



EMPLOYMENT TRIBUNALS

Claimant: Mr A Hatch
Respondent: H2M Engineering Ltd
Heard at: Leicester
On: 8 March 2021
Before: Employment Judge Ahmed (sitting alone)

Representation

Claimant: Mr Steve Cramphorn, Lay representative
Respondent: Mr Simon Hoyle, Consultant, Croner UK Ltd

JUDGMENT

1. The Judgment of the Tribunal is that the Claimant was unfairly dismissed.
2. The issue of remedy is adjourned to Friday 21 May 2021 at 10.00am.

REASONS

1. This is a complaint of unfair dismissal. The Claimant, Mr Anthony Hatch, was employed by the Respondent as a CMC Setter/Operator from 4 September 2016 to 7 August 2020, the latter being the 'effective date of termination' and 'relevant date'. The Claimant was dismissed by reason of redundancy.
2. The Respondent is a relatively small business with 38 staff. The Managing Director is Mr Andrew Forryan. He is the practical owner of the business. His son, Mr Martin Forryan, is also a Director in the business. There is no recognised union.
3. The Claimant's case in a nutshell is that he was unfairly dismissed because there was no genuine redundancy situation but if there was he was unfairly selected for redundancy. The selection process was undertaken by Mr Martin Forryan who did not attend this hearing nor has he produced a witness statement for these proceedings. The Respondent was invited at the start of this hearing to consider whether it wished to apply for a postponement as it had only recently instructed advisors to represent them. After a brief period to allow for a private discussion the Respondent decided to proceed. The end result was that there was no direct

CASE NO: 2604018/2020

evidence from the decision-maker in relation to the selection process.

4. The business was to all intents and purposes doing well in early 2020 with a full order book. That was before the onset of the COVID-19 pandemic. Once the lockdown began the consequent reduction in orders and therefore the workload was dramatic. The Company had to make 8 redundancies in total. Prior to that, it had never made any redundancies in its entire history.

5. On 10 June 2020, Mr Andrew Forryan sent a letter to all staff explaining the negative impact of the pandemic and the likelihood that redundancies would happen.

6. On 24 June 2020, Mr Andrew Forryan wrote to say that having considered ways of reducing costs, it was unfortunately necessary to make four immediate redundancies. One of those would be from the Milling Department where the Claimant worked.

7. A redundancy selection matrix form was prepared. This set out six selection criteria - knowledge, skills, experience, qualifications, attendance and disciplinary record. Points were allocated up to a maximum of 30 with 5 points for each criterion. There were four employees in the pool which included the Claimant and one Apprentice. The marking was done by Mr Martin Forryan alone. The Claimant scored 20 points. The Apprentice scored 24. The other two scored the maximum of 30 points each. The Claimant's score was the lowest and he was selected for redundancy.

8. On 14 July 2020, the Claimant was sent a letter to confirm that he had been selected for redundancy. No alternative vacancies within any Department were identified.

9. On 8 November 2020 the Claimant presented his claim to the Tribunal after undergoing ACAS early conciliation.

THE LAW

10. The law is contained in the Employment Rights Act 1996 ('ERA 1996'). The relevant provisions are sections 139(1) and section 98(1), (2) and (4).

Section 139(1) ERA

"(1) 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 his 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 employer,

CASE NO: 2604018/2020

have ceased or diminished or are expected to cease or diminish.”

Section 98 ERA

“(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) [not relevant]

(c) is that the employee was redundant,

(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 case.”

11. In **Williams v Compair Maxam Ltd** [1982] 83, the Employment Appeal Tribunal gave important guidance on selection employees for redundancy. That guidance is as follows

“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.”

THE ISSUES

12. The issues in this case are as follows:

12.1 Was there a genuine redundancy situation at the time that the Claimant

was dismissed?

12.2 Was the Claimant fairly selected for redundancy?

12.3 Did the Respondent fail to consider alternative employment in order to avoid redundancy?

12.4 Was the redundancy procedurally unfair?

CONCLUSIONS

13. I am satisfied that there was a redundancy situation within the meaning of section 139(1)(b) of ERA 1996. The requirement for employees to carry out work of a particular kind, namely milling and CNC setter work, had diminished by reason of the downturn following the COVID-19 pandemic and the global reduction in demand as a consequence.

14. In relation to the **Williams** criteria, I substitute the Claimant in place of 'the union' as there was no recognised union at the workplace. In that respect there was a failure to consult with the Claimant as to the best means by which the desired management result of reducing costs was to be achieved, there was no discussion or consultation as to the criteria to be adopted, the decision rested on the sole opinion of one individual and the criteria used were largely subjective. There is no explanation as to the way in which marking was to be exercised. For example, it is not clear what was meant by 'knowledge' (the Claimant clearly had knowledge of the job and possibly more so than the apprentice who scored the same on that criterion), or how the skills and experience criteria were to be assessed. The marking appears to have been undertaken without direct reference to any objective records. The absence of the selecting officer at this hearing makes it very difficult if not impossible for the Tribunal to understand the rationale in the decision-making process.

15. In coming to my decision I have been conscious not to undertake a re-marking exercise or to substitute my views in terms of who should be selected for the views of the Respondent. I have borne in mind the words of section 98(4) ERA 1996 and the guidance in **Williams** which has to be read in the light of section 98(4) ERA 1996. In addition, I have had regard to the following facts:

15.1 The selection criteria employed by the Respondent is quite different to the procedure set out in the Claimant's contract of employment. In the latter, redundancy is to be assessed on the following criteria – capabilities, performance, service length, conduct, reliability, attendance record and suitability for the remaining work. There is no satisfactory explanation as to why the Respondent chose to depart from its own procedure. There is a real possibility that if the Respondent had adopted the criteria set out in its own procedure, the Claimant may have done better (and perhaps well enough to avoid redundancy).

15.2 The fact that this was not a fair or genuine marking exercise can be gathered from the fact that two of the employees in the pool (both of whom the Respondent clearly wanted to retain) received the maximum possible marks. It seems to me highly unlikely that two employees would achieve exactly the same marks on all 6 criteria. The more likely explanation is that what the selecting

officer was doing was to ensure that the two employees he wanted to retain in the business could not possibly be selected for redundancy.

16. Furthermore, there is no explanation as to how each criterion was assessed. I have already referred to the knowledge criterion and the absence of an explanation as to what this meant. It is also not clear why the Claimant scored less in terms of experience by reference to his length of service or why he received a very low mark for qualifications when none were required for him to undertake his role.

17. The Claimant gave names of other employees who could and potentially should have been in the same selection pool. There is no explanation as to why they were not included.

18. I find that the redundancy was procedurally as well as substantively unfair because there was a failure to engage in any direct or personal consultation with the Claimant as to redundancy. This may or may not have made a difference to the eventual outcome. The issue of whether it would be determined at the remedy hearing.

19. In relation to suitable alternative employment, there does not appear to have been any enquiries as to what roles if any were available. There may or may not have been any but no enquiries were made. It has to be said though that the Claimant has been unable to identify any role that could have been offered to him in order to avoid redundancy.

20. For the reasons given, I find that whilst the Claimant was dismissed by reason of redundancy (which is a potentially fair reason for dismissal) he was unfairly selected for redundancy and thus he was unfairly dismissed.

21. The issue of remedy is adjourned on a date to be fixed.

Employment Judge Ahmed

Date: 12 April 2021

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.