EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr H Lewis		Network Rail Infrastructure Limited

Heard at: London Central Employment Tribunal

On: 17 January 2024

Before: Employment Judge Adkin (sitting alone)

Representations

For the Claimant: in person
For the Respondent: Mr B Randle, Counsel

JUDGMENT

(1) The judgment made on 22 November 2023 that the Claimant's claim for unfair dismissal succeeded is revoked and replaced with a decision that the claim is not well founded pursuant to rule 70 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

REASONS

Background

1. The Claimant presented his claim of unfair dismissal on 27 February 2023.

2. In a decision sent to the parties on 22 November 2023 the Tribunal (Employment Judge Adkin sitting alone) found that the claim for unfair dismissal pursuant to sections 94 and 98 of Employment Rights Act 1996 ("ERA") was well founded, subject to a possible deduction under section 123 ERA following

the principle established by the House of Lords in the case of Polkey v A E Dayton Services Ltd [1987] IRLR 503, [1988] AC 344, to be determined at a remedy hearing.

3. By an application dated 6 December 2023, the Respondent applied for a reconsideration of that decision. I wrote to the parties to confirm that the hearing listed for remedy on 17 January 2024 would be converted to a hearing to consider the Respondent's application for reconsideration.

4. By an application dated 10 December 2023, the Claimant also applied for a reconsideration of the Tribunal's decision. While that application was made more than 14 days after promulgation of the decision, at the hearing on 17 January 2024, having heard oral submissions from the parties, I gave an oral decision that that time would be extended pursuant to rule 5 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules"), such this application would be heard. Notice was sent that day and a written response produced by the Respondent that day during the course of the hearing.

5. Both parties agreed in the hearing that it would be appropriate to hear oral submissions at the hearing on 17 January 2024 to deal with both applications for reconsideration rather than adjourning to another day.

6. Oral submissions were made on the substantive merits of the application.

Evidence

7. I had the benefit of the agreed bundle and witness statements as at the hearing on liability.

Submissions received

Respondent's submissions on R's application

8. The Respondent's submissions were contained in the letter of application dated 6 December 2023 itself and Mr Randle's skeleton argument, which he supplemented with oral argument.

Claimant's submissions on R's application

9. The Claimant's submissions on the Respondent's application for reconsideration were contained in his letter of 10 December 2023, a submissions document dated 11 December 2023 which he supplemented orally at the hearing.

Claimant's submissions on C's application

10. The Claimant's application for reconsideration was contained in a letter dated 10 December 2023. Further submissions were contained in a document dated 11 December 2023, which Mr Lewis supplemented orally in the hearing.

Respondent's submissions on C's application

11. The Respondent's position on the Claimant's application for reconsideration were made with commendable alacrity in a letter of response on 17 January 2023 and supplemented orally by Mr Randle in the hearing. The Claimant was given 30 minutes to read the Respondent's short letter of response before Mr Randle commenced his submissions.

Evidence

12. In submissions, the Respondent highlighted the following documents, [**123**] denoting page numbers in the bundle:

    12.1. [**272**] Entitled "Eastern Region - Digital Reorganisation / Microsoft Teams Closed Listing drop-in sessions / Wednesday, 20th October 2021 and Thursday, 21st October 2021 / Questions and Answers, in particular Q13 – this was referred to in questions put to the Claimant in cross examination in the hearing on liability.

    Q13 says:

    > **13) Please confirm how the closed listing applications/CV's are going to be objectively assessed including scoring and any weighting that will be applied to each section/answers?**
    >
    > Will be an open and transparent process and the results of any scoring will be shared with the applicant?
    >
    > To ensure a fair and robust process it is likely the business will look to interview for roles which will follow normal Network Rail recruitment/interview processes. Individual scoring can be shared via feedback if required.

    12.2. [**330**] An email dated 29 November 2021 from Mark Holt, Resourcing Business Partner Support Eastern Region which not referred to in the final hearing directly, but is referred to at paragraph 67 of Toufic Machnouk's witness statement. It is submitted by the Respondent that this does demonstrate some HR involvement in the process.

13. The Claimant in his submissions highlighted:

    13.1. [**49**] Redeployment Policy and Procedure Version 3.0 (Date issued 17.12.2013). At 1.2 Principles there some guidance of relevance to the Claimant's situation:

    > " - Employees who are at risk of redundancy will be offered a vacant role if it is a suitable alternative role, or would be suitable following a period of training within a reasonable timescale.

- If more than one displaced employee is potentially suitable for a vacancy then they will be interviewed and the selection decision will be based on the best match."

13.2. [**216-220**] documents relating to old and proposed roles – he submits that all this shows is that the Business Improvement Manager role was not matched.

Law

Reconsideration

14. The process for reconsideration is contained at rules 70-72 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules").

15. A decision may be varied or revoked where it is in the interests of justice. There is no requirement for "exceptional circumstances". Regard should be had to the overriding objective, which is contained in rule 2, set out below.

16. The Court of Appeal recently reviewed earlier leading cases on reconsideration and gave guidance in the case of **Phipps v Priory Education Services Ltd** [2023] EWCA Civ 652, [2023] IRLR 851, [2023] ICR 1043. Bean LJ said at paragraph 31:

> "(1) The interests of justice test is broad-textured and should not be so encrusted with case law that decisions are made by resort to phrases or labels drawn from the authorities rather than on a careful assessment of what justice requires. The ET has a wide discretion in such cases. But dealing with cases justly requires that they be dealt with in accordance with recognised principles"

17. At paragraph 36 Bean LJ said:

> "An application for reconsideration under r 70 must include a weighing of the injustice to the Applicant if reconsideration is refused against the injustice to the Respondent if it is granted, also giving weight to the public interest in the finality of litigation."

Overriding objective

18. Rule 2 contains the following:

> **Overriding objective**
>
> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.
> …

Unfairness where a breach

19. An employers' failure to comply with an agreed procedure is a factor to be taken into account, but the weight to be given to it depends on the circumstances; it must be looked at in the context of the overall process to consider whether R acted reasonably: see **Bailey v BP Oil Kent Refinery Ltd** [1980] IRLR 287 at [12]; **South London and Maudsley NHS v Balogun** (UKEAT/0212/14/BA) (5 December 2014) at [9] – [10].

20. In **Bailey** there was a failure to notify an appropriate full-time union official of an intention to dismiss where the Claimant was found to have abused the self certification short-term sickness absence procedure by stating he was ill when that he was on holiday in Majorca. The Court of Appeal found that the EAT was wrong to interfere with the decision of the tribunal that the dismissal was nevertheless fair. Failure to comply with an agreement would be one factor to take into account but the weight would depend on the circumstances.

21. **Balogun** was also a conduct case. The EAT similarly found that an employment judge at first instance had focused too much on a procedural defect without looking at the overall process to consider whether the employer was acting reasonably.

DISPOSAL OF APPLICATIONS

22. In the case of each party's application for reconsideration I could not say that there was no reasonable prospect of success pursuant to rule 72(1), and given this heard arguments from each party on each application.

23. I acknowledged to the parties at the reconsideration hearing that I had found this a difficult case. It seemed to me at the substantive hearing that the arguments on unfairness were finely-balanced.

Summary of reasons why dismissal found to be unfair

24. I found that the Respondent had not followed their own policy contained at paragraph 10 of the Respondent's Managing Our People Through Change ("**MOPTC**") policy.

25. My finding, based on paragraphs **10.1**, **10.3** and **10.4** of that policy (set out paragraph 123 of the written reasons) was that the policy required a selection panel to be convened which would be include an HR representative and would initially run a paper-based exercise unless there was insufficient information in which case there would be an interview process.

26. I found two failings. First, there had been no selection panel had convened involving an HR representative. Second, there was no evidence of a paper-based process leading to a decision that there was insufficient information such that individual should be called to an interview. The Respondent had proceeded directly to an interview process.

27. That led me to the conclusion, set out at paragraphs 174 – 190 of the written reasons, that in short the Respondent had not followed their own process and that fell outside of the range of reasonable responses. It followed that the decision to dismiss was unfair.

Summary of submissions

Respondent's submissions

28. The detail of the Respondent's position is contained within an 8 page skeleton argument.

29. The Respondent submits that

    29.1. There was a role for HR and what they did was sufficient to satisfy the policy.

    29.2. The answers at Q1, Q3 and Q13 to a Q&A session in October 2021 amounted to a variation in the MOPTC process which all pointed in the direction of an interview rather than a paper exercise in the first instance.

    29.3. The Tribunal needs to step back even having found breach of the material process to look at the overall picture per **Bailey** and **Balogun** discussed above.

Claimant's submissions

30. Mr Lewis submits that:

    30.1. there was confusion between "role" and "candidate" in Tribunal's written reasons;

    30.2. "identification" between his old role of Business Improvement Manager (BIM) and the role of Business Manager (BM), did not take place;

30.3. the identification process of BIM and BM roles should have been entirely separate to identification of Ms Edwards' Senior Program Manager role to the BM role, rather than proceeding directly to a competitive interview process;

30.4. the Respondent did not follow an ACAS process.

Discussion of Claimant's application

Role/Candidate confusion

31. As to the Claimant's submission that the Tribunal was confused between "role" and "candidate", I do not find having considered the point carefully again that my decision on this point ought to be varied.

32. Paragraphs 156-157 set out findings in relation to the policy. I noted the apparent conflict in the policy between roles and candidates. Section 1 of the policy refers to roles and job descriptions (as well as "affected employees"). Section 4 of the same policy refers to "candidates" and states "more than one individual can claim identification to a post". This suggests a process whereby individual employees make a request to identify to a post in the new structure.

33. The Glossary of Terms in section 4 referred to at paragraph 185 provides that role identification only takes place where there is one candidate for a particular role. In this case there were two candidates. I found that the Respondent was entitled to find that identification therefore did not apply.

34. I recognise that the Claimant had a different interpretation as to the way that the policy should have operated, that is something that I had in mind at the time that I made the decision in this case. Ultimately I found that although there was an ambiguity on this point the Respondent was entitled to operate the policy in the way that they did.

Identification

35. Consideration of the identification process and the Claimant's opportunity to challenge the Respondent's approach to identification appears at paragraphs 153-158 and 159-164 respectively of the written reasons. For reasons given there and above I do not consider that the Claimant's submissions lead me to the conclusion that I ought to vary my decision.

ACAS

36. The Claimant says that there was a delay dealing with his grievance which amounted to a breach of the ACAS process.

37. The ACAS Code of Practice on disciplinary and grievance procedures, published in March 2015 gives guidance to employers. The first part, paragraphs 5 – 31 relates to disciplinary matters. The second part, paragraphs 32 – 47 provides guidance for grievances.

38. The first part of the ACAS code is relevant to cases of unfair dismissal in setting out suggested basic standards for such as informing employee of the problem, holding a meeting to discuss and granting an appeal right. It expressly does not apply to redundancy situations. ACAS offers separate guidance on redundancies.

39. At paragraph 146 of reasons my decision was that the relevance of the content of the grievance process was only insofar as it cast a light on the redundancy and appeal. I was not making a separate assessment of that grievance and grievance appeal process.

40. Even if there was a delay in dealing with the grievance, I do not find that for the purposes of a complaint of unfair dismissal this made the decision procedurally unfair. The primary focus is necessarily on the decision to dismiss and the appeal against that dismissal.

Conclusion

41. In conclusion therefore I do not see that the Claimant's arguments succeed such that I should vary my decision.

Conclusion on Respondent's application

Role of HR

42. I am not persuaded by the Respondent's first argument that there was no additional role for HR over and above that which they took.

43. Paragraph 10.1 of the policy provides that there should be a selection panel which includes an HR representative. The reasons for selection or non-selection were supposed to be recorded by HR. Neither of these things happened. I see no reason to vary my conclusion that the Respondent was thereby in breach of the MOPTC policy. The involvement in HR in the case of the Claimant was less than provided for by that policy.

Effect of Q&A on process

44. I am persuaded by the Respondent's second argument that the procedure being followed in this particular redundancy exercise needs to be read in the context of the Q&A document in October 2021 which in effect overrode the MOPTC approach of paper exercise first, interview second.

45. Questions 1, 3 and 13 of that document (the last which I did not cite in my written reasons) do make it clear that it was envisaged that an interview would be likely and in particular "interview/selection process" would be the fairest way to settle a situation in which more than one person expressed a preference for a particular role. That is what occurred given that the Claimant and another candidate were both applying for the same role.

46. The MOPTC has to be read in the context of that Q&A document. There is some tension between the two documents. The former is a general policy. The

Q&A was created specifically for this redundancy exercise. The Q&A must therefore be relevant.

Overall picture

47. I accept the Respondent's submission that a Tribunal must, following decisions in the cases of **Bailey** and **Balogun**, step back and look at the overall picture even having found a breach of policy. Although those are both conduct cases, it seems to me that that is a good principle for a redundancy situation. The weight to be given to an particular breach of policy must depend on the circumstances. I must look at the overall process.

48. I remain of the view that the involvement of HR was less than should have been provided under the MOPTC policy. Taking a step back and looking at the overall process, did that defect make the dismissal outside of the range of reasonable responses and therefore unfair?

49. It seems to me that in looking at the overall process, I must consider whether the minimal HR involvement in this process make any difference.

50. Part of the Claimant's case is that he felt that the notes of interview (which are the closest thing we have two reasons for selection/non-selection) were inadequate in his case and were not balanced by contrast with the notes taken in the interview with the other candidate Ms Edwards. It might be expected that HR, sitting outside of the shoes of the recruiting manager might be thought to be more "neutral" and might perhaps have done a better job of recording dispassionately what was said in the selection interviews. It is my finding however at paragraph 167 of the written reasons that on the balance of probabilities there is no evidence that the matters recorded in the interviews did not reflect the reality that Ms Edwards had given fuller answers.

51. Further, the Claimant's case is that he had formed the impression from things said to him by other colleagues that the Ms Edwards had been informally earmarked for the Business Manager role. Again it might be argued that HR might provide a "check" on a selection panel operating on the basis of a preordained plan. I bear in mind however that the selection panel included a senior colleague who was not part of the team being recruited into and sat in a different function. In other words there was some check if indeed it was the case that Mr Machnouk had a pre-existing preference for Ms Edwards to take the Business Manager role.

52. I should not ignore that paragraph 183 of the written reasons I found that had there not been an agreed process in relation to the role of HR the approach of having two interviewers to deal with a contested competitive interview in the way that it happened was entirely reasonable. In other words the absence of HR was not inherently unfair in a general sense, but only because the policy seemed to provide for the presence of HR.

53. I have borne in mind that the defect identified is in a selection process which was part of a wider and lengthy redundancy procedure. Apart from that defect I have not found the decision to dismiss by reason of redundancy or the

procedure followed at the dismissal and appeal stage to be procedurally or substantively unfair.

Range of reasonable responses

54. Considering the matter afresh, I am (just) persuaded that the breach of MOPTC policy in relation to the involvement HR did not take the procedure followed outside the range of reasonable responses. In coming to that conclusion I have stepped back to look at the overall process. I have reminded myself that the question of the Business Manager role selection was really one small element of the overall process.

Discretion to reconsider

55. I must, following **Phipps**, weigh any injustice caused to the parties in respectively granting or refusing the Respondent's application. If I grant the application the Claimant will have a liability decision in his favour on unfair dismissal taken away from him. The exact value of that would depend on the level of the Polkey deduction from any compensatory award.

56. On the other hand the Respondent will if the application is refused have to pay a compensatory award.

57. I have given due weight to the desirability of finality in litigation. I have been persuaded that I had not sufficiently stepped back to look at the overall process as per the guidance in the **Bailey** and **Balogun** cases. In my judgment the interests of justice are best served by me carrying out that assessment rather than sticking with a decision purely for finality.

58. This hearing had originally been listed to deal with remedy, but was converted to a reconsideration hearing. The reality is that much of that remedy hearing would have been taken up with similar arguments to those in this reconsideration hearing, since there is considerable overlap between the Respondent's arguments for reconsideration and the likely arguments that they would have made for a Polkey deduction (i.e. if there was a breach of process what difference did it make overall). It follows that there is limited prejudice to the Claimant beyond the loss of an award in his favour which plainly will be disappointing for him.

59. I consider it is in the interests of justice to vary the decision and substitute a decision that the complaint of unfair dismissal is not made out.

Remedy

60. In view of my decision to vary my earlier decision, there is no need to list a remedy hearing.

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Employment Judge Adkin

Date 21 February 2024

JUDGMENT AND WRITTEN REASONS SENT TO THE PARTIES ON:

5 March 2024

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FOR THE TRIBUNAL OFFICE

Notes

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