EMPLOYMENT TRIBUNALS

Claimant: Mr H R Doran

Respondent: Sky Dental Ceramics Limited

Heard at: Manchester **On:** 22 November 2018

Before: Employment Judge Sherratt

REPRESENTATION:

Claimant: Miss L Quigley, Counsel
Respondent: Mr B Hendley, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was dismissed by reason of redundancy. The dismissal was unfair.

2. The respondent shall pay to the claimant the sum of £244.50 by way of basic award after allowing for the sum of £7,824 already paid as a redundancy payment.

3. The respondent shall pay to the claimant the sum of £14,673.85 by way of compensatory award.

4. The Employment Tribunals (Recoupment of Benefits) Regulations 1996 apply to this award.

(a) Grand total	£14,918.35
(b) Prescribed element	£14,217.00
(c) Period of prescribed element from 19 January to 22 November 2018	
(d) Excess of grand total over prescribed element	£591.35

REASONS

1. The claimant was employed by the respondent for some 11 years in a business providing services to dentists as a Plaster Technician. He was dismissed by reason of redundancy. He has brought a claim of unfair dismissal.

2. The has given evidence on his own behalf, and the respondent's evidence has come from Mr D J Welsby, Managing Director, who made the decision to dismiss the claimant; Mrs A Godding, who provides administrative support and played a minor role in this matter; and Mrs T Welsby who heard the appeal. Mrs Welsby is company secretary but normally does not have any involvement in the business as she is employed elsewhere in a completely unrelated field.

3. The List of Issues was provided and agreed as follows:

(1) Was the claimant dismissed?

(2) If so, was it for a potentially fair reason?

(3) Did the respondent act reasonably etc?

(4) Did the respondent follow a fair procedure?

(5) Did the respondent follow a fair selection process?

(6) Was there proper consultation?

(7) Would the claimant have been dismissed and so should compensation be reduced in line with Polkey?

(8) Has the claimant mitigated his loss?

(9) Is it just and equitable to award the claimant compensation?

4. Having heard the evidence and listened to the submissions my brief conclusions are as follows.

Findings of Fact

5. By Wednesday 20 September 2017 Mr Welsby was concerned that the amount of work coming in to the business and therefore the fee income had reduced, and he needed to do something about it. He held a meeting with his staff and notes of the meeting have been produced to the Tribunal. It would appear that the meeting notes were not made up immediately after the meeting because they were not provided to the claimant until as part of the disclosure process relating to these proceedings.

6. The claimant disagrees with some of the contents of those notes. Had they been produced and provided to the claimant shortly after the meeting it may have

been possible for the parties to have tried to reach an agreement as to what was actually said.

7. There is an agreement that the first proposal put forward by Mr Welsby was for the three technicians (plaster, metal and porcelain) to adopt a change in pay structure to be paid per job done rather than by way of fixed salary. The second proposal, that the claimant disputes, is that a position within the company would be at risk of redundancy. Given the state of the documentary evidence and various other problems with the evidence of Mr Welsby that will be mentioned below, I am inclined to prefer the evidence of the claimant that the question of redundancy was not mentioned at that meeting.

8. The evidence of Mr Welsby is that on 28 September 2017 he had one-to-one meetings with the three technicians: Mr Doran and two others, whose names need not be referred to. The claimant denies that any meeting took place with him on 28 September 2017, and again I prefer his version of the evidence, particularly when these meetings were not noted by Mr Welsby. If any of them took place, and if he took any notes, they clearly had not been produced for the Tribunal nor were they provided to the claimant at the time. According to Mr Welsby's statement:

> "Mr Doran clearly indicated he was not going to consider any changes to his role and did not do so. In fact it was noted that he stated he would snatch my hand off if he was offered a redundancy package."

9. I am unable to say whether or not there was a meeting with the other two technicians on 28 September, but at some stage during the relevant time period they appeared to have reached an agreement to be paid by the unit or piece rather than on the basis of a weekly salary.

10. Moving on the evidence of Mr Welsby is that on 2 October 2017 he had to cover the delivery role because the temporary driver was not available, and these are his words in his witness statement:

> "I spoke with Mr Doran on 2 October before I went out driving. I asked him if he had thought of any solutions to deal with the financial situation. He replied to say that was not his job."

11. Then a letter was handed to the claimant by Mrs Godding, the administrator, at a time when Mr Welsby was out, and it is interesting to see how that letter compares with his witness statement. It says:

> "Further to our meeting on 2 October 17 in which I consulted with you and informed you that the company regrettably anticipates having to make redundancies in the near future. This decision has been made because there has been a downturn in the business. Regretfully I am writing to advise you it is likely your position of Plasterer Technician is at risk and you should accept this letter as confirmation and forewarning that you are potentially at risk of redundancy."

12. The evidence given by Mr Welsby in his witness statement does not in any way translate to the matters set out in the letter, and either his evidence is mistaken or the way in which it has been prepared has not made it consistent with the written document. I am content to find that all that he said was "I asked him if he'd thought of any solutions to deal with the financial situation, his reply being it was not his job so to do".

13. However, that letter does go on to say:

> "Consequently the company has now entered into a period of consultation with you. This consultation is expected to be for three days. During this period of consultation I will meet with you regularly to discuss alternatives in order that we may be able to protected your employment. I urge you to consider and put forward alternative proposals and suggestions at our consultation meetings with the aim of avoiding redundancy, etc."

14. The claimant having received this letter was not happy, he became unwell and went home sick, and he did not return until November because he was scheduled to take three weeks of holiday in October. After three of four days sick leave the claimant went on holiday and his return to work was at the beginning of November, after possibly on extra day of post-holiday sickness. During the period from the letter being given to the claimant until he returned at the beginning of November 2017 he did not see Mr Welsby, there was no discussion and they did not meet regularly to discuss alternatives to redundancy.

15. The parties next met on 1 November 2017. The claimant was on that day sat at his bench doing his work when without prior warning or arrangement Mr Welsby came to have a discussion with him; at least it can be said there was no-one else apart from those two in the room when the discussion took place. The meeting was the subject of a note made by Mr Welsby. He says at the beginning of the note that he instigated a meeting lasting just over an hour between himself and the claimant. He states that no minutes were taken.

16. The document that is said to be notes regarding the meeting held on 1 November 2017 was Mr Welsby's recollections of that meeting. The date the notes were produced is not known because it is not on the document and Mr Welsby was unable to assist. However, in this note he says again that the claimant "verbally raised the point that if redundancy was offered to him he would snatch my hand off and was not prepared to alter his working day or pay whatsoever". Again the claimant denies that such phrase was used by him or that there was really any discussion at all before Mr Welsby produced from his pocket a letter of dismissal by reason of redundancy which had been prepared earlier, thus suggesting that the mind of Mr Welsby was made up before he went into the meeting with the claimant. The letter dated 1 November stated:

> "Further to our consultation meetings and my letter of 2 October 2017 I am writing to advise you that the redundancy consultation process has now been completed."

17. The completion of the redundancy process was that meeting of up to one hour which according to the note involved also discussion of the claimant's holiday. Going back to the letter:

> "As explained to you at the start and throughout the process the reason for the redundancy is a downturn in business. Unfortunately now that all alternatives have been reviewed and considered we have not been able to find a solution to the company's current problem other than compulsory redundancy, consequently your employment will terminate by reason of redundancy."

18. Provision was given for 11 weeks' notice that the claimant was required to work, which to his credit he seems to have done.

19. The claimant was given the right to appeal against the dismissal and consistent with him not considering that he would "snatch the hand off of anyone" who volunteered to offer him redundancy terms, he did appeal; he set out over 1½ pages a number of points which were in support of his appeal.

20. The appeal was assigned to Mrs Welsby, the company secretary. She had one or two documents produced for her to read prior to the appeal, and it would appear that at the appeal not all of the matters raised by the claimant were discussed. The decision, said Mrs Welsby, was hers although the letter turning down the appeal was done for her by the Employment Law Consultant. She contributed three or four matters to that letter. The letter concluded on 1 December 2017:

> "The grounds of your appeal were there has been insufficient consultation, there has not been a downturn in business which would warrant redundancies, a new driver has been recently recruited."

21. These were not completely the grounds of the claimant's appeal. The conclusion was that the original decision taken by Duncan Welsby was to stand for the following reasons:

> "I am confident that there has been sufficient consultation over a reasonable period of time including the issue of an 'at risk' letter on 2/10/17. There has been a significant downturn in business as evidenced by the attached figures. A driver was indeed recruited recently but only on a temporary basis as sickness absence cover."

22. The appeal was dismissed, with the interesting conclusion that there had been sufficient consultation which appears to have consisted of two meetings with the claimant.

23. The respondent, from the hearing bundle, had an "Employment Handbook". The extent to which this figured if at all in the process has not been made clear, but it is in the bundle and the employment handbook appears to have been provided by a previous employment law adviser to the respondent rather than their current employment law adviser. Like many employment handbooks it has a section on redundancy, and:

> "In the event of a redundancy situation arising the company will first seek to minimise the effect of redundancies by considering the following:
>
> - Natural wastage;
> - Imposing restrictions on recruitment;
> - Ensuring all staff at retirement age are retired;
> - Reducing overtime;
> - Short time working or lay-offs;
> - Redeploying staff into other positions or locations.
>
> If after these measures have been taken the need for redundancy then exists then the following selection criteria will be considered:
>
> - Length of service, skills, experience and qualifications;
> - Standard of work performance, attendance and disciplinary records."

24. It is apparent from the evidence that the claimant was the longest serving employee, that he had other skills besides plaster work in that he could do metal work as well; he had probably the longest experience of the three technicians. I am not aware of any relevant qualifications either that he had or did not have, or what anyone else had. Standards of work/performance/attendance and disciplinary records - no-one has said that the claimant's work was anything other than satisfactory, neither have any problems concerning his attendance or matters of discipline been placed before the Tribunal to suggest that the claimant would have been anything other than a person retained had the company followed its own laid down procedure in dealing with this redundancy exercise.

The Law

25. Against that background I have to consider what was the reason for the dismissal. The Employment Rights Act 1996 provides for a number of potentially fair reasons for dismissal, and one of those is redundancy. Redundancy is defined in section 139 of the Employment Rights Act 1996, and putting it very shortly:

> "An employee who is dismissed shall be taken to be dismissed by reason of reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish."

26. It seems to me, notwithstanding my scepticism in respect of some of the evidence of Mr Welsby, was that the respondent's business was suffering from a downturn, there was a need to either reduce staff or change their terms, and the decision taken here by Mr Welsby was to dismiss the claimant by reason of redundancy. It is my conclusion that redundancy was the reason for the dismissal.

27. However, was that fair for the purposes of section 98(4) of the Employment Rights Act which provides that:

> "(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."

28. There was no proper discussion or consultation with the claimant. Such consultation as did take place was wholly inadequate. Based on the evidence that I accept from the claimant rather than Mr Welsby, the reasons for his selection does not appear to have been discussed with him, notwithstanding various matters having been discussed with the other two technicians. It was apparent from evidence I have not referred to above that the claimant was never given any figures as to how working to a price per unit rather than a salary might have worked for him and for Mr Welsby. The consultation did not take place as it should have done.

29. In my judgment the reason for the dismissal was redundancy. The process was not fair. The claimant was unfairly dismissed. Had the company's own procedure been followed, that laid down in the Employment Handbook, it seems to me that the claimant is not the person who would have been selected for redundancy.

30. I have taken evidence on remedy which includes an updated Schedule of Loss. I have heard that the claimant has found employment with Royal Mail on a 24 hour a week contract, which gives a loss on a week to week basis. The claimant says he has chosen this employment because it allows him from time to time to get involved in mountain rescue; that is something that usually happens in the afternoon or evening which is consistent with working a morning/early afternoon shift with the Royal Mail. The mountain rescue voluntary work it seems was something that he did when he was employed by the respondent.

31. I find that it is just and equitable to provide for the claimant to be compensated for his losses and that he has taken reasonable steps to mitigate his losses.

32. How to deal with that: I have sympathy with the fact that the claimant is doing public service in terms of mountain rescue; I also have sympathy with the respondent from the point of view that the claimant has perhaps artificially limited the work that he has applied for.

33. What I am intending to do is to look at the compensatory award figures that the claimant has put forward and reduce them, on a just and equitable basis, by 10% to take into account the mountain rescue factor. The compensatory award, using the

updated figures provided by counsel for the claimant, is **£14,893.90** which is £16,548.78 – 10%. The claimant's redundancy payment was underpaid by £244.50, so there will be a basic award of **£244.50**.

Employment Judge Sherratt

18 December 2018

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

02 January 2018

.....
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.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2410893/2018**

Name of case(s): **Mr HR Doran** v **Sky Dental Ceramics Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **02 January 2019**

"the calculation day" is: **03 January 2019**

"the stipulated rate of interest" is: **8%**

MRS L WHITE
For the Employment Tribunal Office