EMPLOYMENT TRIBUNALS

Claimant: Mr K Wasiak

Respondent: Polypipe Limited

Heard: via CVP in the North East Region **On:** 4 January 2024

Before: Employment Judge Ayre, sitting alone

Representation

Claimant: In person
Respondent: Ms E Wheeler, counsel

Polish interpreter : Tomasz Gorszwa

JUDGMENT

The claim for a redundancy payment fails and is dismissed.

REASONS

Background

1. On 20 August 2023 the claimant issued a claim in the Employment Tribunal following a period of early conciliation that started on 10 July 2023 and ended on 17 August 2023. The claim form includes a claim for a redundancy payment. The respondent defends the claim.

The hearing

2. There was an agreed bundle of documents running to 129 pages. I heard evidence

from the claimant and, on behalf of the respondent, from Lindsay Nolan-Wilcox, Transport Manager, and Steve Nevins, Interim Operations Director.

The issues

3. The issue for determination by the Tribunal, as discussed and agreed at the start of the hearing, was whether the claimant was dismissed by reason of redundancy

Findings of fact

4. The claimant was employed by the respondent from 30 June 2014, initially as a General Operative and, from 6 June 2022, as a Class 1 HGV Driver.

5. The claimant's hours of work as an HGV Driver, as set out in a letter dated 8 June 2002 were "*an average of 55 hours per week, working Monday to Friday, start time 6.00 am*" with overtime as required. The Hours of Work clause in the letter also stated that :"*You may be required to work alternative working hours or sites either on a permanent or temporary basis. If this is necessary, we will give you as much notice as possible*".

6. The claimant was paid for 55 hours a week as an HGV driver. He did not always work those hours, however. The tachograph records provided by the claimant in the bundle showed that over the 15 week period from 13 March 2023 to 30 June 2023 he worked an average of 48.15 hours a week.

7. In late 2022 the respondent carried out an analysis of its drivers' working hours. This involved an examination of information stored in the respondent's tachograph system. The analysis showed that during 2022 the drivers worked an average of 46.78 hours a week. The drivers were therefore working approximately 8 hours a week less than they were being paid for on average. The respondent calculated the cost of this 'overpayment' to be more than £500,000 a year.

8. The respondent also benchmarked the standard rate of pay for HGV drivers. That benchmarking exercise led the respondent to conclude that it was normal for HGV drivers to be paid for 50 hours a week rather than 55.

9. In February 2023 the respondent decided to propose a change to drivers' pay so that they would be paid 50 hours a week rather than 55 hours. There were 81 HGV drivers employed by the respondent at the time and it was proposed that this change be implemented for all of them. There was no reduction in the number of HGV drivers that the respondent was employing however, that stayed the same. Indeed the respondent was actively recruiting for drivers. The respondent did not want any drivers to leave as a result of the proposed changes to paid working hours.

10. A process of collective consultation was carried out. Employee representatives were elected and a first consultation meeting took place on 27 February 2023. During that meeting the representatives raised concerns that the data about drivers' working hours was not accurate because not everyone was inputting manual entries correctly

into the tachograph system.

11. The respondent therefore agreed to randomly select and analyse timesheets for 10 drivers for the year 2022. This analysis showed that, taking account of unrecorded additional time worked, the average number of hours worked per week was in fact 5.2% higher, namely 49 hours per week. This was still below the 50 hours that the respondent was proposing to pay the drivers under the new arrangements.

12. A second collective consultation meeting took place on 8 March 2023 at which the results of this additional analysis were discussed.

13. A third and final collective consultation meeting took place on 24 March 2023.

14. At the end of the collective consultation process, the respondent decided to go ahead and implement the proposed changes to the drivers' paid working hours. On 31 March the respondent wrote to the claimant proposing to change his terms and conditions so that he would be paid for an average of 50 hours a week. The respondent recognised that some weeks drivers may work more than 50 hours, and some weeks less, but proposed to manage this locally. The claimant was asked to agree to the change to his terms and conditions but declined to do so.

15. Similar letters were sent to other drivers, and ultimately 79 agreed to accept the changes.

16. For those drivers who did not agree to the change in terms and conditions there was then a period of individual consultation. For the claimant this started on 6 April 2023 with an individual consultation meeting.

17. On 11 May 2023 the respondent wrote to the claimant inviting him to a further consultation meeting to discuss the proposed change to his contract of employment. The claimant was warned that if no agreement could be reached, one possible outcome was that the respondent may give the claimant notice to terminate his current contract and offer him a new contract on the revised terms.

18. The second individual consultation meeting took place on 12 May 2023. At the end of the meeting the claimant was told that if agreement could not be reached by 15 May he would be given notice to terminate his contract with an offer of reengagement on a new contract working 50 hours a week.

19. The claimant did not agree to the new contractual terms. On 15 May therefore the respondent wrote to him giving notice of termination of his contract of employment and an offer of employment on new terms. The letter set out the reasons behind the changes, and the reasons for the claimant's dismissal, which were that:

    "*If you do not voluntarily agree to the changes or if you are dismissed without accepting the New Contract, your employment with us will terminate on 2 July 2023.*"

20. The claimant was offered the right to appeal against the decision to terminate his

contract. He did not exercise that right. He did not accept the offer of new terms made by the respondent.

21. The respondent did not want the claimant to leave its employment. On 19 May Mr Nevins met with the claimant to try and persuade him to stay, because the respondent needed all of the drivers it had. The claimant did not change his mind, and on 2 July 2023 the claimant's employment terminated because he did not agree to the new terms and conditions of employment.

22. On 6 July 2023 the claimant wrote to the respondent by email. In his email he suggested, for the first time, that he was entitled to a redundancy payment. He had not made this suggestion at any time during any of the meetings held prior to the termination of his employment.

23. The respondent replied to the claimant's email the same day stating that he had not been made redundant, but rather had left because he did not want to accept the new terms and conditions.

24. There was no reduction in the work that the respondent had for its HGV drivers. Nor was there any reduction in the number of HGV drivers employed by the respondent. Rather, there was a change in the number of hours that the drivers were paid from 55 to 50. This change was to reflect the average hours actually worked by the drivers and reduce the respondent's wage bill.

25. There was no closure of the business or of the claimant's place of work.

The Law

26. An employee is only entitled to a redundancy payment if he is dismissed by reason of redundancy.

27. Section 123 of the Employment Rights Act 1996 provides that:

"*(1) An employee shall pay a redundancy payment to any employee of his if the employee –*

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time."

28. Section 139 of the Employment Rights Act 1996 defines redundancy as follows:

"*(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 –*

(a) the fact that his employer has ceased or intends to cease

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry out that business in the place where the employee was so employed, or

(b) 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."

29. By virtue of section 163(2) of the Employment Rights Act 1996 there is a presumption that an employee who has been dismissed has been dismissed for redundancy unless the contrary is established.

Conclusions

30. The only issue for consideration in this case is the reason for the claimant's dismissal, and whether that was by reason of redundancy as the claimant asserts.

31. I have no hesitation in finding, on the evidence before me, that the claimant was not dismissed by reason of redundancy. The presumption that the dismissal was by reason of redundancy has therefore been displaced.

32. This is not a case in which there was a redundancy situation falling within section 139 of the Employment Rights Act 1996. There was no reduction in the need for HGV drivers on the respondent's part, and no reduction in the work carried out by those drivers. There was no closure of the business, or of the claimant's place of work.

33. On the contrary, the respondent had more than sufficient work for its drivers and wanted to retain them. Even the claimant, in his evidence, accepted that there was no reduction in the work for HGV drivers.

34. Rather, the changes that were being proposed were to improve efficiency and save costs of over £500,000 a year after the respondent realised that its drivers were being paid on average 8 hours a week more than they were actually working. Although this figure was reduced to 6 hours during the collective consultation when the additional analysis of hours not recorded in the tachograph system was conducted, there was still a substantial number of additional hours that were being paid for but not worked.

35. The only change implemented by the respondent was to drivers' terms and conditions and to their pay. The fact that the average number of hours that drivers would be paid for was going down, to reflect the number of hours worked more accurately, does not give rise to a redundancy situation. The change to terms and

conditions merely reflected this change in hours of work and pay.

36. There was no evidence whatsoever before me to suggest that there was any reduction in the workload of drivers or in the number of drivers employed by the respondent.

37. This is not a situation in which the lay off or short term working provisions apply, as the claimant was dismissed. By virtue of section 151 of the Employment Rights Act 1996 those provisions do not apply if an employee has been dismissed.

38. The claimant was therefore not dismissed by reason of redundancy, but rather due to some other substantial reason, namely a change in contractual terms which he refused to agree to.

39. For these reasons the claim for a redundancy payment is not well founded and fails.

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Employment Judge Ayre

Date: 4 January 2024

JUDGMENT SENT TO THE PARTIES ON

12 January 2024

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