EMPLOYMENT TRIBUNALS

Claimant Ms Daljit Rai v **Respondent** St Augustine's Federated Schools: CE High Schools

Heard at: Watford (by CVP)
On: 25, 26 and 27 September 2023
Before: Employment Judge Alliott (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr Mark Green (counsel)

JUDGMENT having been sent to the parties on 10 November 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent on 1 September 2000. By 2021 she held the position of Subject Leader English as an Additional Language ("EAL"). On 17 May 2021 she was given notice of termination of her contract of employment on the grounds of redundancy and her last day of service was 31 August 2021. By a claim form presented on 20 December 2021, following a period of early conciliation from 22 October to 2 December 2021, the claimant brings a complaint of unfair dismissal.

The issues

2. The issues were set out in a case management summary by Employment Judge Quill following a preliminary hearing heard on 24 April 2023.

3. They are as follows:-

> "8 The issues between the parties which potentially fall to be determined by the Tribunal are as follows:
>
> Unfair dismissal
>
> 8.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?
>
> The respondent asserts that it was redundancy.

8.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

8.3 The Claimant's allegations of unfairness include that:

8.3.1 She does not believe that her questions raised during consultation were answered (adequately)

8.3.2 She does not believe she was given sufficient information about, and/or adequate opportunity to apply for, or be appointed to, the science posts referred to in paragraphs 30 to 34 of the Particulars of Complaint

8.3.3 She does not believe she was given sufficient information about, and/or adequate opportunity to apply for, or be appointed to, the EAL Co-Ordinator post referred to in paragraphs 48 and 49 of the Particulars of Complaint

8.3.4 She does not believe that she was given the opportunity to take redundancy pay, have a 4 week gap following termination, and be appointed to EAL Co-Ordinator. In particular, she alleges she was told that she would have to start on 1 September 2021 if appointed as EAL Co-ordinator, but the Respondent allowed the successful candidate to start later. [The Respondent replies to this allegation at paragraphs 58 and 59 of the Grounds of Resistance]

8.3.5 She alleges that the Respondent did not follow its own reorganisation policies, including Section 9 which deals with alternative work.

8.3.6 More generally, the Tribunal will consider whether the Claimant was given adequate warning about possible redundancies, whether there was adequate consultation, and whether that was genuinely done at a time when it was possible for the contents of consultation to affect the outcome and whether the Respondent acted reasonably in relation to considering alternative to dismissal, including the availability of alternative duties.

Remedy for unfair dismissal

8.4 …"

The law

9 Redundancy is defined in s.139(1) Employment Rights Act 1996:

"(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 on 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."

10 S.98 of the Employment Rights Act 1996 provides as follows:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason…"

11 Subsection (2) provides that redundancy is a potentially fair reason.

12 Section 98(4) provides as follows:

"(4) 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)—

(a) depends on 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

(b) shall be determined in accordance with equity and the substantial merits of the case."

13 As per the IDS Employment Law Handbook on redundancy at 8.79:-

"8.79 A dismissed employee may complain, for example, that he or she was unfairly selected for redundancy; that it was unreasonable for the employer to have dismissed him or her for redundancy where alternative work was available; or that the employer's redundancy procedure was defective – perhaps owing to a failure to consult.

8.80 Although an employer defending a claim of unfair dismissal bears the burden of proving the reason for dismissal under section 98(1), when it comes to the question of reasonableness under section 98(4) there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide.

In Williams and others v Compair Maxam Ltd [1982] ICR 156 EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed, however, that in determining the question of reasonableness it was not for the employment

tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted."

8.81 The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:

- Whether the selection criteria were objectively chosen and fairly applied.
- Whether employees were warned and consulted about the redundancy.
- Whether, if there was a union, the union's view was sought, and
- Whether any alternative work was available."

14 Further, as the IDS Handbook at 8.178:

"8.178 The consideration of alternative employment for employees selected for redundancy will often be an important part of a fair and reasonable redundancy procedure. While the statutory mechanism for offering alternative or renewed employment, and the consequences for an employee of unreasonably refusing suitable alternative employment, are dealt with in chapter 3, we consider below some of the circumstances in which an employer's actions in relation to alternative employment can lead to a redundancy dismissal being rendered unfair.

There is a danger for tribunals in conflating the legal tests when dealing with questions of alternative employment. In the context of a claim for a redundancy payment, the suitability of alternative employment, and whether an employee's refusal of an offer of such employment was reasonable, are both question of fact for the tribunal to determine objectively. When a question of alternative employment arises in the context of an unfair dismissal claim, however, the reasonableness test under section 98(4) requires a tribunal to consider whether the employer's actions lay within the range of responses of a reasonable employer. If the tribunal decides the matter by determining what it objectively considers to have been reasonable in the circumstances, it will fall into a substitutionary mindset and err in law.

8.179 In Thomas & Betts Manufacturing Co Ltd v Harding [1980] IRLR 255, CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work.

8.180 However, as a general rule, tribunals will expect an employer with sufficient resources to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available."

15 And at 8.191 – Inferior position:

"It will not necessarily be unreasonable for an employer to assume that an employee would not wish to accept an inferior position. The EAT suggested in Barratt Construction Ltd v Dalrymple [1984] IRLR 385 EAT that "without laying down any hard and fast rule" a senior manager who was prepared to accept a subordinate post rather than being dismissed should make this known to his or her

employer as soon as possible."

16 In addition, Mr Green, on behalf of the respondent, cited to me the cases of Taylor v Kent CC, [1969] 2QB 560 Divisional Court, Green v CAT Transport and the Barratt case. I record that I have taken those into account.

The evidence

17 I had a hearing bundle running to 1,171 pages and a five-page supplementary bundle. During the course of the hearing I was provided with some additional documents, namely a Teacher's Pay and Conditions document and an unredacted email of 6 May 2021. I had written closing submissions from Mr Green.

18 I had witness statements and heard evidence from the following:

18.1 Ms Sarah Hunt, the respondent's Business Manager and HR Lead.

18.2 Mr Eugene Moriarty, the respondent's Head.

18.3 Mr John McArdle, Governor and Vice Chair of the respondent's governors.

18.4 The claimant.

18.5 Ms Hannah Farhat, a work colleague of the claimant.

18.6 Ms Maryam Milani, a teacher colleague of the claimant.

The facts

19 The claimant was employed by the respondent on 1 September 2000 and by 2021 held the position of Subject Lead English as an Additional language ("EAL"). This was a teaching post. The claimant was a senior teaching grade and on a salary of £62,000 pa. Also in the EAL Department were two part-time Learning Support Assistants (FTE.8 and .6) The department therefore had 2.4 full-time equivalent posts.

20 By 2020 the respondent had been experiencing financial difficulty and there was a need to identify savings. On her arrival in September 2020 Ms Hunt conducted a review of operations and cost saving measures in conjunction with Mr Moriarty. One area of review was the EAL Department. Although 82% of the respondent's student body were recorded as EAL, the EAL Department only directly supported 20 students which equated to less than 2% of the student body. That was projected to fall to 1% when x 11 Year 11s left the school. By comparison, one full-time member of regular non-EAL teaching staff supported an average of 200 students.

21 Research was conducted into how other schools operated EAL. It became clear that other schools operated without EAL departments and that a different model of immersing EAL students alongside their peers, and they and their teachers being supported by someone working in an EAL Coordinator role was preferred. This was referred to as a more modern model to achieve the best provision of EAL support within financial constraints.

22 Mr Moriarty decided to start a formal restructuring process.

23 Mr Moriarty emailed the claimant on 20 Janaury 2021 to set up an informal meeting to discuss the school budget and EAL provision. The meeting was held on 25 Janaury 2021. The claimant was asked to speak to her team and provide suggestions for saving money. Mr Moriarty gave evidence that the claimant said she "got it" and that she was aware of restructuring in EAL provision in other schools. Mr Moriarty was an impressive and thoroughly credible witness and I find that this exchange took place. The claimant accepted that they discussed a review of EAL at this meeting.

24 On 1 February 2021, the claimant emailed Mr Moriarty to confirm that she had no proposals on ways the EAL Department could save money.

25 Mr Moriarty then led the formal consultation process as provided for in the respondent's Managing Organisational Change Policy and Procedure. This provides for consultation with employees and trade union and aims to afford effected employees sufficient time to provide feedback on proposals. Redeployment and suitable alternative employment are specifically addressed. Section 9.2 provides as follows:-

> "9.2 Suitable alternative employment
>
> Suitable alternative employment is intended to reflect the match between the employee's current or most recent role, their skills, knowledge, qualifications (where relevant), aptitude and capability compared with the requirements of the new post with or without further training.
>
> If an employee chooses not to accept the offer of suitable alternative employment the employee may lose their right to a redundancy payment.
>
> 9.3 Protection of pay upon being placed in an alternative job
>
> Where an alternative post accepted by the employee is one grade below the employee's current grade, pay protection will apply for a period of one year for support staff. During the period for which pay is protected, the employee will receive their former salary; however, there will be there no entitlement to the annual pay award or any incremental progression (note: pay protection will not apply where there is a reduction in FTE)."

26 A meeting was held with the trade union representatives of affected staff members on 8 March 2021. Mr Moriarty talked through the consultation paper. The restructuring of EAL to the "Immersion model" was explained. The consultation document sets out the financial savings proposed. The existing EAL Department was costing the respondent £125,634 against the cost of an EAL Coordinator of £40,686, a saving of £84,948. The proposal was to abolish the existing EAL Department in its entirety.

27 The evidence of Ms Hunt and Mr Moriarty provide compelling justification for the restructuring on both educational and cost grounds, and I find there was a genuine redundancy situation. The claimant's and the two Learning Support Assist roles were to be deleted and were redundant.

28 The consultation document expressly states that a full time EAL Coordinator was to be appointed. Although the job description includes some teaching,

Mr Moriarty told me and I accept, that this was an error, and it was a non-teaching support role. The claimant agreed that a teaching qualification was not required for it. It was a term time role only. The salary was about £26,000 with some holiday pay. The claimant could clearly do the role. However, it did not involve teaching. It was a support grade and so would decrease the claimant's status, constitute a demotion and was paid less than 50% of the claimant's existing salary. As the difference in grade was well beyond one below the claimant's existing, so the protection of pay term would not be engaged. The respondent did not deem it suitable alternative employment and I find that it was not. It was far inferior.

29 On 8 March 2021, the claimant had a meeting with Mr Moriarty. She was accompanied by her trade union representative. The consultation document was talked through and explained. The claimant was informed that an EAL Coordinator was to be appointed. It was explained that options included redeployment where possible. Following the meeting the claimant was sent the consultation document.

30 The claimant complains that the issue was insensitively handled, and I have no doubt the restructuring came as a shock to her. However, that is always likely to be the case by virtue of the nature of the exercise and I do not find that the respondent's conduct was unreasonable.

31 On 9 March 2021, the claimant was emailed a letter informing her that her post had been identified for potential deletion and that she was at risk of redundancy.

32 On 17 March 2021, the claimant had an individual consultation meeting with Mr Moriarty. The claimant's trade union representative was present. Understandably, the claimant queried the need to abolish the EAL Department and endeavoured to argue for its retention. The claimant had clearly seen the job description for the EAL Coordinator role. The notes of the meeting confirm that the claimant asked if she could take redundancy and apply for the EAL Coordinator post. The claimant accepted that she was told that this was not possible as the role was due to begin on 1 September 2021. By law, if a redundancy payment were made, an individual could not start a new role for four weeks. The claimant accepted she was told that to facilitate this would be a misuse of public funds and I find it would have been.

33 However, I find that the claimant clearly knew that the EAL Coordinator role was to be advertised and an appointment made by 1 September 2021. Further, that at any time after 8 March 2021 the claimant could have informed the respondent that she wanted to be considered for the position. Further, I find that the claimant knew that if she did apply for and got the position she would not be paid the £16,140 redundancy payment.

34 The claimant requested and was granted an extension of time to respond to the consultation document. On 30 March 2021, the claimant submitted her revised response to the EAL consultation document. It is a detailed 11 page document and specifically references the EAL Coordinator role, asserting that it mirrored her current role. That document did not say that the claimant wanted to apply for the role which is could easily have done.

35 Later in March a 79-page response to consultation document was produced by the respondent which included the claimant's input.

36 The final restructuring proposal was presented to the Governing Body Strategy Group on 13 April 2021. The governing body approved the plan on 15 April 2021.

37 The claimant was provided with a detailed response to her input on 23 April 2021. I find that the questions raised by the claimant during the consultation period were comprehensively addressed and answered.

38 On 7 May 2021, the claimant was emailed to bring to her attention redeployment opportunities being:

38.1 Deputy Head Teacher.

38.2 Teacher of Art (fixed term one year).

38.3 Teacher of English (maternity cover).

38.4 Teacher of Maths.

39 The claimant complains that none of these were suitable for her as they did not meet her skill set. She did not apply for any of those roles.

40 Mr Moriarty met the claimant again on 13 May 2021. She was informed she was to be made compulsorily redundant and she was emailed a formal letter to that effect on the same day. She did not appeal the redundancy which one might have expected had she been waiting to apply for the EAL Coordinator role which she was well aware of.

41 In June 2021, the claimant became aware that people were being observed for a science post and she spoke to the Head of Science who told her they were trying to find a suitable candidate.

42 On 2 July 2021, the claimant was emailed details of the science post. The job description was attached. It was pointed out that it was part-time (FTE.6), was a temporary position (one term) and the claimant was informed that if she were appointed she would be deemed successfully redeployed, would not be paid her redundancy payment and any future redundancy payment would be based on the part-time role. She was invited to submit an expression of interest by Monday 5 July 2021.

43 The claimant complains that she had insufficient information about and inadequate time to apply for this science post (the list of issues is plural in error). I find the claimant had all relevant information about the role and had more than enough time to register an expression of interest. The claimant did not do so as she thought the role was unsuitable as it was part-time, of short duration and she felt she was specialised in the EAL area. Her real complaint is that it had not been notified to her earlier, but, given that she herself considered it unsuitable, I find that that was reasonable conduct on the respondent's part.

44 On 30 June, the respondent advertised the EAL Coordinator role on the

TLS website. The claimant was not notified by the respondent of this. I find that this was reasonable conduct. It was clearly not a suitable position in the context of redeployment/salary protection and eligibility for a redundancy payment. The claimant had known about the position since March 2021 and had not evinced any interest in it since 17 March 2021. She knew the position was to be filled on 1 September 2021 and would be advertised. That was highly likely to be towards the end of the summer term. Any interest she had had appears to have ceased once she was aware she would lose her redundancy payment.

45 The deadline for applying for the EAL Coordinator role was 9 July 2021. On 6 July 2021, a friend and colleague in the Finance Department emailed the claimant a link to the TLS advert. The link itself reads "Vacancy-EAL Coordinator." The claimant replied "Thank you" with a smiley emoji. The claimant told me she did not open the link or see what it was about. I find this very surprising, especially if, as she claims, she was awaiting to apply for the post.

46 What the claimant did on 6 July was to lodge a grievance. Many issues were raised but there is no complaint about not being offered or being able to apply for the EAL Coordinator role.

47 In the week commencing 12 July 2021 a colleague, Ms Farhat, asked if she had applied for the post. The claimant said she was upset and felt she had been kept in the dark by the respondent. The claimant gave evidence that she was waiting for HR to notify her and that the role would have been preferable to losing her job as her teachers' pension would top up the reduced salary. I do not accept this evidence. At the time the claimant found out about the advert, although the deadline had passed, no one had been interviewed. I would expect someone in the claimant's position to have complained and gone to management or HR to request the deadline be extended and to be allowed to apply. That she did not makes me conclude that she was not interested in the role at the time, and she was content to take her redundancy payment. She was not looking for any other alternative employment at the time.

48 The claimant's last day of employment was 31 August 2021.

49 As it happens, the successful candidate for the EAL Coordinator role had been made redundant herself and could not take up the position until 28 September 2021 in order to keep her redundancy payment. This was only revealed to the respondent relatively late in the day and the respondent could either renew the recruitment exercise or allow a delayed start. It decided to do the latter. I do not find anything untoward in how the recruitment process actually turned out.

Conclusions

50 I find that the reason for the claimant's dismissal was redundancy.

51 I find that the claimant was properly warned and that there was extensive consultation with both her and the trade union.

52 I find that selection criteria are not relevant as the whole EAL Department

was redundant.

53 I find that all reasonable efforts were made to redeploy the claimant to a suitable alternative position.

54 I find that in fact and unfortunately there were no suitable alternative positions.

55 I find that the inferior EAL Coordinator role was not concealed from the claimant who knew everything about it and could have made her interest known to the respondent at any time.

56 I find that not sending her notice of the advert for the EAL Coordinator role was reasonable conduct by the respondent as it was not suitable for the claimant. I find that not doing so did not render the dismissal unfair.

57 I find that in all probability the claimant was not interested at the time in the EAL Coordinator role.

58 I find that the claimant had all relevant information about the science post and a reasonable opportunity to express interest in applying for it.

59 I find that the claimant had full knowledge of the EAL Coordinator role and had an adequate opportunity to apply for it or at the very least indicate to the respondent that she was interested in the post.

60 I find it was entirely reasonable not to manufacture a situation where she could have her redundancy payment and also go into the EAL role.

61 I find that the respondent applied its reorganisation policies correctly.

62 For the above reasons I find that the claimant's dismissal was fair.

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Employment Judge Alliott

Date: 13 February 2024

Judgment sent to the parties on

16 February 2024

For the Tribunal office