EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100142/2017

Held at Aberdeen on 3 and 4 August 2017

Employment Judge: Mr J Hendry (sitting alone)

Mrs Shirley Wilson	**Claimant** **Represented by:** **Mr F Lefevre** **Solicitor**
Lows Traditional Ltd	**Respondent** **Represented by:** **Mr D Low**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The claimant's application for a finding of unfair dismissal succeeds, and

2. The respondent shall pay the claimant a monetary award amounting to Five Thousand Six Hundred and Twenty Nine pounds and Ninety Four pence (£5629.94) and that the prescribed element of the award is £2525.90 and as the monetary award exceeds the prescribed element by £3104.05 and that sum is immediately due to the claimant.

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3. That the respondent shall pay the claimant the sum of One Thousand, Three Hundred and Forty-Nine Pounds and Eighty-Two Pence (£1349.82) in lieu of notice.

4. That the respondent shall pay the claimant the sum of £1200 being reimbursement of the fees paid by her to the Employment Tribunal Service.

REASONS

1. The claimant in her ET1 sought a finding that she had been unfairly dismissed from her employment as a Catering Supervisor with the respondent company. The respondent argued that the claimant had been fairly dismissed on the grounds of redundancy and that she was not entitled to a redundancy payment as suitable alternative employment had been offered to her. Further they argued that she was not entitled to notice pay as she had not worked her notice.

Issues

2. The principal issues for the Tribunal were whether or not the claimant had been fairly dismissed on the grounds of redundancy and whether she had been offered suitable alternative employment disentitling her to a redundancy payment. The Tribunal had to consider the process adopted and whether the claimant was entitled to notice.

3. The evidence before the Tribunal was generally straightforward. The Tribunal had the benefit of an Inventory of Productions prepared by the claimant's solicitors which incorporated the documents to which both sides referred. The Tribunal heard evidence from Mr. Low a Director and major shareholder in the respondent company in support of his company's position and from the claimant.

Facts

4. The respondent company owns and operates a fish and chip shop business situated in Westhill a suburb of Aberdeen. They employ between 12 and 13 full

time equivalent employees who work in the chip shop on a rota. The business has a substantial turnover and access if required to legal advice. It has no dedicated HR. adviser. The majority shareholder is Mr. David Low who is a Director of the company. The company has one other Director namely Ms Kara Bruce, Mr Low's partner.

5. The claimant had long experience in the catering industry as a cook. She joined the company on 15 March 2007. At the date of the hearing she had 9 years service and was 57 years old. The claimant was paid at the rate of £9 per hour. She worked a two week rotation. On one week she would work two days and on the next week she worked three days. She worked 7.45am to 2.15pm. (**JBp66**). Her net weekly wage was £149.98.

6. One of the reasons the claimant had joined the respondent was that the work offered to her was in the morning and over lunchtime. She wanted to work mornings and early afternoons only and keep the rest of the day free. Her life was organised around these hours and had been for some years. Mr Low was aware of this.

7. The claimant prepared fillings for sandwiches and paninis and non fried cooked meals such as baked potatoes mostly for the lunchtime trade. She did not fry food. She was well thought of and had a clean disciplinary record.

8. For various reasons including the downturn in the oil industry the respondent company noted that lunchtime trade had slackened. Mr. Low decided that one member of staff should be made redundant. Evening trade remained busy and he needed staff for evening shifts.

9. There were four employees who worked mornings/lunchtime one of which was the claimant. Mr Low met the four employees concerned 11 November 2016. He advised them that there was going to be one redundancy. He made reference to selection criteria that he intended to use namely to select the employee namely.

- Absence and attendance

- Disciplinary records
- Performance
- Skills and experience

There had been no previous redundancies. Staff did not know what was meant by the categories and in particular which skills and what experience was to be important. There was no proposed scoring system. Mr. Low did not go into detail as to what these categories would encompass or what they meant in practice. The claimant understood that a consultation process was underway and waited to hear more about what would happen. There was no discussion about re-deploying staff to the evening rota or about alternative methods of avoiding redundancy such as cost cutting or cuts in hours. There was no discussion as to whether other staff members might be prepared to work in the evenings. Mr. Low did mention voluntary redundancy but when asked what that would amount to was unable to answer. He subsequently did not advise staff about what sum of money they would receive if made redundant.

10. The claimant was at work on Monday 14 November. She was not approached by Mr Low nor did he speak to her that day about the proposed redundancy.

11. On Friday 17 November Mr. Low approached the claimant. He handed her a letter dated 17 November 2016 (**JBp50**). The letter stated:

> "***LOWS TRADITIONAL LTD – REDUNDANCY/OFFER OF ALTERNATIVE EMPLOYMENT***
> *Following our consultation meeting at the shop on Friday 11th November 2016, I write to confirm that your job has become redundant with effect from Monday 21st November 2016.*
> *As discussed during the consultation this is necessary following a downturn of business.*
> *This decision was reached after carrying out an internal points scoring system based on the skills of each employee.*
> *The company is able to offer you alternative employment, still as a Catering Supervisor, with a shift starting time of 4.30pm. Your existing rotation of '2 days one week and 3 days the following week' can be maintained. You are free to choose any days that would suit you and the company would maintain the existing number of hours worked and the existing hourly rate of pay. You have the right to a trial period of 4 weeks, beginning the date you start the new job.*

If you decide against this offer of alternative employment you will be entitled to the statutory notice period commensurate with your age and length of service.
I would be grateful if you would confirm your acceptance of this offer."

12. The claimant was shocked and upset at receiving the letter. She had understood that further consultation would take place. She did not know why she had been chosen over other staff and was not told what the scores were or how they were calculated. She was given no right of appeal. She said that she had a difficulty working in the evenings. She mentioned that she did not want to work with the Supervisor, Tracy, with whom she did not get along.

13. The claimant felt that she was unable to work in the evenings as required by the alternative role being suggested by Mr. Low. She would not have been able to support her daughter, who was a nurse, by looking after her two pre-school children. Mr. Low was aware that the claimant looked after her grandchildren for her daughter. This required her to pick them up from nursery and she would have been unable to start any shift at 4.30 as she would still be looking after them then. In addition the claimant had never worked in the evenings apart from one occasion where she provided temporary Christmas cover. The job in the evening would be materially different from the claimant's job in that there would be no preparation of ready meals, fillings etc. for the lunchtime trade. The job would be serving customers and frying food.

14. The claimant immediately contacted the Citizens Advice Bureau. She treated the letter from Mr. Low as dismissal. On advice from them she wrote to Mr. Low on 20 November (**JBp51**).

"*Dear David*
I am writing with regard to your letter dated 17th November 2016 where you informed me that my position had become redundant with effect from 21st November 2016.
I do consider that the statutory procedures regarding the consultation and selection have not been followed and I would like to express my disappointment at this.
I acknowledge that you have offered me what you consider to be "suitable alternative position" of Catering Supervisor. I do not, however, consider this to be suitable alternative due to the fact that whilst the job

title remains the same, the duties are entirely different to my current position. However, more importantly, the radical change in my working hours is not suitable for my family commitments.
In respect of above, I would request that you pay me my statutory redundancy entitlement according to my age and length of service, along with any outstanding holiday pay in lieu of notice.
I have taken advice from both ACAS and Citizens Advice Bureau. They have advised me that if you do not follow these statutory procedures I will be left with no alternative but to progress this matter further to the stage of Employment Tribunal.
I look forward to a prompt reply from yourself with regard to above."

15. Mr Low responded by letter dated 21 November 2016 (**JBp52**). He set out what he had done. He indicated that he had followed the ACAS 'Handling Small-Scale Redundancies – A Step by Step Guide' during the process. He said that the pool of staff at risk of redundancy "was obvious and identified as the four morning/lunchtime staff due to the downturn of business during this period of business". He indicated that the selection criteria was, absence and attendance, disciplinary records, performance and skills and experience. He wrote *"It was outlined in my letter dated 17th November 2016 and confirmed to Shirley in a face to face individual meeting on 17th November 2016 that her job had become redundant with effect from Monday 21st November 2016. I confirmed in the same letter that she would be entitled to the statutory notice period commensurate with her length of service.*" Mr. Low also indicated that he wanted the claimant to work her nine week notice period. He wrote that he had offered her alternative employment and that he could be flexible about this. He stated that she had indicated that she did not want to work with "Tracey". He added that if the offer of suitable alternative work was rejected then she would forfeit a right to redundancy payment. He indicated that he would be willing to meet her face to face.

16. The claimant had previously asked to meet Mr. Low to discuss matters but he had told her that he did not want to do so unless he had representation.

17. Mrs. Wilson responded to Mr. Low by letter dated 23 November 2016 (**JBp56**).

"*Dear Mr Low,*

In response to your letter of 21 November 2016 I write to advise that notice of my redundancy was given to me in writing on 17 November 2016 and in that letter, it confirmed my position was redundant from 21 November 2016.
The offer of suitable alternative employment was considered but deemed to be unsuitable and was turned down, this was not unreasonable due to the shift start and finish times that were being offered which as you know from my existing arrangements are unsuitable.
As the offer was declined I considered my position to be redundant from 21 November 2016 as per your original letter. I am therefore entitled to

- *statutory redundancy pay which is one and a half weeks pay per years' service,*
- *one week's pay in lieu of notice for each year of service and,*
- *outstanding holiday pay.*

I would be grateful if you could confirm when these payments will be made and when I can expect to receive my P45."

18. Mr Low responded by letter of 25 November (JBp57).

"*It was made very clear during our meeting on Thursday 17th November 2016 that in order for you to be paid for your entitled 9 week notice period I would require you to work the full 9 week notice period. This was also stated in my letter to you of 21st November 2016.*
As you have rejected the offer of suitable and reasonable alternative employment you forfeit the right to a redundancy payment."

19. Accrued holiday pay was paid to the claimant by the respondent.

20. Mrs. Wilson wrote to Mr. Low again on 29 November (JBp58).

"*Due to further advice from the Citizens Advice Bureau (CAB) given to me today 29th November 2016.*
They have clarified that my effect(ive) date of termination was the 21st November 2016 and there was no stated requirement for me to work notice, if so that would have altered my date of termination."

21. The Citizens Advice Bureau wrote to the respondent on the claimant's behalf on 29 November. They wrote:

"…. *our clients effective date of termination, as stated on your letter of 17/11/16, was given as 21/11/16, with no mention that she was required to work her 9 week notice period. If working this 9 week period was required by you, this fact should have been stated in the letter and her termination date altered to reflect this fact. When a termination date is set by an employer and issued to an employee, legally it cannot be altered*."

22. Mr. Low wrote to the Citizens Advice Bureau on 2 December (**JBp61**) indicating that he had provided details of the statutory procedures and consultation that he had undertaken and advised Mrs Wilson verbally and in writing that she would be required to work her notice. He reiterated that suitable and reasonable alternative employment had been offered. At or about this time the claimant was signed off as being unfit to work through a 'stress' related condition.

23. On 8 December Mr. Low wrote to Mrs. Wilson indicating that one of the staff had resigned and offering her the post. The letter stated it was for thirty four and a half hours per week.

24. The Citizens Advice Bureau responded to Mr. Low on 9 December (**JBp63**) on behalf of the claimant. They noted that the vacancy was for full time hours which was not acceptable to the claimant.

25. Following her dismissal the claimant looked or work. She was briefly in receipt of Job Seekers Allowance. She made efforts to obtain work. Eventually she obtained a job as a part-time cleaner working at TC Facilities Management earning £54.81 per week. The differential between her current weekly earnings and her previous earnings amounts to £95.17 per week. The clamant had earned £1370.25 in her new employment until 21 July 2017.

Witnesses

26. I found the claimant to be a wholly credible and reliable witness who gave her evidence in a clear and convincing manner. I found the respondent's Director Mr. Low to be mostly credible and reliable although I did not accept his evidence on a couple of crucial matters particularly that he had a meeting with the claimant and other staff on the 14 September or that he had made the claimant aware that she would have to work her notice. I formed the impression that his evidence was often given with the benefit of hindsight in that he was now aware of what he should have done more to ensure that the process he was adopting was fair and fully

explained to staff. Accordingly on occasions it is what he should have done rather than what he actually did do that was reflected in his evidence.

Submissions

27. Mr. Lefevre's submissions were brief. There had been no meaningful consultation with the claimant or with other staff. It was interesting that Mr. Low mentioned voluntary redundancy but did not have the calculations on hand to allow staff to consider it. This called into question somewhat the genuineness of the process as he did not then carry out the calculations and give them to staff. There was ample scope for fruitful consultation and indeed he might have discovered earlier that a staff member was apparently intending leaving. He had given vague criteria for selection then reduced the criteria to jus the ability to fry food. He had provided no right of appeal although another Director could have been asked to carry this out. The offer of alternative employment was also flawed as it was patently not suitable and just designed to save paying a redundancy payment. The claimant was entitled to notice as the letter clearly made her job redundant. Any reasonable employee would have interpreted the letter in this way. If he had wanted her to work her notice the place for this would be in that letter.

28. Mr. Low suggested that the evidence was clear and that it was contained in the various letters and documents. He had nothing to add.

Discussion and Decision

29. Redundancy is a potentially fair reason for dismissal in terms of section 98 of the Employment Rights Act 1996 ('the Act'). The claimant accepted that there was less work at lunchtimes but did not think that this equated to losing one member of staff. I held that the reason for dismissal was redundancy following a downturn in work. A dismissal on the grounds of redundancy arises in terms of section 139 of the Act. In layman's terms there was not enough work to go around.

30. At this point it should be recalled that the way in which an employer approaches such matters has to be within the discretion afforded to them in their conduct of the

procedural and substantive aspects of such a process. As such it is not for the Tribunal to substitute its views for the decisions taken. (**Sainsburys Supermarket v PJ Hitt (2002) EWCA Civ 1588) Iceland Frozen Foods Ltd v Jones [1983] ICR**.

31. One of the issues here was the criteria used for selection. It is wise perhaps to start with the opening comments made in the case of **British Aerospace** where it is stated**:**

> " ***It has been accepted from the outset of the unfair dismissal jurisdiction that the concept of fairness, when applied to the selection process for redundancy, is incapable of being expressed in absolute terms. There are no cut and dried formulae and no short cuts. The recognised objectives include the retention within the reduced workforce, once the redundancies have taken effect, of employees with the best potential to keep the business going and avoid the need for further redundancies in future; as well as the need to ensure that qualities of loyalty and long service are recognised and rewarded. These are objectives which are liable to conflict with each other. When they do, it becomes the task of the Industrial Tribunal to determine whether in all the circumstances of each particular case the employers have succeeded in providing a response to the tension between them which comes within the range of reasonableness."***

32. In the past employers have used criteria that were objective but often blunt such as the number of absences or timekeeping, length of service and so forth. Criteria that try and keep the most talented employees in the business are to an extent bound to have an element of subjectivity where issues such as performance are being judged. The selection criteria are principally a matter for employers and not an area where a Tribunal can impose its own views. It is only if the criteria are those that no reasonable employer would utilise can the Tribunal intervene. The unfairness here arises in that the criteria are very vague and without explanation difficult for an employee to know how they were to be applied and consequently if they are fair. This is a business where there were no appraisals or job evaluations. The claimant thought she was the equal or superior in skills and experience to the other three staff. In any event the respondent seems to have focussed only on one of the criteria, "Skills". This made it even more important that this criteria and it's application should have been discussed. Added to this the claimant did not see her

scoring or how it was worked out in comparison to others making it impossible to know if she had been fairly treated or not.

33. These sort of issues have a long pedigree and it might be wise to set out exactly what was said in the well-known case of **Williams v Compare Maxam** to which Mr Lefevre alluded.

> ***"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.***
>
> ***2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.***
>
> ***3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.***
>
> ***4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.***
>
> ***5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."***

34. It should be borne in mind that these are in effect guidelines not rules of law and that the case dealt with a collective redundancy process. Nevertheless, this is a case where meaningful discussion and consultation did not take place. The claimant and her colleagues were given little or no time to respond to the first meeting at which the proposal, to make someone redundant, had been made. There is an argument that there could have been fruitful discussions even before the proposal was made. If meaningful consultation had happened then it is clear

that parties might not have come to loggerheads as they did and some compromise whether regarding voluntary redundancy, redeploying a staff member to the evening rota other than the claimant could have been usefully explored. I should record that the claimant, and no doubt other staff, seem to have regarded Mr. Low as a good employer with whom they had enjoyed a long working relationship.

35. In short there was no evidence that Mr Low had considered other matters that a reasonable employer would have considered and consulted upon such possibilities as staff reducing their hours or moving to an evening rota, a job being available then. The rule is what was reasonable in the circumstances and whilst I have some sympathy for Mr Low, he had not been involved in such matters before, the matter must be looked objectively.

36. On the 11 November the claimant and her three colleagues were told that there would be one redundancy. It would have been more fruitful to open up a discussion about hours, perhaps cost saving and whether anyone would move to an evening shift. Mr Low apparently did raise the question of voluntary redundancy but was unable to give figures to the staff that might have encouraged one of them to volunteer. Matters did not really start off on a sound footing. There was reference to criteria being used to select but no discussion about what they meant particularly the rather vague criteria of “skills and experience”. Staff including the claimant were not given their scores and had no idea how the exercise had been conducted. No right of appeal was offered.

37. Mr.Low’s evidence was that it should have been obvious that the ability to fry food was the principal criteria. If this was the case then it should have been stated as such. The claimant was an experienced cook and might have been asked whether she was prepared to learn how to fry food. She generally prepared other dishes involving arguably greater cooking skills. Was consultation futile? No it cannot be said that it was for the reasons I have given. Indeed, an employee later left the respondent’s employment and she might have been identified earlier thus eliminating the need for redundancy at all. There were a number of matters that could have been advantageously considered as I have outlined.

38. The respondent suggested that there was individual consultation on the 14 November. No notes of the alleged discussions were produced nor evidence given as to the substance of any such discussions. The claimant's position being that she did not even see Mr Low that day. On balance I accept that her recollection as being the more persuasive.

39. The next part of the process was that the claimant was given a letter on the Friday making her redundant. It stated: **'your job has become redundant with effect from Monday 21st November**' There was evidence although vague that there had been mention of working notice. The letter is silent in relation to working notice. I accept that the letter did not use the words dismissal or termination but the circumstances and context clearly indicate a termination on that date with no reference to having to work notice.

40. I suspect that Mr Low must have realised that he had forgotten to put this in the letter and tried to retrieve the situation in his later letter dated 21 November. In my view he was too late to do so.

41. The situation was also slightly confusing from the claimant's point of view in that she was offered what the respondent believed was suitable alternative employment. This offer had not been discussed with her. As noted earlier the need for any redundancy seems to have disappeared in early December when a member of staff left. This was after the claimant had been dismissed. The claimant was offered that post but declined it. She was very upset at the way in which she had been treated which she felt had been unfair. She was signed off any work for a stress related condition. I am of the view that it was reasonable for her to decline this offer in the circumstances.

42. The post offered to her in the letter dated 17 November was working from 4.30pm until late. The pay and conditions were the same although the claimant would no longer be preparing ready meals etc. or preparing considerably less that she did for the lunchtime trade. The claimant refused the job offer. I took into account her circumstances in that she supported her daughter and looked after her two young

children. If she had accepted the post she would not have been able to provide this support. In addition the claimant had never, except on one special occasion providing cover at Christmas, worked in the evenings. Her life revolved around having her afternoon and evenings free. She had for many years worked in this way even before joining the business in the mornings. Mr. Low did not explore these issues with her before making the offer he did. He was adamant that the post was suitable alternative employment and the claimant's refusal of the post disentitled her to a redundancy payment.

43. The Tribunal requires to look at the suitability and reasonableness of the offer. The job was not wholly identical to the previous job in two respects. First of all it required working at night and secondly the content of the job changed. Although it has to be accepted that it still involved working in the shop and serving customers and doing some of the sort of tasks the claimant already did. She would no longer have been preparing as much 'non fried' dishes and might have been expected to fry food. An employer really needs to discuss such an alternative post with the employee concerned. This was not done. The claimant was unaware whether she would have to fry food something which she had previously not been trained to do. Was the claimant's refusal unreasonable?.

44. Standing in her shoes for a moment I cannot say it was. It would have meant a significant change to her lifestyle and impacted on the care she provided for her grandchildren allowing her daughter to pursue her career as a Nurse. It would have been a significantly different job. If these matters had been discussed the claimant might perhaps have persuaded Mr Low that such an offer was not suitable and that some further thought should be given to the proposal. Even here, however, there might have been room to compromise but no meaningful dialogue was entered into. The claimant was simply offered the job on a take it or leave it basis. I do not accept that the offer was of reasonable suitable alternative employment in the circumstances and that the claimant was unfairly dismissed. I would record that the letter dated 17 November does not make it clear to the claimant that she would potentially lose her right to redundancy payment if she refused the offer of alternative employment.

Remedy

45. No issue was taken with the calculations in the Quantification of Loss or with the claimant's efforts to mitigate her loss. The claimant is entitled to a basic award of £2024.73 (9 years service x 13.5 x £149.98) which equates to a statutory redundancy payment.

46. The claimant is entitled to compensation for her dismissal. Such compensation must be just and equitable. It consists mostly of wage loss. The calculation shown in the Quantification of Loss was £3706.01 (24.71 weeks from 30 January 2017 when the notice period would have run out until the 21 July) less earnings of £1370.25. As the hearing took place on the 3 August I will add two weeks loss (2 x £95.17) to this figure making £2525.90. A claim is made for 52 weeks future loss. I regard that as being too much. The claimant is an experienced cook and I am sure she will be able to make up some more hours in part time work despite only seeking to work mornings and early afternoons. There is a danger of a windfall. The appropriate period is twenty six weeks which is ample time to find some additional part-time work. This gives future loss of £2474.42. To this must be added £150 for loss of statutory rights.

47. I also have to take account of the chance or risk that the claimant would have been made redundant in any event. This is known as the 'Polkey' principle. It inevitably involves some speculation. In the present case a number of avenues were not explored to get round the need to make the claimant redundant. Nevertheless the evidence was that there had been a downturn in work and the need for making a redundancy was not seriously questioned. Mr Lefevre suggested that the situation was so unsatisfactory that the claimant should in effect get the benefit of the doubt and no deduction should be made. Mr. Low's position was that the redundancy was inevitable. I accept that there was a real risk of redundancy. All of the employees seem, from the very limited evidence before me to be evenly matched and although the claimant did not fry food she had other skills in the preparation of ready meals. Whilst I do not accept that she was the obvious candidate as Mr. Low suggested her skills were less in demand in the evening trade where the only vacancy arose. In the circumstances I believe that a reduction of 30% is

appropriate to reflect the chance of her being made redundant if a fair process had been followed. The compensatory award (£5150.32) will be reduced accordingly to £3605.22.

48. The clamant was in receipt of Job Seekers Allowance. This is a recoupable benefit The Recoupment Regulations apply. The prescribed period is from the 30 January until the 4 August 2017. This amounts to £2525.90. The total monetary award (£2525.90 plus £3605.22) exceeds the prescribed element by £3104.05 and is payable immediately.

49. The clamant was entitled to notice and accordingly is entitled to pay in lieu of notice amounting to £1349.82 (9 weeks x £149.98) and to reimbursement of the fees paid to the Tribunal Service £1200 (£250 plus £950)

Employment Judge: James Hendry
Date of Judgment: 11 August 2017
Entered in register: 11 August 2017
and copied to parties