE basis she further submitted that by reason of the claimant's experience we should find that the claimant would have been successful in securing a position with someone else then being selected for dismissal by reason of redundancy. Ms Moss appeared to overlook the initial consideration of whether adequate consultation and further consideration would have produced a decision other than to locate the claimant in a pool of one with her inevitable selection for dismissal.

5 The initial position statement provided by the claimant in readiness for the remedy hearing appeared to be completely at odds with the basis upon which we had found her dismissal to be unfair. In particular she was seeking an examination of decisions made in August 2020 which was before we found that the respondent had reasonably identified her as being at risk of redundancy. Following consultation with Ms Moss on the first morning of the remedy hearing, the claimant provided a revised statement and schedule of loss in which she assessed her losses at £13,326.97 calculated as follows:

Loss of earnings to date	£3541.53
Future Loss of Earnings	£6014.59
Loss of Statutory Rights	£ 500
Loss of expenditure of securing her PGCE	£3270.85

The final item of loss in the list above relates to expenditure which had been incurred by the claimant in pursuing a PGCE qualification. Her case is that she was unable to proceed with that qualification after her dismissal because there was a requirement that she was employed in a teaching role. She produced no documentation to this effect, but her case is that because of the break in her teaching experience it would now be necessary for her to recommence the training in the future and to incur the expenditure a second time. Had she continued in a teaching role she would have been able to complete the qualification.

6 The respondent's case is that even if the unfairness which we found had been removed from the dismissal process, and even if there have been a more extensive consultation, the outcome would nevertheless have been that the claimant remained in a pool of one and would inevitably have been fairly dismissed. On that basis the respondent argues that, applying the principles set out in ***Polkey -v A E Dayton Services Limited*** **[1998] ICR 142**, the compensatory award should be reduced to zero. The burden of proof to establish that a fair dismissal would have occurred at the same time as the

unfair dismissal in fact occurred rests upon the respondent the standard of proof is the balance of probabilities.

7 A secondary basis argued by the respondent is that in failing to accept the offer of maternity cover made to her before the end of her employment, the claimant failed to mitigate her losses with the effect that this too would reduce her compensatory award to zero.

8 Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. (***Taymech Limited –v- Ryan*** **EAT 633/94;** ***Thomas and Betts Limited –v-Harding*** **[1980] IRLR 255 (CA);** ***Hendy Banks City Print Limited –v-Fairbrother*** **EAT 0691/04**).

9 We found the dismissal to have been unfair in part because the respondent did not give reasonable consideration to the question of pooling on the basis of the claimant working a fractional appointment. The respondent decided on a pool of one because the claimant was the only Community Coordinator - and it is this role which was being removed from the respondent's structure. However, in that role the claimant worked part of her time as a lecturer and she had made it clear that she intended to make a flexible working request – wanting in the future to work on the basis of a 0.7 fractional appointment. Consideration ought therefore to have been given to pooling the claimant with others as a part-time lecturer.

10 Part and parcel of the proper consideration of the pool would have involved consultation with the claimant the lack of consultation was the other basis for our finding of unfair dismissal.

11 In order to consider the respondent's submission that there should be a 100% ***Polkey*** reduction, we therefore need to consider what the likely outcome would have been if proper consideration of the pool have been given, accompanied by proper consultation with the claimant.

12 It has been a feature of this case that the claimant has made a significant number of searching requests for disclosure of documents. We find it surprising that she did not request such disclosure it with regard to the roles occupied by other part-time lecturers. She advanced her case on the basis that she could/should have been pooled with all of the other lecturers.

13 We heard evidence from Ms Jan Myatt (who also gave evidence at the liability hearing) whose evidence we accept, that in fact it would have been inappropriate to pool the claimant with other lecturers on the basis that they had subject specific teaching qualifications which the claimant did not have. The respondent would not have considered displacing a specialist subject teacher to replace that teacher with the claimant who did not have a teaching qualification The other lecturers in frame held the PGCE qualification for which the claimant was still studying.

14 Realistically, on the basis of the evidence of Ms Myatt, and on the basis of the evidence given by the claimant, the only other individual with whom the claimant could have been pooled for selection was Ms Rachel McLaughlin. Ms Moss argues that the claimant should have been pooled with Ms McLaughlin and that the claimant would have been the successful contender from within the pool. Ms McLaughlin would then have been dismissed as redundant.

15 In our judgement, the case advanced by Ms Moss is unrealistic and inconsistent. Ms Moss is quite right that the question of pool is for the employer to decide. The employer has a discretion and must act reasonably. But what should have happened in this case is that the respondent should have discussed with the claimant the possibility of a selection process between the claimant and Ms McLaughlin for the role which at that time was being undertaken by Ms McLaughlin. However on considering the evidence we heard from the claimant during the liability hearing, we are quite satisfied that the claimant would have been strongly resistant to a pool involving herself and Ms McLaughlin. She made clear that she considered Ms McLaughlin’s role to be somewhat junior to hers and that she would have regarded relocation into that role as a significant demotion. This was the principal basis upon which the claimant declined the offer of maternity cover for Ms McLaughlin notwithstanding the respondent’s indication that the claimant’s rate of pay would be protected.

16 Accordingly we find that during a proper consultation process the respondent would have been confirmed in its initial view that the claimant should be in a pool of one. There simply were no truly comparable employees with whom she could have been pooled. The result of this would have been that the claimant would have been inevitably and fairly selected for redundancy and dismissed. It is on this basis that we find that she is not entitled to a compensatory award.

17 We have also considered the respondent’s submission with regard to non-mitigation. The position is that before her employment ended the claimant was

offered the opportunity to cover Ms McLaughlin's role during her absence on maternity leave. In making this offer the respondent made clear the following:

(a) That the claimant's salary would be ring fenced (she was on a higher rate of pay than Ms McLaughlin).
(b) That during the period of the maternity cover, the search would continue for suitable alternative employment for the claimant.
(c) If no suitable alternative was found, at the end of the period of maternity cover, the consultation process for her possible redundancy would recommence.

In other words, for at least the period of the maternity cover the claimant would have secured the position of the employee with whom she now claims that she should have been pooled. She declined the offer of maternity cover because she saw Ms McLaughlin's role as a demotion and also because it was not permanent employment. The claimant wished to pursue opportunities to secure alternative permanent employment.

18 The claimant has provided no explanation as to why she could not have continued the pursuit of alternative permanent employment whilst undertaking the maternity cover. If such employment was found, she could resign. Further, undertaking Ms McLaughlin's role would have enabled the claimant to continue with her PGCE study and would in our judgement have eliminated the waste of costs for which she now makes a claim for compensation.

19 The claimant has been wholly inconsistent in her approach. She had the opportunity to take Mr McLaughlin's role but rejected it as a demotion. However she now argues with some force that she should have been pooled against Ms McLaughlin and retained in that role on a permanent basis.

20 On the basis of our findings in Paragraphs 13 - 16 above, we concluded that it is just and equitable to make a 100% deduction in the compensatory award to which the claimant may otherwise have been entitled. Accordingly we make no award.

Employment Judge Gaskell
9 August 2023