EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MRS B GAMIL	**V**	**THE EMBASSY OF THE REPUBLIC OF YEMEN**

HELD AT: LONDON CENTRAL **ON: 29 JUNE 2021**

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:
FOR THE CLAIMANT **In person**
FOR THE RESPONDENT **Mr F Aziz (Embassy official)**

JUDGMENT

1. The claim of unfair dismissal is well founded and succeeds.
2. The claim of wrongful dismissal is well founded and succeeds.
3. The claim of unlawful deduction from wages is well founded and succeeds.

REMEDY AWARD

1. Redundancy payment: Twenty years' service, aged 56 at dismissal. Gross weekly salary £496.15 (capped at £489 for redundancy payment). 27.5 x £489 = £13,447.50

2. Notice pay: 12 x net wage of £410 per week. £4920

3. Compensation payment : two months net salary. £3,553

4. Holiday pay entitlement: two months net salary. £3,553

5. Unpaid salary 1 – 16 March 2018: £496.00 x 2 = £992.00

6. **Total award** **£26,465.50**

REASONS

7. Judgment and verbal reasons were provided at the Hearing and written reasons were requested at the Hearing.

8. The claimant was employed by the respondent for 20 years, 1 February 1998 to 16 March 2018. The parties agree she was dismissed, the respondent contends for redundancy. The claimant says no process was followed, her dismissal was unfair, her work continued. She does not accept that her role was redundant.

The Issues

9. What was the reason for dismissal?

10. Has the respondent shown that the reason for dismissal was redundancy? If not, the claim of unfair dismissal succeeds.

11. If the respondent has shown that the reason for dismissal was redundancy, was a fair process followed? The claimant contends it was unfair, arguing:
    a. Her dismissal was predetermined
    b. There was no proper consultation or selection criteria
    c. There was no consideration of alternatives to redundancy
    d. She was dismissed without notice at the first redundancy meeting

12. If a fair process was not followed, would the claimant have been dismissed under a fair process?

13. The legal test is what a reasonable employer of similar size and resources would do in this situation – the 'range of reasonable responses' test. The tribunal must be very careful not to substitute its own opinion for that of a reasonable employer.

14. It is accepted that the claimant was not paid for the period 1-16 March 2018 as she failed to collect her last wages.

15. It is accepted that the claimant has a contractual entitlement to 30 days' holiday per year and that she did not take holidays in the two years prior to dismissal.

16. Was the claimant wrongfully dismissed and entitled to a payment in lieu of her period of notice?

Polkey / issues of remedy

17. If the claimant was unfairly dismissed, was there a prospect at some point in the future that she could have been fairly dismissed? If so, what was that prospect as a percentage; alternatively at what date would this have occurred?

Relevant legislation

The Law

18. Employment Rights Act 1996 – Pt X Dismissal

s.94(1) The right

(1) An employee has the right not to be unfairly dismissed by his employer

s.98 General

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

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
a. …
b. …
c. is that the employee was redundant, or

(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

s.139 Redundancy

(1) An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
(a) …
(b) the fact that the requirements of that business –
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

Case Law

19. Unfair dismissal – redundancy

a. *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT: the following "standards of behaviour" apply generally (taking account in the present case of the absence of a trade union):
   i. 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.
   ii. 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.
   iii. 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.
   iv. 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.
   v. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

b. *Polkey*: "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or

their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.'

c. *Langston v Cranfield University* [1998] IRLR 172 EAT: so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case. Moreover, the employer will be expected to lead evidence on each of these issues.

d. *Capita Hartshead Ltd v Byard [2012] IRLR 814*: A pool of one, in which actuaries have personal clients, and her client list had decreased, dismissal was unfair because there were other actuaries doing similar work, there had been no criticisms of her ability and the risk of losing clients if their actuaries had to be rearranged was 'slight'. EAT held that (a) the tribunal does have the power and right to consider the *genuineness* requirement and (b) ruling against the employer's choice of pool may be difficult *but not impossible*. ''Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that (a) "It is not the function of the Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in *Williams v Compair Maxam Limited [1982] IRLR 83*); (b) "…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in *Hendy Banks City Print Limited v Fairbrother and Others* (*UKEAT/0691/04/TM*); (c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in *Taymech v Ryan EAT/663/94*); (d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "*genuinely applied*" his mind to the issue of who should be in the pool for consideration for redundancy; and that (e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.''

e. *Eaton Ltd v King [1995] IRLR 75*: it was sufficient for the employer to have set up a good system for selection and to have administered it fairly. This approach was expressly endorsed by both Waite and Millett LJJ, in the Court of Appeal decision

f. *British Aerospace plc v Green [1995] IRLR 437* ''Employment law recognises, pragmatically, that an over-minute investigation of the

selection process by the tribunal members may run the risk of defeating the purpose which the tribunals were called into being to discharge, namely a swift, informal disposition of disputes arising from redundancy in the workplace. So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him.'

g. *Bascetta v Santander [2010] EWCA Civ 351*: "The tribunal is not entitled to embark on a reassessment exercise. I would endorse the observations of the appeal tribunal in *Eaton Ltd v King* … that it is sufficient for the employer to show that he set up a good system of selection and that it was fairly administered, that ordinarily there will be no need for the employer to justify the assessments on which the selection for redundancy was based."

h. Mental Health Care (UK) Limited v Biluan (UKEAT/0248/12) – there will be a wide range of reasonable choices when determining the selection criteria, and the same for the methods of competence assessment to be used. A finding that either is outside of the range of reasonable responses, "is a strong finding" which should be accompanied with an acknowledgement of the limited role of the employment tribunal in determining such issues.

i. Consideration of alternative employment: *Aramark UK Ltd v Fernandes [2020] IRLR 861* – held that the employer must seek to find *actual* alternative employment, not just the *chance* of it.

20. <u>Polkey</u>

a. *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 HL: Compensation should be awarded for the additional period of time for which the employee would have been employed had the dismissal been fair, the chances of whether or not the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee. If the prospects of the employee having kept his job had proper procedures been complied with were slender, this would be reflected in a reduction in compensation.

> "If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. …"

b. *Lambe v 186K Ltd* [2004] EWCA Civ 1045: Compensation should be awarded for the period over which the relevant consultation would have taken place.

c. *Credit Agricole Corporate and Investment Bank v Wardle* [2011] EWCA Civ 545, [2011] IRLR 604: if there is evidence that the employee would have been dismissed or there is a realistic chance this would have occurred, then this must be factored into the calculation of loss.

d. *Parry v Ministry of Justice* UKEAT/0068/12*:* the ET fell into error and did not approach the *Polkey* issue correctly when it considered simply whether the following of a fair procedure would have resulted in the dismissal of the employee and did not give any consideration to the chance of the employee being dismissed.

e. *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274*, EAT*: A '*Polkey*' reduction has the following features:

> "First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

f. *Red Bank Manufacturing Co Ltd v Meadows* [1992] IRLR 209: The Tribunal will make an error of law if it fails to consider what might have happened had fair proceedings been complied with. In a redundancy context this will involve asking whether consultation might have resulted in an offer of alternative employment and if so where the post would have been.

g. *Virgin Media Ltd v Seddington* UKEAT/0539/08 EAT: would the employee have found, and accepted, alternative employment with the dismissing employer? The EAT concluded that the burden is on the employer to raise the argument that there was no suitable alternative employment that the employee could or would have taken. But if the employer raises a prima facie case, it is then for the employee to say what job, or kind of job, he believes was available and to give evidence to the effect that he would have taken such a job.

The documentation and witnesses

21. At the outset of the hearing documents were sent to me from the respondent – they had been sent earlier electronically but had not arrived. These included a

statement with no name or signature, the evidence of the respondent. The claimant did not provide a statement.

22. I heard evidence from the claimant, who have evidence through an interpreter appointed by the Tribunal. I also heard evidence from Mr Aziz, an Embassy official. I asked questions of both parties and considered the documentation in the bundle.

23. The Hearing was conducted by the CVP video platform. I assessed the hearing throughout to ensure that all parties were participating and could see and hear all the proceedings; especially so given the claimant was given her evidence via an interpreter. Regular breaks were taken every hour to because of the additional strain of watching, listening and speaking over a video link. No concerns were raised by the parties about the format of the Hearing.

24. This judgment does not recite all of the evidence heard, instead it confines its findings to the evidence relevant to the issues in this case.

25. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The evidence

26. The parties agree that the claimant had continuous employment with the Embassy as a local employee for 20 years to the date of her dismissal aged 56.

27. The respondent's position is that the claimant was employed as a typist, typing Arabic only documents in the Archive section which was being closed down. There was no need for a Arabic typist, because employees now typed their own documents.

28. The claimant asserts that two individuals who she named (initials EAA and MD) were taken on as employees shortly before her dismissal, in the consular section and visa section. The claimant accepted in her evidence that these roles involved dealing with members of the public.

29. Mr Aziz's evidence was that the Embassy did not consider whether there was an alternative role available for the claimant, saying that there *"none available to suit her position and her [lack of] English language, her [lack of] proficiency in language and her skills. … no experience in using computer and internet and the latest technology. She was an Arabic typist, with poor knowledge of written and spoken English".* He stated that all staff type now in English and Arabic, so there was no need for a typist."

30. Mr Aziz argued that the other two dismissed were also typists in the visa section, and dealing with public. They were typing documents given to them by customers and that this was typing to do with visas only.

31. The claimant's position was that her role was continuing until the day of her redundancy and beyond, also that she did much more than typing, including summarising, indexing and archiving documents and forwarding to the relevant Ministry in the Republic of Yemen. Mr Aziz's evidence, which I accepted, was that were no Diplomatic Bags to or from the Republic of Yemen, *"there is no archive at the moment … this section is completely closed. We now send documents by email only."*

32. I accepted, as stated in his evidence by Mr Aziz, that there had been a previous meeting with staff and Mr Al-Bawab of the Embassy in which he referenced the situation at home, the financial difficulty of the Government and that there was no guarantee that staff would be paid, there was reference to no position being guaranteed. However, I also concluded that this was a general meeting and that no staff were told that they were at risk of redundancy, and there was nothing beyond a general indication that redundancies may be a possibility at some point in the future.

33. The claimant was given a letter of dismissal at a meeting on 16 March 2018. It was a common letter addressed to her and two other Embassy colleagues (FH and NA-S) saying that due to the *"hard economic circumstances of our country"* leading to an *"inability"* of the Embassy to meet some of its financial obligations *"The Embassy has decided to reduce the number of local staff. We regret to tell you that your employment has been terminated. We will pay you the salaries of two months as an End of Service Bonus".* The letter thanked the three employees for their hard work and wished them success in the future.

34. The respondent's position is that the claimant's contract gives her entitlement to two months' pay on dismissal, and Mr Aziz's evidence was that she was given one month's notice and one month's redundancy pay.

35. Mr Aziz also accepted that the claimant was not paid from 1 – 16 March 2018 – she had only received pay to end February 2018. I accepted that the claimant did not collect her salary, which would be paid along with the two months' offered to the claimant on 16 March 2018.

36. The claimant's evidence was that she had not taken any holiday for the two previous two years. hears – that *"we don't have holiday… it is only twice during my employment that I asked for holidays".* The claimant's evidence was that she believed her last holiday was two years ago when she took two days off for an operation – she took this off as holiday rather than take sickness absence. She stated that the last holiday she was paid for was a 25 day holiday in 2015. Following an adjournment, Mr Aziz confirmed that the Embassy was unable to locate any holiday applications or holidays taken by the claimant in the last two years.

Conclusions

37. I concluded that there was a genuine potential redundancy situation, that the claimant's role in the Archive Department was now no longer required at the Embassy, because of increasing typing being done by staff, and less of a need

for an Archivist as there was no Diplomatic Bag to and from the Republic of Yemen, and such documents were instead being sent by email and stored electronically. I concluded that the senior officials at the Embassy reasonably believed that there as a genuine need to make redundancies, and I concluded that given the downturn of the Archival work and the fact that staff were now typing their own documents, there was a reasonable belief that the claimant's role was no longer required.

38. Considering *Williams v Compair Maxam* I concluded that while there was a general warning that jobs may be at risk, this was not sufficient information to enable the claimant to inform themselves, consider alternatives; there was no consideration of alternative employment or discussion with the claimant to consider alternatives to redundancy, about other roles she may be capable of undertaking.

39. While she was aware that there were clear issues within the Embassy, given the situation within the Republic of Yemen, the rumours circulating, and the meeting with Mr Al-Bawab (I accepted the claimant's evidence that she may not have been present, but I also accepted she received details of what had been said), at no point prior to the 16 March 2018 meeting was the claimant told that her role was at risk.

40. I therefore concluded that while there was a genuine belief within the management of the Embassy that the claimant's role was redundant, no process was undertaken to forewarn the claimant or to consult with her about alternatives.

41. The requirement is to undertake a consultation process with employees who are at risk of redundancy and have been informed that they are at risk, is, as the case law makes clear "… fundamental requirements" (*Langston v Cranfield University*), that it is for the employer to provide evidence of this.

42. The fact that there was a failure to hold any consultation process at all with the claimant, means that her dismissal was unfair.

43. I next concluded what may have happened under a fair process, considering *Polkey v AE Dayton Services Ltd* and the case law guidance above. I noted that there was no suggestion from the respondent in its evidence about what may have happened under a fair process.

44. I concluded that there was a significant reorganisation being undertaken within the Embassy. Staff continued to be employed, for example in the visa section. I accepted that there was no longer a need for an Archivist. However, there was no consideration at all of any alternative role, or a trial period to see whether the claimant could undertake any alternative role she may have suggested. Instead, it was the respondent's position that there was no role suitable for her. This was without any consultation with the claimant.

45. However, a fair process would have needed to involve consultation with the claimant, during which she could have put forward suggestions and alternatives to redundancy. I considered, that given the nature of the claimant's evidence

and her challenge to redundancy, she would have put forward proposals to keep her role, and suggestions of alternative roles she could undertake at the Embassy, and the possibility of reducing her hours.

46. I concluded that a fair process would have needed to consider these suggestions. The first meeting would have been on or around 16 March 2018 and the claimant would have been told she was at risk at this meeting. I conclude that a second meeting would have occurred approximately 2 weeks later, around 30 March / beginning April 2018 and at this meeting she would have put forward proposals. I concluded that consideration would have been given to these proposals under a reasonable process and there would have been consultation about a possible trial period in a role. This consideration and further consultation with the claimant would have taken approximately 6 weeks.

47. I concluded that this consultation process would, however, have led to the same outcome, the claimant's redundancy. I concluded that the likelihood of the claimant being retained beyond this consultation period was very small, that the overwhelming likelihood under a fair process was that the claimant's redundancy would have been confirmed at the end of this process. The claimant identified no role that she could undertake at the Embassy apart from asserting her old role existed and there were other jobs she could have done. I concluded that while she would have put forward proposals, the outcome would have been the same at the end of the process.

48. I concluded that the date of the claimant's dismissal under a fair process would have been 16 May 2018.

49. I noted the respondent's policy in this redundancy round appears to be to dismiss employees without notice and make them a contractual payment of notice pay. I concluded that under a fair process this would have occurred at the end of the two months consultation period. The claimant would have been dismissed without notice, and would have been paid in lieu of her notice entitlement.

50. The claimant's dismissal was on grounds of redundancy. She is therefore entitled to a statutory redundancy payment which is calculated according to her length of service (20 years), age at dismissal (56) and salary (maximum £489 per week).

51. The claimant did not accept the payments offered to her on 16 March 2018 because she decided to dispute her dismissal.

52. It is accepted that the claimant did not receive salary for the period 1-16 March 2018 and claims an unlawful deduction from her wages. The respondent accepts that she is owed this sum.

53. I concluded also that the claimant has had no opportunity to take holiday in the past two years of her entitlement. I therefore awarded a payment in lieu of accrued but untaken holiday, as set out below.

Award

54. The remedy award differs slightly from that given verbally at the Hearing – this is because after the Hearing I calculated the tax deductions on net pay entitlement using the gov.uk calculator which provides a more accurate figure for net pay.

55. The claimant was employed for 20 complete years – 1 February 1998 to 16 March 2018. She was aged 56 at the date her employment ended. Her gross monthly salary was £2,150 a weekly gross payment of £496.15 (capped at £489). She has a redundancy payment entitlement of 27.5 weeks. 27.5 x £489 = £13,447.50

56. The claimant's statutory minimum notice entitlement, based on 20 years' continuous service, is 12 weeks' pay, this is based on net pay entitlement. Using the gov.uk tax calculator the approximate net wage is £410 per week. 12 x £410 = £4920

57. Two months' consultation period – net salary: £410 x 52 / 6 = £3,553

58. 2 years contractual holiday pay entitlement – net pay x 2 month: = £3,553

59. Salary 1 – 16 March 2018: £496.00 x 2 = £992.00

60. **Total award** **£26,465.50**

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EMPLOYMENT JUDGE M EMERY

Dated: 15 November 2021

Judgment sent to the parties
On: 18/11/2021.

For the staff of the Tribunal office