



EMPLOYMENT TRIBUNALS

Claimant: Mr D Kapkowski

Respondent: Energy Solutions (UK) Limited

Heard at: London South (by CVP)

On: 27 January 2021

Before: Employment Judge Braganza

Representation:

Claimant: In person

Respondent: Mr Large (Counsel)

JUDGMENT

It is the judgment of the Tribunal that the Claimant's claim of unfair dismissal is not well-founded.

REASONS

1. By a claim form presented on 29 October 2019 the Claimant claims that he was unfairly dismissed by the Respondent on 27 June 2019. His claim is that when he returned to work on 27 June 2019 after 10 days of sickness absence, he was told that he had been dismissed for redundancy reasons.
2. The Respondent resists the claim on the basis that the sole or principal reason for the dismissal was redundancy. There was a diminished requirement for the work carried out by the Claimant. The Claimant was made redundant after a number of meetings, attended by the Claimant, between 17 and 27 June 2019. At those meetings the Claimant was informed of the downturn in the work he carried out and consulted about alternative employment. The Respondent asserts that it followed a fair process in deciding to dismiss the Claimant. The decision to dismiss was a reasonable one in all the circumstances.

The Evidence

3. This hearing took place by CVP to which neither parties objected.
4. The Respondent called three witnesses: Ms Natalie Sinton, Accounts and Administration Assistant, who had attended three meetings with the Claimant on 17, 24 and 27 June 2019 to take notes, for each of which a typed copy was produced; Mr Mark Penny, Commercial Director, who conducted the meetings with the Claimant and informed the Claimant of the dismissal; and Mrs Melanie Lay, Marketing and HR Director. The Claimant gave evidence. All relied upon written statements.
5. There was a joint bundle of documents consisting of 151. I refer below to the pages in the bundle, where relevant. The Tribunal was also provided with a List of Issues and Opening Note prepared by Mr Large on behalf of the Respondent.

The Issues

6. At the outset of the hearing the Tribunal discussed the List of Issues with the parties as drafted by the Respondent. Both parties confirmed their agreement to the issues as set out within that document. They were agreed as follows:
 - a. Was there a redundancy situation? The Respondent relied on the requirements of the business to carry out work of a particular kind having diminished under section 139(1)(b)(i) of the Employment Rights Act 1996 (the ERA).
 - b. If so, was redundancy the sole or principal reason for the Claimant's dismissal under section 98(1)-(2) of the ERA. The Claimant claimed he was dismissed for the sole or principal reason of either his illness and/or a dispute as to overtime pay.
 - c. Taking account of the circumstances including the size and business resources of the Respondent, general equity and the case' merits, was the dismissal fair under section 98(4) ERA having regard to the following:
 - i. Was the Claimant warned as to the risk of redundancy?
 - ii. Did the Respondent reasonably consult with the Claimant?
 - iii. Was there alternative work available at the time of dismissal?
 - iv. Was sufficient time given to the Claimant to prepare for meetings?
 - d. If the dismissal was unfair, what award was just and equitable under section 123(1) of the ERA:
 - i. should any award be reduced to reflect the prospect that the Claimant would have been dismissed in any event under section 123(1) and *Polkey v AE Drayton*.

- ii. what was the impact on the basic award of a redundancy payment under section 122(3).
- iii. what was the impact of the receipt by the Claimant of notice pay (s.123(1));
- iv. should any award be further reflected to take account of any failure on the Claimant's part to mitigate his loss under section s123(4) ERA.

The Law

7. Under Section 98(1) of the ERA in determining 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 reason, the principal reason) for the dismissal and (b) that it is either a reason that falls within one of the potentially fair reasons under subsection 98(2) or some other substantial reason.
8. Under subsection 98(2)(c) of the ERA a potentially fair reason is redundancy. If the employer establishes such a reason, the Tribunal must then determine whether the dismissal is fair. Under section 98(4) 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 the equity and substantial merits of the case.
9. Section 139(1) of the ERA 1996 provides that:

“For the purposes of this act 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) the fact that the employer has ceased or intends to cease –
 - (i) to carry on the business for the purposes of which the employee was employed by him or
 - (ii) to carry on that business in the place where the employee was so employed, or
 - (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 employerhave ceased or diminished or are expected to cease or diminish”
10. In judging the reasonableness of an employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses within which one employer might reasonably take one view and a different employer might reasonably take another view. The function of the Tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss fell

- within the band of reasonable responses which an employer might have adopted.
11. In *Williams & Others v Compare Maxam Limited* [1982] ICR 156, the Employment Appeal Tribunal laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The factors suggested were whether the selection criteria were objectively chosen and fairly applied, whether the employees were warned and consulted about the redundancy, whether, if there was a union, the union's view was sought and whether any alternative work was available.
 12. In *R v British Coal Corporation and Secretary of State for Trade and Industry Ex parte Price* [1994] IRLR 72 Glidewell LJ stated:
"Fair consultation means:
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation."
 13. The issue as to the pool for the redundancy is a matter for the employer. Where there is a pool from which selections are to be made, a fair and, in so far as is possible, objective method of selection is to be adopted. As to the issue of alternative employment, an employer should go as far as is reasonable to locate alternative work. Whilst an employer is obliged to inquire about job opportunities, a failure to do so will not necessarily render the dismissal unfair. If there is a defect in the procedure that defect must be such that the dismissal is outside the band of reasonable responses.
 14. It is not the decision of the Tribunal and what the Tribunal would have done but whether the employer acted outside the band of reasonable responses.
 15. The Tribunal reaches its findings of fact on the balance of probabilities.

Findings of fact

16. Having heard the evidence, I make the following findings on the balance of probabilities.
17. The Respondent, Energy Solutions (UK) Limited, is a privately owned electrical power monitoring distributor and manufacturing business. It was established in 1996 and had approximately 25 staff working at the material time across production, engineering, service, sales and accounts. The company designs and manufactures its own range of products and also works with international manufacturers, supplying customers with electrical power monitoring and control solutions.
18. The Claimant, Mr Kapkowski, started working with the Respondent on 21 April 2015 as an HEME technician. In December 2015 Mr Kapkowski was moved to the production department as an engraver. He was responsible for all laser

cutting and engraving work and would also help on mechanical projects and assemblies, including off grid power units. Primarily, his role was that of engraver. Mr Kapkowski worked in the production department with 7 other production technicians. He worked on a 40 hour week.

Was there a redundancy situation?

19. I accept Mr Penny's and Mrs Lay's evidence that Energy Solutions had been suffering a downturn in manufactured goods orders in 2019 across all business sectors. This is supported by an email from Mr Penny to Mrs Lay on 4 December 2019 which gives a breakdown of the reduced engraving activity from July 2019 until December 2019 [53]. It is also borne out by a schedule showing reduced activity from January 2018 to December 2019 [74].
20. In addition, it is also consistent with the contemporaneous evidence of the first meeting on 17 June 2019 between Mr Penny and Mr Kapkowski, at which Mrs Sinton took notes [34]. At that meeting it is recorded that Mr Penny informed Mr Kapkowski that there was a downturn in orders which was impacting on the amount of work available. Mr Penny explained that one area of the workshop that had suffered a significant reduction was the engraving and label making side of the business and that this reduction in the orders was impacting on the finances of the company.
21. I accept Mr Penny's evidence that by June 2019 the engraving department had only had 64 days of work with a value of £18,500 (64 x 8 x £36) which represented 50% capacity. The forward order book for the rest of the year amounted to 5.8 days of work at a value of £1,626. The company was employing 1 person full-time to run 3 machines to provide the service and held stock to support the activity valued at £31,748. The staff cost was approximately £28,000 per year based on the current salary and benefits. Machinery maintenance was approximately £2,500 per year. 2 of the 3 machines had not been run since Mr Kapkowski left the company with a small amount of work being outsourced to local companies.
22. As a result, the board of directors decided that engraving was not a viable proposition for the business and that there was no requirement to have an employee dedicated to the work labels and small orders. This could reasonably be handled by the current engineering and workshop staff, with significant orders outsourced. The downturn in orders also impacted on the amount of other work within the workshop. There were no additional duties that could be assigned to Mr Kapkowski to give him 40 hours of work per week. The overall business was affected significantly over the year with other redundancies in departments including sales and dispatch and the company continued to work on cost cutting measures.
23. In February 2019 Mr Kapkowski had a car accident. He says that after that accident there were comments made towards him by Mr Penny which he says included "Good morning loser." "Dawid, do you have enough work? Do you need more time off? You don't look busy." Mr Penny accepted that he did make some comments of this kind. He described the comments as "workshop banter" and explained that he would speak to others in the production team in the same

way. He said that he always asked if the panel wiremen had enough work. I accept that Mr Penny made some comments of this kind and that they were not just directed at Mr Kapkowski but at the rest of the team too.

Meetings on 17 June, 24 June and 27 June 2019

24. There is a dispute between the parties as to whether the three meetings on 17, 24 and 27 June 2019 took place. Mr Kapkowski's evidence is that he was not at work at all from 17 June until 27 June 2019 when he was first told that he was redundant. He relies on a Statement of Fitness for Work from Gillingham Medical Centre dated 19 June 2019 [67] advising that he is not fit to work from 17 June 2019 until 30 June 2019. It was Mr Penny's and Mrs Lay's evidence that they had not seen this note prior to these proceedings. There are a number of difficulties with Mr Kapkowski's evidence, which I refer to below.

Meeting of 17 June 2019

25. I find that the first of these meetings on 17 June 2019 took place as described by Mr Penny and Ms Sinton. First, there is a contemporaneously prepared note of the meeting [34]. That note was prepared by Ms Sinton, who is described in the note as 'Note Taker'. Second, the content of the note reflects Mr Penny's evidence as to the content of the meeting and, also refers to Mr Kapkowski raising his concern that he was being considered for redundancy because he had been off sick. That reflects Mr Kapkowski's claim and adds plausibility to the notes. Within the notes, it sets out that Mr Kapkowski specifically queried whether this was the reason that he was being told about 'staff cutbacks'. Third, Ms Sinton provided a witness statement and gave clear and credible evidence of having attended the meeting and taking the notes. She states she took them by hand and then typed them up. I accept her evidence. Fourth, there is a letter dated 17 June, the same date as the meeting, which was sent to Mr Kapkowski and is headed 'Warning of risk of redundancy' [35]. The letter opens with reference to "Following our discussion today, I regret to confirm that your role is potentially going to be made redundant." I accept that letter was sent. Fifth, there is an email on 17 June 2019 at 14:04 [36] from Mrs Lay to Mr Penny referring to Mrs Lay having had a brief meeting with Mr Kapkowski that day where he had outlined some of his health issues "following your at risk of redundancy meeting earlier in the day." Sixth, that same email states "he also asked me what he needs to come back to you with before Friday, I explained it would be worthwhile him outlining his skills experience and his view of opportunities with the business where he may be able to contribute." A list was prepared headed "Dawid skills" [40] and is also referred to being given to Mr Penny within the minutes of the second meeting on 21 June 2019 [39] "(List of jobs given to Mark.)"
26. I find that at the first meeting on 17 June 2019 [34] Mr Kapkowski was told by Mr Penny that the Respondent was considering staff cutbacks due to a downturn in orders and that he should consider what he could do within the company other than engraving.
27. I find that directly after that meeting on 17 June 2019 Mr Penny wrote to Mr Kapkowski [35] warning him of the risk of redundancy, confirming that this was

due to a downturn in work and informing him of a second meeting on 21 June to discuss Mr Kapkowski's response.

28. I accept Mrs Lay's evidence that after the meeting on 17 June 2019 with Mr Penny, Mr Kapkowski spoke to Mrs Lay about the redundancy meeting. That is referred to in Mrs Lay's email to Mr Penny [36]. Mrs Lay explained that the redundancy meeting was purely business related and not connected to his health issues. She also confirmed that there was no doctor's note on file. The email records that in response to being told that the decision was "purely a business one, he did agree that he understood that". Mrs Lay told Mr Kapkowski that he should provide a list of his skills, experiences and opportunities within the business for the meeting on 21 June 2019.
29. Mr Kapkowski accepts that he had the meeting on 17 June with Mrs Lay but was not clear in his evidence about the sequence of events. He said within his witness statement that he took a day off sick on the 17 June 2019 and communicated this in a phone call. He says that he was informed that he would have to provide a sick note in evidence. At the hearing, he gave evidence that he had come in and seen Miss Lay and then gone home. That is inconsistent with what he had set out in his statement.

Meeting on 21 June 2019

30. I find that there was a second meeting on the 21 June 2019. Again, Mr Kapkowski says that this meeting did not happen. I reject that evidence. First, there is contemporaneous evidence in the note of the meeting [39] which confirms that it was attended by Mr Penny, Mr Kapkowski and Ms Sinton, as the note taker. Second, Ms Sinton confirmed in her oral evidence the content of her witness statement that she had attended the meeting and prepared the notes. Third, the list of Mr Kapkowski's skills, entitled "Dawid skills" [40] is referred to in the minutes as having been given to Mr Penny [39]. Mr Kapkowski says that this is not the list that he provided. I reject that. Fourth, the content of the meeting reflects Mr Penny's evidence as to the discussions.
31. At that meeting it was explained to Mr Kapkowski that due to the reduction in current orders, the Respondent did not have the work and would need to review and decide whether to go ahead with the redundancy. The meeting ended with Mr Penny asking Mr Kapkowski what he could do for the business and that they would meet again in the next week.

Letter of 24 June 2019

32. There then followed another letter of 24 June 2019 from Mr Penny to Mr Kapkowski [41]. Mr Penny explained that a process of consultation had started as there was a risk of redundancy due to the business experiencing a downturn in orders. The letter referred to the meeting of 21 June 2019 and invited Mr Kapkowski to a final meeting on 27 June 2019 at 10am.

Meeting on 27 June 2019

33. On 27 June 2019 a final meeting took place between Mr Penny and Mr Kapkowski. That meeting is referred to in the letter of 27 June 2019 dismissing Mr Kapkowski [43]. It set out "Further to our recent discussions on 17th June,

- 21st June and 27th June, it is with regret that we must confirm that your position with the Company will become redundant as of today.” Mr Kapkowski was paid 4 weeks’ pay in lieu of notice and statutory redundancy pay. His effective date of termination was 27 June 2019.
34. A further reason why I reject Mr Kapkowski's evidence that the previous meetings did not take place is that they are referred to within the letter of 27 June 2019 and there is nothing in response from Mr Kapkowski disputing that those meetings took place. There was also no appeal by Mr Kapkowski.
35. I have also been provided with a number of absence forms. These absence forms show that Mr Kapkowski was absent for 1 hour on 19 June 2019 [69], 1 day on 20 June 2019 [71], 3 hours on 21 June 2019 [72] and 4 hours on 24 June 2019. There are also completed time sheets [75-126] for the period 1 April 2019 to 26 June 2019 for Mr Kapkowski which confirm that in the month of June he was working on 17, 18, 19, 21, 24, 25 and 26 June 2019.
36. There is further evidence undermining Mr Kapkowski's claim that he was not working over that period. In an email [70] dated 19 June 2019 from Mr Kapkowski to Mrs Lay, he attaches a parental leave request form. In an email on 20 June 2019 [70] also to Mrs Lay he says that he had visited Beneden hospital. In reply by email a few minutes later on 20 of June 2019 Mrs Lay thanks him for letting her know and says “See you tomorrow.” That undermines Mr Kapkowski’s claim that he had a GP note signing him off from 17 June 2019 until 30 June. I have also been provided with pay slips for April to July [127-130]. They show various periods of unpaid sickness and leave. The payslip for June [129] shows a deduction for unpaid sickness of £360.80 referring to the 4 days for the time taken as reflected in the absence forms. There is no statutory sick pay or any deduction for the period Mr Kapkowski claims not to have been at work from 17 to 27 June 2019.
- Was redundancy the sole or principal reason for the dismissal?
37. Turning back to the issues I accept the evidence from Mr Penny that there was a reduction in the requirements of the business and that the principal reason for the dismissal was redundancy.
- Was the dismissal fair?
38. I accept that the dismissal was fair in all the circumstances. Mr Kapkowski was warned as to the risk of redundancy dating back to the meeting on 17 June 2019. Mr Penny reasonably consulted with him during the course of the meetings on 17, 24 and 27 June 2019. Mr Penny discussed and considered alternative work and Mr Kapkowski provided a list of his skills and experience which Mr Penny considered prior to the decision to dismiss. Mr Kapkowski was also given sufficient time to prepare for the meetings.
39. Mr Kapkowski relies on an undated WhatsApp chain between him and a colleague of his called Chris Hyland [46], an apprentice with the Respondent, in which Mr Hyland says that “Work is the same as usual haha. They’ve got me doing all your work as well as panel wiring but oh well.” I accept the evidence from Mr Penny and Mrs Lay that Mr Hyland was on an apprenticeship that

started in August 2016. At the time of the discussion Mr Hyland was in the final stage of his apprentice framework which was due to end in July 2020. Mr Hyland took on some of the work of Mr Kapkowski after he left in addition to his own panel wiring work, which confirms that there was a reduction in the engraving work available. Mr Kapkowski had initially also relied on his redundancy being due to an overtime dispute but I have been provided with no evidence as to any grievance or dispute in that regard. Finally, although Mr Kapkowski did not raise any issue on this, I also accept that it was within the band of responses that the Respondent considered a pool of one.

40. I find that Mr Kapkowski was dismissed for the reason of redundancy and that the dismissal was carried out in such a way that was fair in all the circumstances and within the range of reasonable responses.
41. For those reasons I dismiss this claim.

Employment Judge Braganza
Date: 15 March 2021