Case No: 2300358/2022

EMPLOYMENT TRIBUNALS

Claimant: **L Charlesworth**

Respondent: **The Governing Body of Dalmain Primary School and the London Borough of Lewisham**

Heard at: **London South (by video - CVP)** **On: 7, 8 & 21 November 2022**

Before: **Employment Judge Hamour (sitting alone)**

Representation
Claimant: In person
Respondent: Sally Robertson, Counsel

RESERVED JUDGMENT

The Claimant's claim for unlawful deduction from wages is dismissed on withdrawal by the Claimant.

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

The Parties

1. The Respondents are, respectively, the governing body of a school, and the London borough within which the school is located and operates. The Respondents carried out a redundancy exercise at Dalmain Primary School (the School), as a result of which the Claimant was dismissed for redundancy.

2. The Claimant was employed as a teaching assistant ("TA") at the School. She commenced employment on 2 October 2013 and her employment was terminated with effect from 31 August 2021.

The Issues

3. The School carried out a redundancy exercise, the outcome of which was the Claimant's dismissal for redundancy. The Claimant contends that her role is ongoing and that her dismissal was therefore unfair.

4. The Respondent contends it was a genuine redundancy, which the Claimant accepted by taking voluntary redundancy, and that the dismissal was fair.

5. The Claimant's claim included a claim for unlawful deduction from wages, which related to the redundancy payment calculation. A question and answer document in this regard appeared in the bundle at page 40, together with confirmation that the Claimant now agreed the calculation. The Claimant therefore confirmed at the hearing that she no longer pursued the wages claim, which was withdrawn.

6. The Claimant clarified that her claims of unfairness in the dismissal related only to:

    a. The School's nursery support role not being presented as a 'Level 3" role rather than a "Curriculum Resource Support" ("CRS") role;

    b. It not being clear to the Claimant that the CRS roles would include 121 duties;

    c. The School's recruitment for two temporary SEND roles in the summer of 2021; and

    d. The School's requirements for the interview and assessment process for the new CRS roles.

7. Other than as set out in para 6 above, the Claimant did not seek to challenge the wider redundancy process, including the fairness of the consultation or selection.

8. The Respondent contended that it was not open to the Claimant, in support of her claim for unfair dismissal, to rely upon her own reasons for accepting voluntary redundancy. The Claimant contended that she did not consider her redundancy to have been voluntary.

The Evidence

9. The Respondent provided a bundle of documents which numbered 439 pages. I was also provided with a separate witness statement bundle, which numbered 48 pages and contained the witness statements of Erika Eisele – Headteacher, Hannah Thurley – SENCo, Sarah Rose – Deputy Head, all for the Respondent, and witness statements of the Claimant and Ms Henry-Hart, an ex-colleague.

10. After clarifying the remaining issues with the parties, I heard evidence from all the witnesses, including the Claimant.

11. The Respondent's representative provided an opening note, and written submissions at the end of the hearing, supplemented by oral submissions. The Claimant made oral submissions at the end of the hearing.

Findings of Fact

12. The essential facts, being those relevant only to the Claimant's complaints set out in para 6 above, are as follows:

13. The school designed a proposal, in the Spring of 2021, to reorganise the provision of its support staff, so that the various support roles such as classroom assistants and teaching assistants would be removed, and a new single category of Curriculum Resource Support ("CRS") roles would be created. This was partly for reasons of flexibility and efficiency, and partly to aid the reduction of the School's budget deficit.

14. In particular, the new CRS role was designed so that the CRS staff could be assigned anywhere in the School, to any required support function. This differed from the existing arrangement whereby some staff were engaged for specific tasks, such as 121s, which meant that they could not necessarily be utilised elsewhere if their 121 assigned children were not present or left the School, or did not require a 121 for some other reason.

15. The restructure process was such that the school's leadership team designed its proposal in conjunction with the Board of Governors, following which a consultation with the affected staff and their unions took place.

16. The proposed restructure led to a potential redundancy exercise, The proposal was put to staff in April 2021, with a consultation period from 19 April to 10 May 2021. The relevant redundancy policy document was co-authored/agreed by the relevant unions.

17. The Claimant did not agree with the underlying premise of the redundancy exercise, being the school's stated desire to have flexibility as to the allocation and assignments given to its staff. She considered this not to be in the best interests of the SENco children.

18. Following the consultation period, the restructure proposal was adopted and the existing support staff roles were made redundant. The affected support staff, including the Claimant, were able to apply for the newly created CRS roles.

The School's nursery support role not being presented as a 'Level 3" role rather than a "Curriculum Resource Support" ("CRS") role

19. The School's nursery was, prior to the restructure, staffed by a teacher, and a nursery nurse.

20. The nurse retired in October 2020, before the restructure took place. The Claimant had expressed an interest in taking on a replacement role in the School's nursery, and said to the School's management that a Level 3 qualification, which the Claimant held, was required for that role. However,

the Claimant then withdrew that interest and the nursery role was covered by agency workers.

21. The Senior Leadership Team ("SLT"), and in particular Ms Rose, having made her own enquiries, was of the view that a Level 3 qualification was not required for the nursery. A Level 3 role in nursery was not one of the available roles during the restructure process.

22. It later transpired, following an inspection on 4 November 2021, and a report dated 10 November 2021, that the School was mistaken as to the requirements, and was operating out of ratio by not having a Level 3 in the nursery alongside the teacher.

23. Once the School became aware of this mistake, it was corrected. The School intended to use another teacher for cover, but was instead able to use one of the CRS employees who incidentally held a Level 3 qualification, and had SEND experience, although these had not been stated requirements of the role.

24. The Claimant contends that the School should have been aware as she had informed them of the Level 3 requirement, and further contends that she missed the opportunity for a Level 3 role in the nursery, because the School assigned a CRS to the nursery post rather than recruiting a dedicated Level 3 nursery post.

25. The Claimant says that if there had been a Level 3 role available in the nursery, rather than a CRS role, she would have applied for it. She contends that the failure by the School to give her a Level 3 role in the School's nursery was unfair.

26. The School was not aware of the requirement for a Level 3 role in the nursery at the time of the restructure or at the time redundancies were made. Although the Claimant had informed the School of the requirement, Ms Rose made her own enquiries and reached the mistaken view that no Level 3 was required.

27. Ms Rose gave plausible evidence that even if the School had known of the requirement for a Level 3, it is likely that, rather than recruiting for a nursery specific role, it would have been included within the CRS recruitment process, due to the School's intention to have flexibility of assigning its staff.

It not being clear to the Claimant that the CRS roles would include 121 duties

28. The Claimant said that she was initially recruited as a 121, then when there was no child for her to work with on a 121 basis, she was a class Teaching Assistant, then when there was a child who needed support, she was put back to work with SEN. She therefore said that this flexibility is the same as the current CRS role, which includes 121 work. The Respondent disputed this, as it did not demonstrate any right of the Respondent to require, rather than request, flexibility.

29. The Claimant understood from the consultation process and documentation, that there would be no more 121 roles. She therefore understood that the CRS roles would not include 121 work.

30. In fact, the CRS roles are described in the restructure documents as being to support pupils "including SEND". The roles were to provide support in any way required by the School, depending on its varying pupils and needs, and might include 121s, without a right for staff to insist upon them.

31. As the CRS roles do or can include 121 work, the Claimant contends that her previous role is continuing and is not in fact redundant.

32. The new CRS roles were planned and structured on the following basis:

    a. CRS can be assigned anywhere in the School, at the discretion of the SLT;
    b. CRS may be asked to cover lessons where necessary;
    c. CRS duties may or may not include 121s or SEN work;
    d. The School no longer has support contracts linked to specific roles; and
    e. The School can avoid staff refusing to work other than in their usual class or with their usual child, or doing so only grudgingly.

33. In light of my findings at paras 14 and 32, I find that there is a distinction between the new CRS roles and the Claimant's previous role at the School.

34. The Claimant gave evidence that even if she had known that the CRS included 121s, she still would not have pursued her application for the role, because of her unhappiness with the application process (which is detailed below).

The School's recruitment for two temporary SEND roles in the summer of 2021

35. On 27 July 2021 Ms Eisele sent an email internally to staff with an advert for temporary CRS SEND practitioners to start in September 2021. The positions were linked to specific children joining the School, and would terminate if the relevant children left the school.

36. The Claimant did not apply for these roles or express interest in them.

37. The Claimant accepted in evidence that she would not have wanted to take one of these roles, given that they were only temporary posts.

38. She described it as too much of an insecure circumstance to forego the redundancy payment in order to seek a temporary role.

39. The Claimant also said that by the time the temporary roles were advertised in the summer, she no longer wanted to remain at the School.

The School's requirements for the interview and assessment process for the new CRS roles

40. The School established an interview and assessment process for those applying for the newly created CRS roles. This included being asked to:

    a. Plan & teach a lesson;
    b. Complete a written task (no preparation needed); and
    c. Have an interview with members of the School's Senior Leadership Team.

41. The Claimant, on 19 May 2021, put herself forward for one of the alternative CRS roles, and was due to attend an interview on 25 May 2021. By email of 24 May 2021, the Claimant withdrew from the process, declined to attend the interview, and accepted the redundancy payment offered.

42. The Claimant withdrew her CRS application because she thought the interview process and requirements were unreasonable, and beyond what she felt was required for the CRS role to be performed. In particular, the Claimant felt that:

    a. It was not clear from the CRS job specification that planning and teaching was required;

    b. the level of requirement of the CRS role, which she described as "elevated" meant that there would be an expectation the CRS may have to cover the class;

    c. As she thought that 121s were not included in the CRS requirement, it was more likely that whole class cover would be required of the CRS, as that was less likely to occur if 121s were included, because of the particular demands of 121 work;

    d. She did not want to be in a role where would be asked to cover a class and be challenged to do that all the time; and

    e. She was concerned that with the school's financial constraints that job roles were being merged and the most junior roles were being required to cover the work of more senior staff.

43. The Claimant did not express any of these reservations to the Respondent, whether directly or via her union representative.

44. The same interview and assessment requirements were applied to all staff putting themselves forward for CRS roles.

45. On withdrawing from the application process for one of the CRS roles, the Claimant requested to take voluntary redundancy, which was accepted by the Respondent.

46. The Claimant was given notice from 14 July to 31 August, and was then paid in lieu to 8 September 2021.

47. In evidence, the Claimant said that her redundancy was not 'voluntary'. Given the content of the Claimant's email of 24 May 2021, I find that the Claimant did request voluntary redundancy. However, nothing turns on this as it was not in dispute that the termination of the Claimant's employment constituted a dismissal by the Respondent by reason of redundancy.

Analysis and Conclusions

Unfair Dismissal

The Law

48. Section 98 of the Employment Rights Act 1996 ("ERA") provides so far as relevant:

"(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—

(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.

Redundancy

49. Section 139. of the Employment Rights Act 1996 ("ERA") provides so far as relevant:

(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—

(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind

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

(3) For the purposes of subsection (1) the activities carried on by a [local authority]1 with respect to the schools maintained by it, and the activities carried on by the [governing bodies]2 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).

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

Conclusions on unfair dismissal

50. I now apply the relevant law as I have set it out to my findings of fact.

51. The Claimant was dismissed for redundancy under S.98(2) ERA. The question for me to consider, is whether the dismissal was fair under S.98(4), having regard to the provisions of S.139.

52. Given the limited grounds of complaint set out in para 6, it is not before me to consider the fairness or reasonableness of the redundancy consultation process, or of the Claimant's selection for redundancy. I have therefore applied the relevant law only to my findings of fact in relation to the four points set out below.

The School's nursery support role not being presented as a 'Level 3" role rather than a "Curriculum Resource Support" ("CRS") role

53. This was not the Claimant's role, but a role she would have wanted to apply for had it been in existence during the redundancy process, which it was not. I have therefore considered whether, in light of the School's mistaken belief that no Level 3 role was required in the nursery, the dismissal of the Claimant was fair in accordance with S.98(4)

54. The School's requirement for non-generic (i.e. non-CRS) posts had "ceased or diminished", as specified in S.139 (1)(b)(i) due to the School's decision to operate a new system of flexible CRS roles. The requirement for the Claimant's role of TA (or 121 SEND support, as she was sometimes assigned) had "ceased or diminished".

55. The Claimant's refusal to be considered for a CRS post, the only posts available during the restructure, meant that it was within the band of reasonable responses of a reasonable employer to treat the "ceasing and diminishing" of her role, as sufficient reason to dismiss her (S.98(4)(a).

56. In the alternative, in respect of the ratio requirement for a Level 3 role in the nursery, the School's mistake as to the requirement was a "reason" as required in S.139(6), such that the ceasing and diminishing was "for whatever reason".

57. As I have accepted the Respondent's evidence that it was likely a Level 3 recruitment would have in any event been covered by one of the CRS posts,

even if the School had not been mistaken, the Claimant's refusal to be considered for a CRS role justified her dismissal as set out in para 55 above.

It not being clear to the Claimant that the CRS roles would include 121 duties

58. The Claimant contends that because the CRS roles may include 121s, this means that her role is continuing, and that the requirement for "work of a particular kind" under S.139(1)(b)(i) has not "ceased or diminished".

59. I have found, as set out at para 32, that the CRS roles are different to the TA role, or the SEND 121 function that was being carried out by the Claimant at the time of the restructure. I have also had regard to the distinctions drawn by the Claimant in para 42.

60. The Claimant's role was therefore redundant as set out in para 54 and dismissal fell within S.98(4)(a), as set out in para 55.

The School's recruitment for two temporary SEND roles in the summer of 2021

61. My findings in paras 36-39 are that the Claimant did not apply for these roles and did not want them. In light of this finding, and the Claimant's admission to this effect, it was within the band of reasonable responses of a reasonable employer to treat the "ceasing and diminishing" of her role, as sufficient reason to dismiss her (S.98(4)(a).

The School's requirements for the interview and assessment process for the new CRS roles

62. The School's requirements for application for the alternative roles do not affect the fact that there was a redundancy of the Claimant's role, as I have set out in para 54.

63. In considering whether the School's decision to dismiss fell within S.98(4)(a), I have considered the reasonableness of the School's application requirements for the CRS roles.

64. The School applied the same requirements for all candidates and all employees affected by the redundancies, and is entitled to decide upon its own requirements, which were not challenged by the Claimant, or by the unions.

65. It was within the band of reasonable responses of a reasonable employer for the School to operate the application process it chose, and the Claimant's withdrawal from that process meant that it was within the band of reasonable responses of a reasonable employer to treat the "ceasing and diminishing" of her role, as sufficient reason to dismiss her (S.98(4)(a).

Summary

66. For these reasons I find that the dismissal of the Claimant was on grounds of redundancy in accordance with S.98(2) and was fair under S.98(4). The Claimant's claim of unfair dismissal therefore fails.

Remedy

67. The question of remedy in respect of unfair dismissal does not therefore arise.

Conclusion

68. The Claimant's claims of unfair dismissal, and unlawful deduction from wages, fail and are dismissed.

Employment Judge Hamour

6 February 2023