EMPLOYMENT TRIBUNALS

Claimant: Mr D Gillespie

Respondent: Metal Processing Limited

Heard at: Southampton Tribunal via Video Hearing Service

On: 11 and 12 April 2023

Before: Employment Judge Brewer

Representation

Claimant: Mrs D Gillespie
Respondent: Ms C Burcham, lay representative

JUDGMENT

1. The claimant's claim for unfair dismissal succeeds.

2. The respondent shall pay to the claimant compensation of £6,278.38.

REASONS

Introduction

1. This claim is made by the claimant against his former employer, Metal Processing Limited, a scrap metal business. The claimant was represented by his wife Mrs Gillespie and the respondent was represented by Ms Burcham who is a director of a company called G Sait Limited. The connection between the respondent and G Sait Limited is Mr G Sait who is a director of G Sait Limited and is also a director of the respondent. It is also the case that the respondent was substantially owned by Mr Z Sait, the son of Mr G Sait.

2. I heard evidence from Ms Burcham and the claimant and submissions from both representatives. I had written witness statements from the witnesses and there was limited cross examination. I was provided with a number of documents all of which I have taken into account in reaching my decision.

Issues

3. The issues in this case are as follows.

4. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy. This was not in dispute.

5. 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 decide, in particular, whether:

    a. the respondent adequately warned and consulted the claimant,
    b. the respondent adopted a reasonable selection decision, including its approach to a selection pool,
    c. the respondent took reasonable steps to find the claimant suitable alternative employment,
    d. dismissal was within the range of reasonable responses.

Law

6. In **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These were

    a. whether the selection criteria were objectively chosen and fairly applied,
    b. whether employees were warned and consulted about the redundancy,
    c. whether, if there was a union, the union's view was sought, and
    d. whether any alternative work was available.

7. However, these guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under S.98(4) ERA. A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair, nor should a tribunal's failure to have regard or give effect to one of the guidelines amount to a misdirection in law. It is also noted that these guidelines represent the view of the lay members of the EAT as to fair industrial relations practice in 1982 and are not immutable. Practices and attitudes change with time and the overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

8. Where there is no customary arrangement or agreed procedure to be considered in determining the **pool** for selection, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR

255, CA. the Court of Appeal said that the employer need only show that they have applied their minds to the problem and acted from genuine motives.

9. The tribunal should judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in **Kvaerner Oil and Gas Ltd v Parker and ors** EAT 0444/02:

> *'different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band.'*

10. In considering whether this was so, the following factors may be relevant:

    a. whether other groups of employees are doing similar work to the group from which selections were made,
    b. whether employees' jobs are interchangeable,
    c. whether the employee's inclusion in the unit is consistent with his or her previous position, and
    d. whether the selection unit was agreed with any union.

11. In order to ensure fairness, the **selection criteria** must not be unduly vague or ambiguous, they must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service.

12. Provided an employer's selection criteria are objective, a tribunal should not subject them or their application to over-minute scrutiny — **British Aerospace plc v Green and ors** 1995 ICR 1006, CA. Essentially, the task is for the tribunal to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion.

13. In order that dismissals on the basis of any particular selection criteria are fair, the application of those criteria must be reasonable.

14. In terms of **consultation**, in **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL. In that case, Lord Bridge stated that:

> *'In the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation.'*

15. This was reinforced in **De Grasse v Stockwell Tools Ltd** 1992 IRLR 269, EAT in which it was stated that the size and administrative resources of the respondent, specifically referred to as relevant to the determination of reasonableness in S.98(4) ERA could affect the nature and formality of the consultation process and later cases determined that a total absence of

consultation could be excused but only if it could have reasonably been concluded that a proper procedure would be ‘utterly useless’ or ‘futile’.

16. In relation to individual consultation the question is consultation about what? To some extent, the subject matter will depend upon the specific circumstances, but best practice suggests that it should normally include:

    a. an indication (i.e. warning) that the individual has been provisionally selected for redundancy,
    b. confirmation of the basis for selection,
    c. an opportunity for the employee to comment on his or her redundancy selection assessment,
    d. consideration as to what, if any, alternative positions of employment may exist, and
    e. an opportunity for the employee to address any other matters he or she may wish to raise.

17. The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided, it also helps employees to protect themselves against the consequences of being made redundant.

18. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR 255, CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek **alternative work**.

19. In **Fisher v Hoopoe Finance Ltd EAT 0043/05** the EAT suggested that an employer’s responsibility does not necessarily end with drawing the employee’s attention to job vacancies that may be suitable. The employer should also provide information about the financial prospects of any vacant alternative positions. A failure to do so may lead to any later redundancy dismissal being found to be unfair. Furthermore, when informing an employee of an available alternative position, the employer should be clear about any eligibility criteria for the role, and the terms on which the role might be offered.

Findings of fact

20. I make the following findings of fact.

21. The respondent is a small scrap metal merchant. At its height it employed around 20 people but at the material time for the purposes of this case there were around 10 employees.

22. The claimant was employed as a driver of which there were two, the second being Mr Alex Brill.

23. By August 2022 the respondent was in significant financial difficulties and had received financial support from G Sait Limited. A particular difficulty was that the business operated on land which it did not own, and the landlord refused to extend the respondent's lease on the land and therefore it became clear that

the business would have to close. Given that the respondent was substantially owned by Mr Z Smith, his father, who substantially owned G Sait Limited, and who is also a director of the respondent, wanted to try to ensure that no one including creditors and staff, would lose money because of the closure of the respondent.

24. At the date the respondent ceased trading, 4 August 2022, and indeed to date, there were no, and are no insolvency proceedings in train.

25. Closing down the business was not a simple matter. Plant and equipment had to be auctioned off and the land had to be cleared, amongst other things.

26. Ms Burcham is and was at the relevant time a director of G Sait Limited. On 4 August 2022 Ms Burcham arrived at the respondent's site and began acting as in effect the senior administrator for the respondent. At lunchtime on 4 August 2022, she told the claimant that he was being made redundant, that is to say dismissed with immediate effect. Thus the claimant's employment terminated at around lunchtime on 4 August 2022 which for all purposes is the effective date of termination.

27. Mr Brill was not dismissed on 4 August 2022. He, along with a number of other employees, remained in employment, in the case of Mr Brill, until 2 February 2023.

28. Those are the brief material facts of this case.

Discussion and conclusion

29. There is no dispute between the parties that the reason for dismissal was redundancy. The claimant has received payment in lieu of notice; all other payments due to him including statutory redundancy pay.

30. What the claimant says is that his dismissal was unfair because of the process followed and in particular, had there been a proper consultation and selection process he may have remained in employment doing what in effect Mr Brill had been doing until February 2023.

31. In her evidence, Ms Burcham said that Mr Brill was chosen to remain in employment because he had extra skills needed as the business wound down. Ms Burcham said that she arrived at the respondent at around mid-morning on 4 August 2022. She said that the decision to make the claimant redundant with immediate effect was that of Mr G Sait and that there had been discussions with him, with Mr C Sait and the site engineer. In the event there was what Ms Burcham said was a discussion between her, the claimant and Mr Brill shortly after 1:00 PM on 4 August 2022 at which the claimant was told he was being made redundant and at which point he left work.

32. Ms Burcham sought to argue that everyone was made redundant by 31 August 2022 but that was clearly not the case. She struggled with trying to explain what occurred after 31 August 2022, but it was clear from her evidence that a

number of staff remained employed to help with clearing the site and importantly from the claimant's perspective, one of those was Mr Brill.

33. What remains entirely unexplained and indeed unevidenced is the basis upon which Mr Brill was chosen to remain employed instead of the claimant. In her written evidence Ms Burcham said that the claimant,

> *"as one of two lorry drivers was selected against the criteria of skill set, attendance, reliability and performance. As the other driver had additional skill sets that could be utilised in the closure process, Mr Gillespie was selected for redundancy first".*

34. Ms Burcham also suggested that the respondent had consulted with the claimant "*in accordance with government guidelines*". She relies upon the government's guidance on the length of consultation where it is stated that there are no rules about how an employer should carry out consultation, but of course there are rules in relation to collective redundancies that is to say where 20 or more redundancy are proposed at one establishment within a 90-day period. In effect she argues that the fact that there are no rules should be equated with there being no period of consultation. This of course is a fundamental misunderstanding. The law is quite clear that the following process should be followed for individual redundancies irrespective of any collective consultation process:

    a. an indication (i.e. warning) that the individual has been provisionally selected for redundancy,
    b. confirmation of the basis for selection,
    c. an opportunity for the employee to comment on his or her redundancy selection assessment (consultation),
    d. consideration as to what, if any, alternative positions of employment may exist, and
    e. an opportunity for the employee to address any other matters he or she may wish to raise.

35. Considering what took place the claimant was not warned or consulted about his selection for redundancy at all. It is no answer to that for the respondent to say that everyone was made redundant and therefore this issue did not arise and that is the case for two reasons. The first is Ms Burcham's own evidence that there was a selection process involving skill set, attendance, reliability and performance. That process should have been the subject of consultation. The second is that self-evidently there was a comparison between the claimant and Mr Brill because Mr Brill was chosen to remain in employment beyond 31 August 2022 until 2 February 2023 a period of five months. The basis of any assessment of the claimant against those criteria should also have been the subject of consultation with him.

36. The basis for selection is entirely opaque. It is unclear what the respondent meant by skill set, reliability or performance. There was no evidence that the claimant was anything other than reliable or that he performed well. It is not clear what extra skills were required during the closure process nor that Mr Brill

had such skills which meant that he should remain employed whereas the claimant should be dismissed as redundant either on the 4th of August or at some point before 2 February 2023.

37. There was therefore no opportunity for the claimant to comment on his redundancy selection either in terms of the criteria that were applied or as to how such criteria were applied to him.

38. It is no answer to the procedural issues raised above that the business was closing, because notwithstanding that the respondent did not trade after 4 August 2022, the fact remains that a number of staff, including Mr Brill, remained employed beyond that date and indeed beyond the purported date of redundancy for everyone who remained employed after 4 August 2022, that is to say 31 August 2022. As I have found, it is clearly not the case, that everyone was made redundant on 31 August 2022.

39. Furthermore, given that the claimant was paid for three weeks in lieu of notice, that three-week time period could have been used to undertake a reasonable consultation process. It would not necessarily have cost the respondent any more money to do that and therefore I can only conclude that a deliberate decision was taken not to consult with the claimant at all on his selection for redundancy.

40. In short, it took between two and three hours to decide that only one of the two drivers was needed beyond 4 August 2022, selection criteria were established and applied to both drivers, there were internal discussions at director level and with the engineer and a decision was taken to dismiss the claimant, none of which was communicated to or discussed with the claimant other than the fact of his dismissal about which he was informed immediately before it was implemented. There was no warning to or consultation with the claimant about his redundancy dismissal whether in terms of the selection criteria to be used or their application to him. He was not given an opportunity to comment on whether he should remain employed instead of Mr Brill and the basis of the claimant's selection for dismissal on 4 August 2022 instead of Mr Brill is entirely unclear. There is simply no evidence before me upon which I could base a finding that the selection process carried out was fair and reasonable in all the circumstances and I find that it was unfair.

41. From the evidence it seems that what remained to be done after the respondent stopped trading was to clear the site of the very large accumulation of scrap metal but it is entirely unclear what particular skills were needed which meant that Mr Brill was more suited to that task than the claimant and from that I cannot conclude that had a fair process been followed the claimant would still have been selected at that point i.e., on 4 August 2022, or indeed at any particular point, for redundancy.

42. For all of those reasons the claimant's dismissal was unfair, and his claim succeeds.

Remedy

43. The claimant has suffered loss following his unfair dismissal.

44. Given that he received a statutory redundancy payment the claimant is not entitled to a basic award.

45. The claimant's losses are therefore as follows:

    a. Loss of 2 weeks' net pay while unemployed - £501.78 x 2 = **£1003.56**
    b. Difference between new and previous net earnings from 31 August 2022 to 2 February 2023 – 24 weeks x £104.69 = **£2,512.56**
    c. Loss of bonus of £450.00 per month x 6 months (4 August 2022 to 2 February 2023) = **£1,716.00**
    d. Pension loss of £21.01 per week x 26 weeks = **£546.26**
    e. Loss of statutory rights - **£500.00**

    Total compensation of £6,278.38*

    *As this is less than £30,000, no grossing up is necessary

Employment Judge Brewer
Date: 12 April 2023

Judgment sent to the parties on 24 April 2023

For the Tribunal Office