



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103445/2023

Held in Edinburgh by Cloud Based Video Platform (CVP)
on 10 & 11 October 2023

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Employment Judge M Sangster

Mr J Douglas

Claimant
Represented by
Ms M Simpson
Lay Representative

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Holders Technology UK Limited

Respondent
Represented by
Mr K Melvin
Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's complaint of unfair dismissal does not succeed and is dismissed.

Introduction

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1. The claimant presented a complaint of unfair dismissal.
2. The respondent resisted the claim. They stated that the claimant had been fairly dismissed by reason of redundancy.
3. The respondent led evidence from Kirsten Melvin (**KM**), Director and General Manager for the respondent.

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4. The claimant gave evidence on his own behalf and called one witness, Stephen Ogden, Production Supervisor for the respondent.
5. Each party lodged their own set of productions. The respondent's productions extended to 16 pages, the claimant's to 10.

Issues to be determined

6. The complaints brought were discussed at the outset of the hearing. The issues to be determined by the Tribunal were as follows:
- 10 a. Whether the claimant's contract with the respondent was a contract of employment or apprenticeship?
- b. Was the principal reason for dismissal a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**)? The respondent asserts that the reason was redundancy.
- 15 c. If so, was the dismissal fair or unfair in accordance with s 98(4) ERA?
- d. If the claimant was unfairly dismissed, should he be reinstated to his previous role? If not, what compensation should be awarded?

Findings in Fact

- 20 7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
8. The respondent has around 30 employees. Their business has two divisions: one relating to commercial lighting and electrical components and the other relating to the supply and distribution of printed circuit boards.
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9. The claimant started working with the respondent, in a temporary role, as an Assembly Engineer on 18 November 2020. His temporary contract was due to finish in December 2020, but was extended until March 2021. On 19 March
- 30 2021, following discussions with the General Manager of the respondent at

that time, the claimant was offered the position of 'Technical Apprentice' with the respondent, commencing 19 March 2021. He was given a short, two page, letter setting out the terms of that offer. This contained the following particulars:

- 5 a. His hours of work would be Monday to Thursday 8.45am to 5pm & Friday 8.45am to 4pm;
 - b. That the offer was for a 4 year term, and his salary would increase on an annual basis (subject to company annual pay review and statutory regulations). Indicative figures for each year were provided;
 - 10 c. That 'on completion of the apprenticeship program and acceptable grades have been achieved' his role would change to 'Technical Engineer';
 - d. His entitlement to participate in the company pension scheme;
 - e. Annual leave entitlement; and
 - f. That the notice period applicable was one month and, if the claimant
15 wished to leave employment, the amounts he would require to reimburse the respondent for a percentage of his course fees, on a sliding scale.
10. The claimant verbally accepted the offer and started in that role on 19 March 2021. The claimant did not receive or sign any further contractual
20 documentation in relation to his role.
11. The claimant's role and duties did not change in March 2021. He continued to undertake the same work as he had since November 2020, namely working
25 independently on assembly and answering straightforward customer technical queries. The only change was that, from September 2021 he attended Edinburgh College 2 days per week (during term time) for two years, and gained a qualification as a result of doing so. Thereafter it was envisaged that he would simply continue with his duties for the respondent for the remaining
30 2 years. The respondent did not provide any structured training for the claimant and there were no particular milestones which the respondent required the claimant required to meet in the 4 year period.

12. KM commenced working with the respondent, as Financial Controller, in May 2022. From 1 January 2023 became General Manager and was appointed as a statutory director.
- 5 13. In the first half of their financial year 2022/3, the respondent's sales decreased and their costs increased. They implemented cost saving measures as a result. This included:
- 10 a. Conducting a full review of all business costs and potential sales for future months;
 - b. Implementing cost reduction activities including elimination of overtime, moving some staff to part time and reducing travel;
 - c. Management team salaries were reduced by 5% for the remainder of the financial year; and
 - 15 d. A review of roles and anticipated workload requirements was undertaken, which resulted in 4 roles being combined and 2 roles made redundant.
14. Despite these measures, the respondent identified that further steps were required. Having reviewed matters, the respondent concluded that there was
20 insufficient technical workload for the respondent to maintain the role of Technical Apprentice. In May 2023, KM discussed, with her contact at Edinburgh College, the potential of making the claimant's role redundant. She was advised, at the start of June 2023, that she had discussed this with Skills
25 Development Scotland they had confirmed that the respondent could simply *'follow [their] own procedures to make an apprentice redundant'* but that it would be of benefit if the claimant could first achieve his National Certificate, which he was due to do by 15 June 2023, as this would benefit him when looking for alternative employment.
- 30 15. On 2 June 2023, the claimant was informed that his role was at risk of redundancy. This was confirmed in a letter that day, setting out the reasons for the potential redundancy situation, the consultation process which would be followed and the claimant's entitlements, if he were to be made redundant.

16. A consultation meeting was arranged for 7 June 2023. The claimant raised a number of questions at that meeting, which the respondent undertook to consider and provide responses to. They did so at the next consultation meeting, which took place on 9 June 2023.
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17. At the consultation meeting on 9 June 2023, it was determined that there were no viable alternatives but to make the claimant's role redundant, and that there was no alternative employment available. It was accordingly confirmed that the claimant's employment would terminate by reason of redundancy. He was informed that he required to work his one month notice period, but was entitled to time off to look for alternative employment. He was informed of his right of appeal. He received a letter confirming these points.
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18. During the claimant's notice period, on 30 June 2023, another employee left the respondent's employment unexpectedly. KM discussed with the claimant whether he would be interested in a hybrid role of Warehouse/Assembly Operative in order to avoid being made redundant. The claimant stated that he would not. The role was subsequently advertised internally, but the claimant did not express an interest.
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19. The claimant's employment with the respondent terminated on 7 July 2023. He did not submit an appeal in relation to the decision to terminate his employment.
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20. Since July 2023, the respondent has required to make further roles redundant.
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Submissions

21. Each party gave a brief submission, summarising the evidence led.

Relevant Law

30 *Contract of Apprenticeship or Employment*

22. Whether there is a contract of service or apprenticeship is determined by the common law. The use of the label "apprentice" by the parties is not determinative (*Young & Woods Ltd v West* [1980] IRLR 201). An apprentice

is almost always retained under a limited term contract (**Wallace v C A Roofing Services Ltd** [1996] IRLR 435). An apprenticeship cannot ordinarily be terminated at will during its term (**Flett v Matheson** [2006] IRLR 277, CA). The essential feature of an apprenticeship is that the apprentice is to be taught a trade or calling (**Wiltshire Police Authority v Wynn** [1980] ICR 649, CA) whether by the employer or a third party. The teaching of a trade or calling is the primary purpose – undertaking work for the employer is secondary. An apprentice wrongfully dismissed may be entitled to enhanced damages by reason of the loss of prospects as a tradesman on completion of their apprenticeship (**Dunk v George Waller & Son Ltd** [1970] 2 All ER 630, [1970] 2 QB 163, CA).

Unfair Dismissal

23. Section 94 ERA provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant, as defined by statute.
24. An employee is 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, to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).
25. In **Safeway Stores plc v Burrell** [1997] IRLR 200 the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide: -
- a. Whether the employee was dismissed?

- b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?
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26. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was, in the circumstances, within the range of reasonable responses open to a reasonable employer.
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27. The House of Lords in ***Polkey v A E Dayton Services Ltd*** 1987 IRLR 503 held that *"in the case of redundancy, the employer will not normally have acted 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 its own organisation"*.
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Discussion & Decision

Contract of Apprenticeship or Service

28. While the claimant worked under a limited term contract, that contract expressly stated that it could be terminated at will by either party, on one month's notice.
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- The claimant continued to undertake the same work for the respondent as he had previously and they did not provide any formal training to him. The primary purpose of the contract was for the claimant to provide work to the respondent, not the teaching of a trade or calling. Whilst he undertook a 2 year course at Edinburgh College during the 4 year period, that was not the primary purpose of the contract. Undertaking work for the employer was of equal if not greater standing. Applying the common law to these facts, particularly the fact the
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contract could be terminated at will on notice and that principal purpose of the contract was for the claimant to provide work/services to the respondent, with the claimant's College course being incidental to this, the Tribunal concluded that the claimant was retained under a contract of service, not a common law contract of apprenticeship.

Unfair Dismissal

29. The Tribunal referred to section 98 ERA, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2) ERA. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

30. In relation to the question of whether the claimant was dismissed for redundancy, the Tribunal considered each of the tests set out in **Safeway Stores plc v Burrell**. It is clear that the claimant was dismissed, so the first element was satisfied. The Tribunal accepted that the requirements of the respondent's business for employees to carry out work of a particular kind had diminished. The second test was accordingly also satisfied. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly or mainly caused by that diminution. The Tribunal were accordingly satisfied that there was a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely as a result of that.

31. The Tribunal then considered section 98(4) ERA. The Tribunal had to determine (the burden of proof at this point being neutral) whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking), the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the claimant. This should be

determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439 that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. Whether the Employment Tribunal would have acted in the same way is not the question to be asked. Instead, it must apply an objective test of whether dismissal, and the procedure used to reach that decision, was within the range of reasonable responses open to a reasonable employer in the circumstances.

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32. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in ***Polkey*** in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. Taking each factor in turn, the following conclusions were reached.

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Warning and Consultation.

33. The Tribunal was satisfied that there was adequate warning and consultation in this case. The respondent warned the claimant that he was at risk of redundancy and consulted with him. They discussed the reasons for the claimant being placed at risk of redundancy and process they intended to follow. They responded to the questions he raised in the consultation meetings.

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Adopts a fair basis for selection.

34. There was no challenge to the claimant's selection. There were no other individuals carrying out the same role as the claimant. The Tribunal found that the respondent acted reasonably in determining that the claimant's role required to be made redundant.

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Consideration of alternative employment.

35. The Tribunal accepted that there was no alternative employment available at the time the claimant was given notice of termination. None could accordingly have been offered to the claimant. While an alternative role did become

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available during the claimant's notice period, this was discussed with him and he did not wish to explore this further.

5 *Conclusions regarding Unfair Dismissal Claim*

36. Given these findings, the Tribunal found that the respondent acted reasonably in treating redundancy as a sufficient reason to dismiss the claimant.

37. The claim of unfair dismissal does not therefore succeed and is dismissed.

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Employment Judge: M Sangster
Date of Judgment: 20 October 2023
Entered in register: 23 October 2023
and copied to parties

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