



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107277/2023

Held in Edinburgh on 16-18 April & 8 May 2024

Employment Judge Sangster

Mr C Smith

**Claimant
Represented by
Mr D Stevenson
CAB Representative**

East Lothian Council

**Respondent
Represented by
Ms K Sutherland
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

- the claimant's complaint of unfair dismissal does not succeed and is dismissed; and
- the claimant's complaints for wrongful dismissal and failure to pay a statutory redundancy payment are dismissed following withdrawal.

REASONS

Introduction

1. The claimant presented a complaints of unfair dismissal, wrongful dismissal and failure to pay a statutory redundancy payment. The complaint of wrongful

E.T. Z4 (WR)

dismissal was withdrawn at the commencement of the final hearing. The complaint for failure to pay a redundancy payment was withdrawn during submissions.

5 2. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was some other substantial reason, a potentially fair reasons for dismissal, which arose as a result of a restructure. The respondent maintained that they acted fairly and reasonably in treating some other substantial reason, as sufficient reason for dismissal.

10

3. The respondent led evidence from:

- a. Lynn Crothers (**LC**), Service Manager, Protective Services;
- b. Shona Grant (**SG**), Team Manager, Environmental Protection;
- 15 c. Sharon Saunders (**SS**), Head of Communities; and
- d. Lesley Brown (**LB**), Executive Director.

4. The claimant gave evidence on his own behalf.

20 5. A joint set of productions was lodged, extending to 417 pages.

6. Other individuals mentioned in the Judgment are:

- a. Alexa Paterson (**AP**), HR Business Partner for the respondent.

25 **Issues to be Determined**

7. In submissions, the claimant conceded that the respondent had demonstrated that the principal reason for dismissal was some other substantial reason, which is a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**). The principal reason for dismissal was accordingly not redundancy.

30

8. The only remaining issues in this case were accordingly:

- a. Was the dismissal fair or unfair in accordance with s98(4) ERA?
- b. If the claimant was unfairly dismissed what compensation should be awarded?

5

Findings in Fact

9. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if the claim succeeds or fails. If a particular point is not mentioned, it does not mean that it has been overlooked, it simply means that it is not relevant to the issues to be determined. The relevant facts, which the Tribunal found to be admitted or proven, are set out below.
10
10. The claimant left school with 2 Highers, in Biology and History. He went on to secure Higher English at night school and later gained a College Diploma in Social Work Studies and an HNC in Business Management. He served in the army and in the police service, and undertook a number of other roles, before taking up a role with the respondent.
15
11. The claimant commenced employment with the respondent, as a Waste Management Officer, in November 1993. In 2004 he became an Environmental Protection Officer. Whilst he initially carried out the full range of duties as an Environmental Protection Officer, he also became lead officer for abandoned vehicles at that time. This gradually took up more and more of his time. By 2008 he was concentrating solely on abandoned vehicles, undertaking other duties only very occasionally.
20
25
12. LC commenced working with the respondent as Service Manager for Protective Services in May 2020. She has two Honours Degrees - in Environmental Health and Environmental Science, and a postgraduate qualification in Professional Practice in Environmental Health. She has worked in Environmental Health since 2000, in various roles - initially as an
30

Environmental Health Officer and, immediately prior to joining the respondent, as Manager of the Environmental Protection Team at Scottish Borders Council. She is currently President of the Royal Environmental Health Institute of Scotland

5

13. In her role with the respondent, LC was responsible for 6 teams within Protective Services, namely: Trading Standards; Food and Safety; Public Health & Environmental Protection; Safer Communities; Emergency Planning, Risk & Resilience; and Corporate Health & Safety.

10

14. LC was aware, when she started in her role with the respondent, that a Service Review had been contemplated for a number of years and that the expectation was that she would progress and complete that. While her ability to do so was initially delayed by the Covid-19 pandemic, she took steps to review the existing structure and, in April 2022, issued a document entitled 'Protective Services – Service Review & Redesign Proposals' (the **Proposal Document**), for consultation. This set out the current structure and remit of Protective Services and the teams within it, the proposed redesigned structure and the rationale for the proposed changes. The Proposal Document noted that the review was not conducted to achieve savings, but to improve working practices, performance and efficiency. In relation to Public Health & Environmental Protection, the Proposal Document stated LC's view that the team had *'a number of system and process 'Points of Failure' where there is a reliance on one officer to carry out a critical function'*. Abandoned Cars was included as one of the points of failure identified. She detailed her proposal that these posts should be deleted and new, more general, roles be created to ensure responsibility for critical functions was carried out by a number of individuals, rather than one. Appended to the Proposal Document were existing and proposed structure charts and job descriptions for the roles in the proposed new structure.

15

20

25

30

15. All staff in Protective Services were sent the Proposal Document, with all appendices, on/around 8 April 2022. They were also provided with a power point summary of the proposals, the proposed method and timeline for

consultation and a consultation pro-forma, requesting individual feedback on the proposals.

- 5 16. Consultation then took place in relation to the proposals. The key stages in the consultation process are summarised as follows:
- 10 a. Individual consultation initially took place in the period from 8 April to 17 June 2022. Employees were initially invited to complete the pro-forma setting out their views on the proposals. Individual consultation meetings were then held on a 1-2-1 basis.
- 15 b. Collective consultation took place with the respondent's recognised trade unions: Unison, Unite and GMB. This covered the proposals set out in the Service Review, the proposed new structure, the proposed new job descriptions and the process to be adopted in implementing the proposals, once agreed. Formal meetings with the trade unions took place on 10 & 23 May, 1 & 10 June, 21 July & 28 November 2022.
- 20 c. Joint Statements were issued to all staff following each of the first 4 collective consultation meetings, setting out what had been discussed and agreed and next steps.
- 25 d. After the fifth collective consultation meeting a document detailing frequently asked questions, and the Service Management's response to each of those, was issued to all staff. This explained the proposed matching process, where staff were in roles which may be deleted.
- 30 e. The process of evaluating and grading each of the roles new structure took quite some time, and was not completed until the end of May 2023. Review meetings with the trade unions took place during that time and updates were provided to all staff.

- 5 f. Revised proposals were sent to all staff on 12 June 2023, incorporating a number of changes to the proposed structure, which had been introduced and agreed during the individual and collective consultation process, as well as grades for each of the roles. This explained that, once the revised proposals were formally approved, following the conclusion of the consultation process, the implementation stage would commence, whereby displaced staff would be matched into roles in the new structure.
- 10 g. On 25 August 2023, staff were informed that the structure, which had been sent to staff on 12 June 2023 had been approved and the matching process would now commence. The matching process, and individual consultation in relation to this, was explained.
- 15 h. Individual consultation then took place in relation to matched roles for displaced staff.
17. The matching process was conducted by LC, supported by AP. The respondent's procedures state that, where possible, displaced employees should be matched into the same or broadly similar posts i.e. a role which is
20 *'broadly similar to the employee's current post in terms of status, remuneration level, location of post, hours of work and/or one which the employee is able to evidence that they have at least 80% of the necessary competencies, experience and skill set to undertake the role.'*
- 25 18. On 28 August 2023, the claimant was informed, at a meeting and in writing, that he had been matched to the role of Community Protection Officer. This was the role to which the respondent's statutory duties regarding abandoned vehicles would be allocated to. The claimant had the necessary
30 competencies, experience and skill set to undertake the role. This was however a lower grade role (7 rather than 8), so had a lower salary (although there would be pay protection for 3 years), with a requirement to work shifts and weekends (the claimant worked compressed, fixed, hours Monday to Thursday). On 31 August 2023, the claimant rejected that role.

19. As a result of the claimant's rejection of the role he was initially matched to, consideration was given to alternatives. On 6 September 2023, LC confirmed there may be other posts in the new structure which may be suitable for the claimant, namely Senior Community Protection Officer and Environmental Compliance Officer, both of which were grade 8. Both were the same salary as the claimant's existing role and neither involved evening or weekend working. LC provided detailed job descriptions for each to the claimant and invited him to submit a personal profile form, if he was interested in either/both of the posts. The claimant was informed that a matching interview would be scheduled, if he was interested in the roles.
20. The claimant submitted his personal profile form on 7 September 2023, stating that he only wished to be considered for one of the roles, namely Environmental Compliance Officer. He was interviewed for that role on 13 September 2023 by LC and AP. At interview the claimant provided examples of work he had undertaken over 20 years ago, prior to him becoming lead officer for abandoned vehicles, to support his application.
21. Having reflected on matters following the interview, LC concluded that the role of Environmental Compliance Officer was not a suitable match for the claimant. The principal reason for this was that one of the essential requirements for the role was that the individual be *'educated to HND level in a relevant scientific/engineering discipline or able to demonstrate equivalent knowledge, skills and experience'*. The claimant did not have an HND. He had an HNC, but this was in Business Management, not in a scientific/engineering discipline. LC concluded, from the interview conducted, that the claimant did not demonstrate that he had knowledge, skills and experience equivalent to an HND in a relevant scientific/engineering discipline. This was required as the role encapsulated contaminated land, air quality and noise control and would involve review and analysis of technical information. In addition, knowledge of geology, soil science, chemistry and how pollutants could impact human health was required. Based on the

information and examples he provided at interview, LC concluded that the claimant had little/no relevant experience, skills and knowledge and would be unable to undertake the role. From the structured questions asked at the interview, related to the requirements of the role, the claimant was allocated a score of 24% and was deemed not to be a match for the role.

22. LC wrote to the claimant and informed him of this on 14 September 2023. She stated however that she had identified that the role of Senior Community Protection Officer was a suitable match. She stated that *'although you do not have direct experience in dealing with anti-social behaviour, you do have experience as a police officer and transferrable skills that are broadly comparable with the requirements of the post such as investigative skills, communications skills, mediating and negotiating, providing customer service, dealing with challenging behaviours and using your initiative'*. She confirmed that the role was the same grade, salary and number of hours as the claimant's current role. Alternatively, she confirmed that it was still open to the claimant to accept the Community Protection Officer role. The claimant was invited to discuss these options further with LC, or to simply to provide confirmation of his preference by 21 September 2023.

23. The claimant sent an email to LC on 20 September 2023, stating that he would be discussing matters with his lawyer the following week and would be in touch after that. The claimant was placed on paid leave, pending that meeting.

24. On 26 September 2023 he sent an email headed 'Appeal against dismissal as EPO'. He was informed, later that day, that he had not been dismissed, but was on paid leave.

25. By letter dated 6 October 2023 from SS, the claimant was invited to a 'final consultation/consideration of dismissal meeting on 17 October 2023'. The letter summarised the consultation process to date. It confirmed that the alternative employment options previously identified would be discussed again at the meeting. A list of all current vacancies was also attached, for

consideration. The claimant was informed that, if he was interested in any of the current vacancies listed, he should provide confirmation of that at least 2 working days in advance of the meeting. He was informed that a potential outcome of the meeting was his dismissal.

5

26. The meeting was postponed, to 25 October 2023, at the claimant's request. The claimant did not express an interest in any of the current vacancies, from the list sent to him, in advance of the meeting.

10 27. At the meeting on 25 October 2023, the following key points were discussed:

15

a. In relation to the Environmental Compliance Officer role, SS explained her understanding of why the claimant was not found to be a suitable match for the role. The claimant disputed that he did not have the minimum technical knowledge or skillset required for the role. He was provided with a further opportunity to provide supplementary information, and any evidence of skills and transferrable experience, to allow the outcome of his interview to be reconsidered. He was unable to provide any additional information at the meeting and was informed that any additional information/evidence should be submitted by 1 November 2023.

20

25

b. In relation to the Community Protection Officer role, the claimant stated that he did not accept the role, given the requirement to work weekends and evenings, on a rota basis.

30

c. In relation to the Senior Community Protection Officer role, the claimant stated that he may now be interested in undertaking that role, if it could be undertaken working compressed hours. It was agreed that a meeting would take place with the claimant, LC and others, to ascertain if this was possible, and the claimant should then confirm whether he accepted that role by 5pm on 1 November 2023.

d. SS informed the claimant that, if no viable alternatives were identified by 1 November 2023, the claimant would be dismissed for some other substantial reason.

5 28. A meeting was arranged for 30 October 2023, with the claimant, LC and others, to discuss the claimant undertaking the Senior Community Protection Officer role on a compressed hours basis. At the outset of the meeting the claimant confirmed that he no longer wished to discuss the option of compressed hours for that role, as he had concluded that he did not wish to
10 accept the role, even if compressed hours were offered. He stated that he felt he should be offered a trial period in relation to the Environmental Compliance Officer role instead. He did not however provide any supplementary information, or any evidence of skills and transferrable experience, in relation to that role, as had been discussed at the meeting with SS on 25 October
15 2023.

29. SS, LC and AP then met to consider the position. They concluded that the purpose of the Environmental Compliance Officer role was to provide technical and specialist support in connection with the respondent's statutory
20 duties. This included tasks and activities related to contaminated land, local air quality management and noise. It may also include responding to environmental incidents and pollution events and involve decisions on, for example, how an area of contaminated land should be remediated to protect the public from harm. It would involve activities and tasks such as sampling,
25 investigations, review of technical information, providing science-based technical advice, data analysis and scientific report writing. The post-holder would require to be comfortable analysing data, using modelling techniques and have an understanding of the physical environment e.g. geology, hydrology, soils etc. They concluded that the claimant had not
30 demonstrated that he had the necessary skills, knowledge and experience to do so in his personal profile form, his interview or when subsequently provided with a further opportunity to provide additional information/evidence of skills and transferrable experience, relevant to that role. They concluded

that the gap between the claimant's skills and knowledge and the basic/minimum requirements for the role were so significant that, appointing the claimant to the role, even on a trial basis, would pose a significant risk to human health, with the potential of environmental liabilities and reputational damage. A trial period in the role would accordingly not be offered. It remained the case that the claimant did not meet the essential criteria for the role, did not have the necessary knowledge, skills or experience to undertake the role and was not a suitable match for it.

5
10 30. SS considered the position and concluded that there were no further potentially viable alternatives to consider: The claimant had declined the two potentially suitable roles which had been identified; had not expressed an interest in any other roles; and his previous role no longer existed in the respondent's structure. In these circumstances, SS concluded that there was
15 no other option but to dismiss the claimant, with 12 weeks' pay in lieu of notice, for some other substantial reason. This was confirmed in a letter to the claimant dated 1 November 2023, in which he was informed of his right to appeal.

20 31. The claimant appealed by letter dated 8 November 2023. He attended an appeal hearing, conducted by LB, on 28 November 2023. She considered each of his grounds of appeal, but concluded that his appeal should not be upheld. She confirmed this in writing, by letter dated 5 December 2023, setting out a detailed response to each ground of appeal and why she
25 concluded this should not be upheld.

32. The claimant was the only individual who did not accept a role in the new structure and who was dismissed as a result.

Relevant Law

30
33. S94 ERA provides that an employee has the right not to be unfairly dismissed.

34. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA). 'Some other substantial reason' is one of the permissible reasons for a fair dismissal (section 98(1)(b) (section 98(1)(b) ERA).

5 35. 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 (*Iceland Frozen Foods Limited* [1982] IRLR 439).

15 **Submissions**

36. The respondent submitted that the reason for dismissal was the restructure of their organisation, which amounted to some other substantial reason for dismissal. The claimant was not dismissed for redundancy. They submitted that the respondent followed a fair procedure in treating the restructure of their organisation as some other substantial reason and as sufficient reason to dismiss the claimant: they carried out appropriate individual and collective consultation; appropriately considered alternative roles for the claimant - reaching conclusions which were open to them in the circumstances; and they followed a fair process.

37. The claimant accepted that the respondent had demonstrated that the reason for dismissal was some other substantial reason, rather than redundancy. He submitted however that the respondent did not act reasonably in treating this as a sufficient reason for dismissal. In relation to this he submitted that:

a. The consultation process was inadequate. It was not fair or reasonable. The proposal that the claimant's role be deleted was not altered during

consultation and he could not input in the consultation process until he knew which role he would be matched into in the new structure.

b. The respondent did not follow their own procedures in relation to matching.

5

c. The claimant ought to have been matched into the Environmental Compliance Officer role, or at very least been afforded the opportunity of a trial period in that role.

Discussion & Decision

10

38. It was accepted by the claimant that the respondent had shown that the reason for the claimant's dismissal was some other substantial reason, a potentially fair reason for dismissal. In the Tribunal's view, this concession was appropriate. There was no redundancy situation, as there was no diminution in the work to be undertaken in relation to abandoned vehicles, it was simply being redistributed. The Tribunal was satisfied that the reason for the claimant's dismissal was the restructure of Protective Services and, in particular, the decision to restructure how the work in relation to abandoned vehicles was undertaken. There were sound, good business reasons for the restructure.

15

20

39. The Tribunal considered s98(4) ERA. The Tribunal had to determine 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 the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. 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* [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. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If

25

30

no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

40. The Tribunal found that the respondent's decision to dismiss the claimant fell well within the band of reasonable responses open to them in the circumstances. It cannot be said that no reasonable employer would have dismissed the claimant in these circumstances. In reaching a conclusion, the Tribunal took into account a range of factors, as follows:
- 5 a. The Tribunal accepted that there were sound, good business reasons for the respondent to review the way they operated Protective Services and, in particular, to restructure how the work in relation to abandoned vehicles was undertaken. This led to the claimant's role being removed from the respondent's structure.
 - 10 b. The respondent reasonably and appropriately consulted their recognised trade unions on the proposals set out in the Service Review, the proposed new structure, the proposed new job descriptions and the process to be adopted in implementing the proposals, once agreed. Changes were made to the proposals in the course of consultation and the trade unions were satisfied with the revised proposals, which were circulated to all staff on 12 June 2023 and subsequently approved.
 - 15 c. Appropriate and reasonable individual consultation also took place in relation to the proposals generally and the particular impact on individual employees. In relation the consultation with the claimant, the respondent engaged with him to seek to identify further roles, when he indicated that he would not accept the role he was initially matched into.
 - 20 d. The respondent followed their matching process in considering what role the claimant should be matched into. The respondent's process required that displaced employees should be matched into the same or broadly similar posts i.e. a role which is *'broadly similar to the employee's current post in terms of status, remuneration level, location of post, hours of work*
 - 25
 - 30

and/or one which the employee is able to evidence that they have at least 80% of the necessary competencies, experience and skill set to undertake the role. (Emphasis added). The Tribunal accepted that the claimant had 'at least 80% of the necessary competencies, experience and skill set' to undertake the Community Protection Officer and Senior Community Protection Officer roles. In addition, in relation to the Senior Community Protection Officer role, that role was equivalent to the claimant's role in terms of status, remuneration level, location of post and hours of work.

- 5
- 10
- 15
- 20
- 25
- 30
- e. Whilst the Tribunal could understand the claimant's unwillingness to move to the Community Protection Officer role, given the lower grade, salary and requirement for evening and weekend working, those were not factors which were present in the Senior Community Protection Officer role. His objection to that role was the duties it involved. He accepted however that he could do the role. He just did not want to do so.
 - f. The Tribunal accepted LC's evidence that the claimant was not qualified to undertake the role of Environmental Compliance Officer, even on a trial basis, for the reasons set out in paragraphs 21 & 29 above. Given LC's qualifications and experience, as set out in paragraph 12, the Tribunal accepted that she understood the requirements of the role and was well placed to assess whether the claimant had the necessary competencies, experience and skill set to undertake the role. She cogently explained her reasons for reaching the conclusions she did.
 - g. No other alternatives were identified by the respondent or the claimant.
 - h. The claimant was the only individual who did not accept a role in the new structure and who was dismissed as a result.
 - i. The respondent followed a fair procedure. The claimant was warned that he could be dismissed, if a viable alternative role was not identified for him. He was invited to a meeting at which he could put forward his views and these

were then considered/explored before a decision was made. He was given the opportunity to appeal, and a fair process was followed in relation to that.

- 5 41. The Tribunal therefore concluded that acted reasonably in treating the restructure of their operations as a sufficient reason to dismiss the claimant and the claimant's dismissal was fair. His complaint of unfair dismissal accordingly does not succeed and is dismissed.

10

Employment Judge: M Sangster
Date of Judgment: 10 May 2024
Entered in register: 10 May 2024
and copied to parties