



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr I Kilvington

Bowdraper Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (remotely via CVP)

ON 1 March 2022

EMPLOYMENT JUDGE Dimbylow

Representation

For the claimant: Not present or represented

For the respondent: Mr P Lewis, Managing Director

This hearing took place against the background of the coronavirus pandemic; and was conducted remotely by CVP in accordance with safe practice and guidelines.

JUDGMENT

The claimant was fairly dismissed by reason of redundancy. Therefore, his claim for unfair dismissal is not well-founded, fails and is dismissed.

REASONS

1.1 The claim. This is a claim by Mr Ian Kilvington (the claimant) against his former employer Bowdraper Limited (the respondent). The claim form was presented on 21 November 2020 following early conciliation via ACAS with the start and end dates being 19 October 2020 and 19 November 2020. In the claim form the claimant brought a claim for unfair dismissal. The response form was lodged on 16 December 2020 and the claim was resisted. The tribunal issued some standard directions for the just disposal of the case on 31 March 2021 when at the same time 2 days of hearing were fixed for 1 and 2 March 2022.

The directions included the preparation of an agreed bundle, exchange of witness statements, and the provision of a schedule of loss.

1.2 The hearing today was somewhat unusual in that it proceeded in the absence of the claimant. The tribunal received an email from the claimant timed at 21.15 on 28 February 2022 in which he stated: "Hi sorry for the last-minute email. I completely forgot the case was due to be heard tomorrow. I've got a funeral to attend tomorrow so won't be able to login to the hearing." This communication was not copied to the respondent. The clerk at the hearing today telephoned the claimant's number at approximately 9:30am but could not get hold of him. A message was left for him to call back. Also, the clerk sent an email to the claimant. By the time the hearing commenced, nothing had been heard from the claimant. I canvassed with Mr Lewis as to how the case should proceed. We discussed Rule 47 which deals with the non-attendance of a party. Stated shortly this provides the tribunal with the authority to dismiss the claim or proceed with the hearing in the absence of the party. Before doing so the tribunal shall consider any information which is available to it after enquiries are made, if practicable, about the reasons for the party's absence. We already knew the reason, and we had made some further enquiries as were practicable. We also discussed carrying on with the hearing. Mr Lewis submitted that I should carry on with the hearing and he took me through some previous failures on the part of the claimant to progress the claim. Mr Lewis confirmed that the claimant had not supplied a schedule of loss as ordered by the tribunal, and this was to be done by 26 May 2021. He had not provided any documents or a witness statement. Furthermore, the respondent had written to the tribunal on 31 March 2021, and the tribunal had sent a copy to the claimant on 25 January 2022 seeking his comments by 1 February 2022. The claimant had not responded. The claimant had signified to the respondent late in 2021 that he had evidence to support his view that someone else was carrying out his work and although the respondent asked to see this information the claimant never supplied it. In view of the way the case had developed, I decided that it was just, fair, and proportionate to accede to the request of Mr Lewis and hear the case today in the claimant's absence. The claimant has known of the hearing date for almost a year. He has decided to do something else today rather than deal with his case. I noted also that the claimant did not apply for an adjournment. Whilst I sympathise with the claimant over his loss, and his decision to make the funeral his priority, he gave me no insight into how he made the choice. The lack of information before me now reflects the claimant's failure to give relevant information during the proceedings generally.

2. The issue.

Was the claimant fairly dismissed by reason of redundancy? This involves me considering these matters:

- 1.1 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.
- 1.2 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide whether:
 - 1.2.1 The respondent adequately warned and consulted the claimant.
 - 1.2.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool.
 - 1.2.3 The respondent took reasonable steps to find the claimant suitable alternative employment.
 - 1.2.4 Dismissal was within the range of reasonable responses.

3. The law and guidance. The parties in the documents agree that the claimant was dismissed, and so the respondent would present its case first. I adopt in relation to an unfair dismissal claim arising out a redundancy an analysis based on the leading authorities of Burrell v Safeway Stores Plc [1997] IRLR 200 EAT and Murray v Foyle Meats Ltd [1999] IRLR 562 HL, and I use the test derived from them as this:

3.1 Was the claimant dismissed?

3.2 Had the requirements of the respondent's business for employees to carry out work of a particular kind ceased or diminished or was expected so to do?

3.3 If so, was the dismissal caused wholly or mainly by the cessation or diminution?

3.4 Was the claimant's work actually affected by the cessation or diminution? If not, an explanation from the respondent will be required.

3.5 Was there any opportunity for re-deployment?

4. I would also consider the case of Williams & Others v Compair Maxam Ltd [1982] IRLR 83 and guidance given to tribunals in relation to dismissal for redundancy. This includes:

- (i) Were the criteria for selection objectively chosen and fairly applied?
- (ii) Was the claimant warned and was there consultation?
- (iii) Were the trade union's views obtained? In this case the claimant was not a trade union member as far as I am aware.
- (iv) Again, was alternative employment discussed?

5. There is an initial burden of proof upon the respondent to establish a potentially fair reason for dismissal. This is upon the balance of probabilities pursuant to section 98 (1) and (2) of the Employment Rights Act 1996 (ERA). Thereafter, overall fairness is neutral, there being no burden of proof on either party, and my assessment is made subject to section 98(4) ERA. This would include my examining the dismissal and appeal processes.

6. Section 98 ERA states this:

“(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) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

b) relates to the conduct of the employee,

c) is that the employee was redundant, or

d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) –

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

(5)

(6)

7. I also considered the ACAS Code of Practice.

8. Redundancy is defined in the ERA at s.139 as follows:

(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, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local education authority with respect to the schools maintained by it, and the activities carried on by the governors of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment, he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

9. The evidence. I received no oral evidence from the parties. I also received some documents which I marked as exhibits as follows:

R1 Respondent's bundle of documents (28 pages)

C1 Photograph from the claimant

10. Findings of fact. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have taken into account my assessment of the evidence with the surrounding facts.

11. The claimant is 38 years of age. He commenced work for the respondent on 13 April 2017. The effective date of termination of his contract of employment was on 4 October 2020. He was employed as a cleaner working some 15 or 16 hours per week earning approximately £188 per week. He was not in any pension scheme. He worked on Friday and Saturday nights from 10pm to 6am.

12. The respondent employs some 500 employees altogether, 6 of whom worked at the same place as the claimant. It is a significant employer, with annual sales of some £7million. The respondent placed the claimant at the premises of its client KE. The claimant was employed to undertake the nightshift cleaning at those premises.

13. On 1 July 2020 the respondent wrote to the claimant confirming a conversation that the local manager of the respondent had with the claimant wherein it had been confirmed that the client no longer required the weekend nightshift upon which the claimant worked. The letter confirmed that the claimant had been offered alternative weekday shifts by the respondent at the same premises, but the claimant rejected that offer. The respondent agreed to seek

alternative employment for the claimant during the notice period, which was given to terminate on Sunday, 4 October 2020. The claimant was given notice of redundancy if there was no redeployment. He was told how much redundancy pay he would receive. The client KE later confirmed that there would be no reduction in hours in the contract with the respondent; but from 5 October 2020 there was no longer a requirement for nightshift work from Monday to Sunday. Saturday and Sunday cleaning was only required from 6am to 2pm.

14. The respondent wrote to the claimant again on 22 September 2020 confirming that as alternative employment had not been found the claimant would be made redundant 4 October 2020. The area manager for the respondent spoke to the claimant to discuss whether he would be willing to take on hours during the day or afternoons from 6am to 10pm, but the claimant declined this alternative arrangement. The claimant did not appeal against the decision.

15. The submissions. I heard from Mr Lewis. He submitted that the photograph supplied by the claimant appeared to have been taken on a mobile telephone on 23 October 2020 at 23:22. However, this fact cannot be verified at this stage and in any event the person shown in the photograph would not be anyone employed by the respondent as there was no requirement to do the work. There had been no TUPE transfer as the respondent was the only cleaning contractor undertaking daily cleaning. He understood that there may be specialist cleaning services provided to the client on its site by other providers but if so, this had nothing to do with the respondent.

16. The claimant was not present to make any submissions. However, I considered the contents of the claim form and the photograph which he supplied. There is little detail in the claim form explaining why the dismissal was unfair, and the claimant does not explain why he could not accept the alternative proposal put to him or what was unreasonable about it. The issue for the claimant was that an older employee was moved in to do his work after he had left, and this was to save a larger redundancy payment to that person by the respondent.

17. My conclusions and reasons. I apply the law to the facts. The respondent has proved on the balance of probabilities a potentially fair reason for dismissal, namely redundancy. Then I asked myself, was the dismissal overall fair? I find that the requirements of the respondent's business for employees to carry out work of a particular kind had ceased or diminished in the sense that there was a restructure involving a change of its contractual hours with KE. The hours which were lost or changed were those undertaken by the claimant in his contract with the respondent. He was offered alternative work, which appeared to be reasonable, in that it was in the same premises. The claimant does not appear to argue that this was an unreasonable offer and a reasonable refusal. His argument is that someone else was doing the work that he was undertaking at the time when he would have done it after he was dismissed. Unfortunately, that fact is not established on the balance of probabilities. It was unhelpful of the

claimant to produce his photograph very much at the 11th hour. However, on the information available to me this was not showing someone employed by the respondent. The claimant was given over three months' notice of what was going to happen. This was adequate warning, and I find that there was also consultation which included looking at suitable alternative employment. The respondent adopted a reasonable selection decision as the contract with its client involved the removal of the time when the claimant undertook his cleaning at those premises. The respondent took reasonable steps to find the claimant suitable alternative employment. Dismissal was within the range of reasonable responses. The alteration and diminution in the hours available in the KE contract when the claimant worked there caused the dismissal. The claimant unreasonably (because he has not explained to me why he rejected it) rejected a reasonable offer of alternative employment.

18. I had regard to the size and administrative resources of the respondent and came to my decision having regard to equity and the substantial merits of the case.

Signed by Employment Judge Dimbylow

On 1 March 2022

Decision sent to parties on 16/03/2022