



EMPLOYMENT TRIBUNALS

Claimant: Ms K Fogg

Respondent: Legal Brokers Limited

HELD AT: Manchester by CVP

ON: 11 March 2024

BEFORE: Employment Judge Fearon

REPRESENTATION:

Claimant: In person

Respondent: Ms Mayhew-Hills, representative

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unfair dismissal is not well founded and is dismissed.
2. The claim for wrongful dismissal (non-payment of notice pay) is well founded. The respondent has already paid to the claimant the sum due of £1,666.67.
3. The claimant's claim for holiday pay for 3 days is well-founded. The respondent has already paid to the claimant the sum due of £230.76.
4. The counter claim is dismissed on withdrawal

REASONS

Introduction

1. Ms Fogg was employed by the respondent as a conveyancing assistant from 15 September 2020 until her dismissal on 14 July 2023. Ms Fogg presented a claim on 22 August 2023 for unfair dismissal, notice pay and holiday pay.

The Issues for the Tribunal to decide

2. At the outset I discussed with the parties the issues in the case and the list of issues to be determined was agreed in relation to the claims for notice pay, holiday pay and unfair dismissal.
3. R had previously confirmed in writing prior to the hearing the counter claim was withdrawn.
4. The list of issues agreed with the parties is as follows:

Wrongful dismissal / Notice pay

- 1.1 What was the claimant's notice period?
- 1.2 Was the claimant paid for that notice period?
- 1.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Holiday Pay (Working Time Regulations 1998)

- 1.1 What was the claimant's leave year?
- 1.2 How much of the leave year had passed when the claimant's employment ended?
- 1.3 How much leave had accrued for the year by that date?
- 1.4 How much paid leave had the claimant taken in the year?
- 1.5 Were any days carried over from previous holiday years?
- 1.6 How many days remain unpaid?
- 1.7 What is the relevant daily rate of pay?

Unfair dismissal

- 1.1 Was the claimant dismissed?
- 1.2 If the claimant was dismissed, what was the reason or principal reason for dismissal and was it a potentially fair reason? The respondent says the reason was redundancy.
- 1.3 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:
 - 1.3.1 The respondent adequately warned and consulted the claimant;
 - 1.3.2 The respondent adopted a reasonable selection decision,
 - 1.3.3 The respondent took reasonable steps to find the claimant suitable alternative employment;
 - 1.3.4 Dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

1.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.1.1 What financial losses has the dismissal caused the claimant?

1.1.2 Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

1.1.3 If not, for what period of loss should the claimant be compensated?

1.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.1.5 If so, should the claimant's compensation be reduced? By how much?

1.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

1.1.7 If yes, did the respondent or the claimant unreasonably fail to comply with it?

1.1.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

1.1.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

1.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

1.2 What basic award is payable to the claimant, if any?

1.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Evidence

5. I considered the agreed bundle of evidence provided by the parties comprising 194 electronic pages as well as the statements of the claimant and the statements of Jonathan Hilton, Katherine Hamer, Kim Crook, Darren Fazackerley and Emily Hilton on behalf of the respondent.
6. The claimant gave sworn evidence. I heard sworn evidence on behalf of the respondent from Jonathan Hilton, a director of the respondent, and Katherine Hamer.

Findings of Fact

7. The claimant was employed by the respondent as conveyancing assistant from 15 September 2020 until her dismissal on 14 July 2023.
8. The respondent is a small limited company employing 10 people at 1 site. They provide various services including in relation to conveyancing services. The claimant's role was to convert conveyancing enquiries into case work for their panel of solicitors. The claimant was the only person employed in that role.

9. The claimant's employment contract at Section 9 deals with termination of employment and confirms that her notice period is 1 month and that payment in lieu of notice may be made. On 31 August 2023, the respondent paid the claimant her notice pay of £1,666.67
10. The claimant's employment contract at Section 5 sets out terms as to holidays. The holiday year begins on 1 January each year. The claimant was entitled to 21 days' holiday per year and public holidays in addition. The holiday request form in the hearing bundle sets out the holidays the claimant had requested in the holiday year from 1 January 2023. During the hearing, the claimant's accrued holidays were discussed after the parties had considered that issue further over the lunch break. The claimant agreed during the hearing that as at 14 July 2023, her accrued holiday entitlement was 14 days. She confirmed she had taken 11 days' holiday and accordingly agreed that her remaining holiday entitlement was 3 days; she was therefore, at the termination of her employment, owed for 3 days holiday accrued but not taken.
11. The respondent's business suffered a downturn in work, due to various factors including the outfall of the mini budget in September 2022, interest rate increases, inflation issues and the cost of living crisis. The income generated from the claimant's role sharply declined over the period she was employed by the respondent as follows:
 - 01/08/2020 - 31/07/2021 £160,948.99
 - 01/08/2021 - 31/07/2022 £105,791.34
 - 01/08/2022 - 31/07/2023 £60,702.50
12. In the period 01/07/2023 to 31/07/2023, the conveyancing income generated from the claimant's role was only £1,030.00.
13. The respondent considered and discussed the issues of the decline of work and lack of leads during meetings with staff, including at office meetings with all staff every Monday morning, which the claimant attended; the respondent's evidence on this was unchallenged.
14. Given the reduced income and workload the respondent took various steps to try and resolve the situation, including employing an agency to attract conveyancing leads (which was unsuccessful). As the claimant's workload within her role was much reduced, the respondent sought to offer her other work, including sending mailshots and adding content to the database of law firms and estate agents.
15. The significantly reduced income from the claimant's role was not covering costs and even with the additional duties the respondent had provided to the claimant, the position remained such that the respondent considered the claimant's role could no longer be financially supported. The respondent's evidence in this regard was unchallenged.
16. On Friday 14 July 2023, at around 3pm, the claimant was called in to a meeting with Jonathan Hilton and Katherine Hamer so that they could discuss with her the position of her role being at risk of redundancy.

17. In her ET1 claim form the claimant alleges in that meeting on 14 July she was asked about a reference request the respondent had received for her, told she no longer had a job and was asked to take her belongings and leave immediately. She states in her claim form no reason was given for the dismissal and only after raising a grievance was she told she had been made redundant. The respondent's position is that during the meeting on 14 July 2023 they told the claimant they needed to make her redundant and needed to discuss a redundancy package with her and that as soon as redundancy was mentioned, the claimant left the office of her own accord.
18. The reference request from NAWAS was received by Darren Fazackerley, the respondent's business development manager. During the meeting on 14 July the claimant initially said this reference request was a spam email and she had not applied for another position. She subsequently confirmed she had applied for a job and the proposed start date was 24 July 2024 but she had then declined the role, in part that was because she had not passed her driving test so could not travel to work for the start date and training. I find the respondent was confused as to whether or not the claimant was intending to take that role given the differing accounts she provided to them in discussions on 14 July 2023.
19. On 14 July Darren Fazackerley submitted the completed reference for the claimant for the NAWAS job (it being received by NAWAS at 17:26). The respondent was unclear from discussions with the claimant that afternoon whether or not she had wanted to take that role and they considered they were assisting her by completing the reference in case she wished to take up that role. I accept Mr Hilton's evidence that the respondent had no issue with the claimant seeking other jobs elsewhere.
20. The claimant's witness statement dated 5 January 2024 does not mention that redundancy was discussed with her on 14 July 2023 and states that salary reviews, a new team member and a reference request for her were discussed. During sworn evidence on cross examination it was put to the claimant that she was told her role was redundant during the meeting on 14 July 2023. The claimant's oral evidence was that the respondent never mentioned redundancy during that meeting. She said the respondent did not make her aware her position was at risk and she was told the respondent was letting her go and she should get her belongings, take 5 minutes to say goodbye to colleagues and then leave the premises.
21. I accept the consistent evidence of Mr Hilton and Ms Hamer, given in their statements and in oral evidence, that on 14 July 2023 they informed the claimant that it was the respondent's intention to make her role redundant and they needed to discuss that with her, including her redundancy package. I reject the claimant's sworn evidence and that in her witness statement dated 5 January 2024, that redundancy was not mentioned to her during the meeting on 14 July 2023. Her evidence is inconsistent with the contemporaneous documents. The claimant emailed the respondent on 15 July 2023, the day after the meeting. In that email she says the reason for her dismissal was unclear to her and that the job reference

and redundancy had both been discussed with her during the meeting the day before.

22. I find that during the meeting on 14 July 2023, the claimant, Mr Hilton and Ms Hamer discussed the reference request the respondent had received from NWS and the claimant's role being at risk of redundancy was also raised. I find the claimant was not asked to get her belongings and leave the premises and that she left of her own free will; it is of course understandable she would be upset when faced with a redundancy situation.
23. Approximately an hour after the claimant left the respondent's office, one of the claimant's relatives attended at the respondent's office and was abusive and aggressive towards the respondent's employees to the extent that Ms Hamer called the police. After that incident was dealt with it was beyond office hours, staff had left and there was no opportunity at that time to put together the proposed redundancy package in writing to confirm the position to the claimant in writing that day.
24. The next day, Saturday 15 July 2023 the claimant emailed the respondent raising a grievance saying she was unclear whether her dismissal was due to the reference request or redundancy, both reasons having been given during the meeting. She also raised that no fair process was followed.
25. The meeting on 14 July 2023 was the initial meeting to raise the issue of the claimant's role being at risk of redundancy. No formal process was followed thereafter in terms of meetings as the claimant abruptly left the 14 July meeting and in her email the following non-working day on 15 July she stated "I kindly request any correspondence from now on be in written format via email. Please do not call me, my anxiety cannot take it". The respondent was aware of the claimant's existing mental health issues, they acknowledged her request and respected her wishes. Accordingly, thereafter the respondent communicated with the claimant in writing, as she requested.
26. The claimant in her email to the respondent dated 15 July 2023 alleged that Mr Hilton had made sexual advances towards her which she had not responded to and she queried if that was a reason for her dismissal. She also confirmed in that email that she would be lodging a complaint with the employment tribunal. Given the allegation of sexual misconduct, Ms Hamer confirmed to the claimant in her email to the claimant dated Thursday 20 July 2023, that Mr Hilton would not take part in further written communications. Proposals were made to the claimant for termination pay but redundancy as the specific reason for dismissal was not confirmed in that email. The claimant replied she was taking the response as meaning this was not redundancy and she would proceed with her claim. On 21 July Ms Hamer emailed the claimant to confirm, as the claimant was already aware, the internet conveyancing work had all but disappeared, they had tried earlier to avoid redundancy if possible, by offering her alternative roles, and that the claimant's role, in the circumstances of a lack of work, no longer existed. The claimant replied to Ms Hamer by email on 21 July on various points and confirmed

she had lodged her claim with ACAS and would be pursuing a claim for compensation. The claimant did not follow up or pursue her allegations of sexual misconduct.

27. On 27 July 2023 Ms Hamer emailed the claimant to deal with the various issues raised including that claimant's role was redundant because of the vastly reduced conveyancing case load. The claimant replied by email on the same date raising issue that no processes were followed regarding redundancy.
28. Ms Hamer emailed the claimant on 31 July 2023 and confirmed her role was redundant and set out the respondent's calculation on payments due to her, being redundancy pay, holiday pay for 3 days accrued but not taken and notice pay. The respondent had paid the claimant the amount of her normal wages for the 2 week period after the meeting on 14 July 2023.
29. On 31 August 2023 the respondent paid to the claimant the net sum of £2,389.07, comprising redundancy pay of £769.24, 4 days' holiday pay of £307.69 and notice pay of £1,666.67.

Law

30. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95. In this case the respondent admits that it dismissed the claimant.
31. Section 98 ERA 1996 Act deals with the fairness of dismissals. Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Secondly, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.
32. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.
33. When section 98 refers to redundancy it is defined in section 139 ERA 1996. When considering redundancy under section 139(1)(b) ERA 1996, the starting point is the requirements of the business. A tribunal will not look behind the employer's decision or require it to justify how or why the diminished requirement has arisen, provided it is genuinely the reason for the dismissal: *Moon v Homeworthy Furniture* [1976] IRLR 298.

34. The leading case on establishing whether an employee has been dismissed by reason of redundancy is the EAT decision in *Safeway Stores plc v Burrell* [1997] IRLR 200, which was approved by the House of Lords in *Murray and another v Foyle Meats Ltd (Northern Ireland)* [1999] IRLR 562. In *Safeway*, the EAT formulated a three-stage test for applying section 139 of ERA 1996:

- 1) Was the employee dismissed?
- 2) If so, had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in section 139(1) of ERA 1996 exist)?
- 3) If so, was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2 above?

Only if the answer at all three stages is "yes" will there be a redundancy dismissal.

35. Redundancy is a potentially fair reason for dismissal (section 98(2) ERA 1996). An employer must act reasonably in treating that reason as sufficient to justify dismissing the employee (section 98(4), ERA 1996).

36. In considering the reasonableness of an employer's decision to dismiss, a tribunal should not impose their own standards and decide whether had they been the employer, they would have acted differently. They must ask whether the employer's decision to dismiss the employee by reason of redundancy fell within the band of reasonable responses: *Williams v Compair Maxam Ltd* [1982] IRLR 83.

37. The leading case on reasonableness in relation to redundancy is *Polkey*, in which the House of Lords held that the employer will normally not act reasonably unless it: (i) warns and consults employees, or their representatives, about the proposed redundancy; (ii) adopts a fair basis on which to select for redundancy; and (iii) considers suitable alternative employment within its organisation.

Submissions

38. The claimant says she was dismissed summarily on 14 July 2023 and it was unclear to her why. She denies having been made aware her role was at risk of redundancy and raised a grievance the following day regarding the reference request. She did not appeal her dismissal and says she was not aware she could appeal. She says two weeks later it was confirmed her role had been made redundant. She says proper processes were not followed in relation to the grievance she raised and the redundancy situation.

39. The respondent submits the claimant was dismissed by reason of redundancy. The respondent submits the claimant was aware of the difficulties in the business and the significant decline in income from her role. The respondent says they tried to discuss the redundancy process and package with the claimant but she abruptly left the initial meeting on 14 July and informed them the following day due to her anxiety they were only to communicate with her in writing, which made it difficult to

follow any process other than by emails, as would otherwise have been the case if oral discussions with the claimant had been possible .

Discussion and conclusions

Unfair Dismissal

40. It is agreed by the parties that the claimant was dismissed from her employment with the respondent with effect from 14 July 2023. I find the claimant was dismissed by reason of redundancy which is a potentially fair reason for dismissal under section 98(2).
41. The reason for the claimant's redundancy was the significant decline in the conveyancing side of the respondent's business and the significantly reduced income generated from the claimant's role meaning her role was not sustainable financially for the respondent's business. The claimant was the only person carrying out that role and only her role was at risk of redundancy. The requirements of the respondent's business for employees to carry out work of a particular kind had diminished. It is clear from the evidence that there was a genuine business rationale for the business decision taken to make the claimant's role redundant. The claimant did not challenge the respondent's rationale of needing to make financial savings in their business.
42. The claimant was aware from weekly Monday meetings which all staff attended that there was a decline in the conveyancing work and lack of leads for that work. As a result of this and the consequent reduction in her workload, she had been asked to take on alternative work with a view to moving her to an alternative role.
43. The claimant attended a meeting on 14 July 2023 with Mr Hilton and Ms Hamer. At that meeting she was told her role was being made redundant and that the respondent wanted to discuss the process and a redundancy package with her. The claimant abruptly left the meeting when redundancy was mentioned so the respondent had no further opportunity that day to discuss the redundancy process or package with her.
44. The claimant raised a grievance on Saturday 15 July 2023, the day after the meeting, including amongst other things that she was unsure if she was dismissed for requesting a reference or by reason of redundancy. She asked the respondent not to contact her by phone and to only contact her in writing, which limited the respondent's ability to fully engage with her in any processes relating to the grievance or redundancy thereafter. Mr Hilton who was involved in the initial meeting on 14 July regarding redundancy also stepped back from involvement in the process given the claimant's allegation against him, made by email on 15 July, of sexual misconduct.
45. The respondent dealt with the issues raised in the claimant's grievance, by way of written correspondence, as the claimant had requested in her email dated 15 July 2023. Various emails passed between the claimant and respondent about the

issues, including about redundancy in emails on 21 and 27 July and then by email dated 31 July 2023, the respondent gave further clarification of the redundancy position and set out their calculations of the sums due to the claimant.

46. The respondent is a small undertaking with 10 employees. They do not have a dedicated HR team. It is reasonable that they did not confirm the redundancy position in writing on 14 July 2023 after the meeting with the claimant, given the events which followed the meeting, of the claimant's relative being abusive at their offices and the police needing to be called, and the timings thereof extending beyond business hours for relevant employees. The respondent engaged with the claimant as best they could following the grievance she raised on 15 July 2023 in light of her wish not to engage with them verbally at all. Even had there been verbal discussions in addition to the written communications, it is likely the claimant would have been made redundant in any event.
47. In the months prior to the meeting on 14 July 2023, the respondent had offered the claimant alternative work given work in her own role had diminished. Alternative roles were not explored further with the claimant after she made it clear on 21 July 2023 that she had no confidence in the respondent's management team and did not wish to be employed by the respondent.
48. Overall, the respondent's decision to dismiss the Claimant by reason of redundancy fell within the band of reasonable responses available to it. The respondent made a considered decision in relation to the claimant's redundancy after considering the financial position over months with regard to the falling workloads and significantly reduced income and trying to allocate alternative work to her. The respondent consulted with the claimant initially verbally on 14 July 2023, albeit discussions were limited as the claimant chose to leave the respondent's offices abruptly when the redundancy issue was raised. The respondent then communicated with the claimant in writing, as the claimant requested due to her anxiety, responding in that manner to the issues she raised. I find in all the circumstances that the claimant was fairly dismissed, the claimant's claim of unfair dismissal is not well-founded and is dismissed.

Notice pay

49. It was agreed by the parties during the hearing that the claimant's notice period was 1 month as is clear from her employment contract. The claimant confirmed she had received payment from the respondent of that 1 month's pay which is also clear from the documents showing the breakdown of payments made. The claim for wrongful dismissal (non-payment of notice pay) is well founded. The respondent has already paid to the claimant the sum due of £1,666.67.

Holiday pay

50. The claimant, as she agreed during discussions in the hearing, at the termination of her employment was entitled to 14 days holiday and she had taken 11 days

holiday and was accordingly entitled to be paid for 3 days holiday accrued but not taken at the date of termination of her employment. She was paid by the respondent for 4 days holiday and has therefore been overpaid by 1 day for holiday pay. The claimant's claim for holiday pay for 3 days is well-founded. The respondent has already paid to the claimant the sum due of £230.76.

Employment Judge Fearon

Dated: 3 April 2024

JUDGMENT AND WRITTEN REASONS SENT TO THE PARTIES ON
19 April 2024

FOR THE TRIBUNAL OFFICE

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>