EMPLOYMENT TRIBUNALS

Claimant: Mrs Deborah Birch

Respondent: Schofields Ltd

FINAL HEARING

Heard at: Manchester (remote hearing in public by video CVP)

On: 15 October 2020
17 December 2020

Before: Judge Brian Doyle (sitting alone)

Representatives
For the claimant: Mr J Hurd, of counsel
For the respondent: Mr K Schofield, director

RESERVED JUDGMENT

The claimant was unfairly dismissed by the respondent by reason of redundancy. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the total sum of £2,753.77 (a basic award of £1,440.00 and a compensatory award of £1,313.77). The claimant's entitlement to a statutory redundancy payment is subsumed by the basic award for unfair dismissal. The recoupment regulations do not apply.

REASONS

Introduction

1. This claim contains two complaints: (1) unfair dismissal and (2) non-payment of statutory redundancy payment.

2. The hearing was conducted via the Cloud-based Video Platform (CVP) and was originally listed for 1 day on 15 October 2020. On that day the respondent

successfully gave its evidence despite Mr Keith Schofield (a director of the company) participating from Portugal (Mr Schofield was both a witness and the respondent's representative). However, when it came to the claimant giving her evidence later that morning, she experienced technical difficulties. Her evidence was interrupted more than once and after about 30 minutes the Tribunal took the decision to adjourn the hearing and relist it part-heard.

3. The hearing resumed part-heard on 17 December 2020. All concerned were able to maintain an audio and video connection via CVP throughout the resumed hearing. However, the sound quality was not good at times. Muting microphones did not neutralise the problem, which appeared to be one of feedback. The Tribunal strove to ensure that everyone could understand what was being said and it was satisfied that neither party was disadvantaged by the sound difficulties. Nobody suggested otherwise.

The evidence

4. The Tribunal heard and tested witness evidence from Mr Schofield (for the respondent) and Mrs Birch (as claimant). Mrs Birch's witness statement ran to 29 paragraphs and had 4 pages of documents attached. Mr Schofield's "statement of evidence" comprised a cover sheet, 3 substantive pages and 2 pages of documents. In addition, the Tribunal had a hearing bundle comprised of 54 pages.

5. Nothing really hangs upon the credibility of the witnesses. The Tribunal was satisfied that both Mrs Birch and Mr Schofield were honest witnesses who were attempting to give their evidence to the best of their ability and recollection. Inevitably the evidence of both witnesses was coloured to a small degree by their strongly held belief in the correctness of their respective positions. This was a case in which, as so often, the documentary evidence is crucial.

Findings of fact

6. The respondent, Schofields Ltd, is a family-owned and family-managed business, specialising in UK and overseas holiday home insurance. As well as being an insurance broker, it is also a coverholder at Lloyd's, with delegated authority to underwrite insurance of holiday properties on behalf of Lloyd's syndicates. Approximately 90% of its business was UK-based and 10% overseas properties.

7. The company is owned by two shareholders: Mr Keith Schofield (the managing director and the majority shareholder) and Mrs Barbara Schofield (a director, the company secretary and the minority shareholder). Three other members of the family are registered as directors of the company (Mr JP Schofield, Mr PD Schofield and Mr MJ Schofield), although only two of those other members are actively involved as employees and managers of the company (Mr JP Schofield as Commercial Director and Mr PD Schofield as Marketing Director). See the organisation chart at [53] of the hearing bundle.

8. At the time of (or prior to the) the events that led to the present claim, in addition to the claimant and the directors named above, there were 5 other employees: M Pilling (Administration Assistant), D Gaskell (Senior Coverholder Administrator), K

Gardner (Coverholder Administrator), L Bury (Administration Assistant) and K Hetherington (Social Media Manager, who left the company in mid-2019, when that work was outsourced). See the organisation chart at [53]. The persons responsible for the overall operation and control of the respondent's coverhold and underwriting activity for the purposes of any Lloyd's agreement were K Schofield, D Gaskell, JP Schofield and K Gardner [see respondent's statement of evidence].

9. On 1 January 2017 the respondent entered into a new contract for a holiday home insurance scheme with Lloyd's. The contract comprised a binder for new business for 3 years until 31 December 2019.

10. As a result of the new contract the claimant, Mrs Deborah Birch, was engaged as an employee by the respondent. She had worked in the insurance industry for some years, largely for insurance brokers, and not directly for insurers or coverholders or underwriters.

11. There is some dispute in these proceedings as to the claimant's exact role and job title. The respondent's grounds of resistance describe her as a "Trainee Underwriter for Overseas Business" and that her role involved providing quotations for holiday home insurance for properties within the new business binder of the Lloyd's contract that commenced on 1 January 2017. See [14] paragraph 5. In her witness statement the claimant refers to her job title as being "Coverhold Administrator".

12. Her statutory statement of employment particulars dated 23 November 2017 states that her employment began on 2 January 2018 (in the event this was amended to 8 January 2018) and that her job title was "Administrator" ("required to undertake all the duties that are within your capabilities within the context of this job title") [31]. While the claimant was required to give the respondent 4 weeks written notice, there is no indication of what notice it was required to give her, save that it permitted the respondent to make a payment in lieu of notice, except in cases of gross misconduct, when no notice and no payment in lieu would be given or made.

13. The statutory statement was issued as a result of an offer of employment made by Mr Keith Schofield by email dated 23 November 2017 and was subject to a review after a trial period of 3 months [33].

14. In the respondent's evidence the claimant is described as being an understudy to Mr JP Schofield to train to handle the non-core overseas new business quotations which came via the company's website, allowing him to concentrate on the respondent's UK business.

15. In the event, the Tribunal is satisfied that it is not necessary to resolve the question of job title definitively. The Tribunal is satisfied that the claimant was neither an underwriter nor an approved or authorised person for the purposes of the respondent's overseas business. Her role was primarily that of an administrator in relation to the insuring of overseas properties. While in due course she might have acquired sufficient training and experience to be regarded as something more than an administrator, no longer closely supervised by more experienced employees, that was not the position at the time of her dismissal.

16. Although the contractual documentation does not describe her as a "trainee underwriter", it is clear from the evidence that she carried out her duties as an "administrator" in relation to the respondent's overseas insurance business under the close supervision of D Gaskell, K Gardner and JP Schofield. They were the persons approved by Lloyd's as authorised signatures on the respondent's binding authorities. They were authorised to carry out the many roles required by the delegated authority to underwrite and bind risks on behalf of Lloyd's. The claimant was not. The claimant was supervised by those three employees in her referral to them of customer policy queries and as to coverage whenever clients raised inquiries by email or telephone. Any quotations provided by the claimant had to be signed off by D Gaskell or JP Schofield.

17. Accordingly, the Tribunal finds that the claimant's job was that of "coverhold administrator".

18. To the extent that there were developmental opportunities for her when working for the respondent, however, it would not be unreasonable to regard her as someone who, with appropriate training and experience, could aspire in the future to underwrite overseas insurance business. As it was, the Tribunal accepts that at the relevant time about 70-80% of her time was spent in dealing with the overseas business and 20-30% of her time in helping generally in the office as part of the wider team.

19. In October 2019 negotiations commenced regarding the renewal of the Lloyd's contract due to expire on 31 December 2019. Less favourable terms were offered to the respondent. It decided as a consequence to discontinue new business for overseas holiday home insurance via its website.

20. Although the respondent asserts in paragraph 7 of its grounds of resistance that Mr K Schofield emailed all staff to explain the change of terms of the contract going forward, the only evidence of this is an email of 24 December 2019 from Mr K Schofield to D Gaskell and K Gardner, which was copied to the claimant [52].

21. This recorded that the existing contract would expire on 31 December 2019 and would not be renewed. From 1 January 2020 the legacy binder would continue in its present form with a small uplift in rates. Risks bound on the "new business" binder over the past 3 years would become a new binder which could accommodate new risks. It would have a new higher rating structure for existing business and a different (higher still) rating structure for new UK and new overseas business. The email referred to the impact falling upon future new business because the previous module had changed. Thus, from 1 January 2020, the new module would concentrate on managing existing business and marketing expenditure, which now became a direct cost to the respondent as a result of the renegotiated contract. A period of consolidation was planned to manage the grown account and to discuss with the underwriters any future needs.

22. Although the email of 24 December 2020 is not addressed to all employees, and is only copied to the claimant, this is the closest that the respondent gets to either a general warning to its employees that its business would need to restructure or a

specific alert to the claimant that her job might be at risk of redundancy, although not addressed in those terms.

23. Mr Keith Scofield's evidence is that the respondent wanted to assess the situation during the course of January 2020. The Tribunal accepts that. Nevertheless, between 24 December 2019 and 5 February 2020 there was no communication or consultation with the claimant, either as an individual or as part of the wider workforce, that might have led her to believe that her job was at risk of redundancy.

24. On 5 February 2020, the claimant was asked to come into the respondent's office to meet Mr Schofield. At that meeting he informed her that her role was no longer required and that the company was ceasing to provide quotations for holiday home insurance for overseas properties. He referred to his email of 24 December 2019.

25. That position was then confirmed to the claimant in writing on 5 February 2020 [27]. That refers to the email of 24 December 2019 and that the business module for holiday home insurance arranged with Lloyd's had changed. This meant, the letter continued, that her role as a "trainee underwriter" providing quotations for overseas properties for which she was employed no longer existed. The letter purported to be written notice of termination. She was informed that she did not need to work her notice period and that she should leave with immediate effect. There was no mention of redundancy or redundancy pay, in those terms.

26. On 12 February 2020, she was informed in confirmation that she would be paid until the end of March 2020, inclusive of holiday pay [26]. It may be that that payment was intended "naively" to address any redundancy payment that might have been due, as the respondent has subsequently suggested, but if so, that was not made explicit at the time [16].

27. On 18 February 2020, solicitors acting for the claimant advised the respondent that she regarded herself as having been made redundant; that no regard had been had to the pool for selection; that no procedure had been followed; and the claimant could have been considered for alternative employment by reference to the roles of M Pilling and D Gaskell [28].

28. On 10 March 2020, the respondent repeated the essence of its position as stated on 5 February 2020 [29].

29. A P45 was later issued on 13 March 2020 and recorded the date of termination of employment as 31 March 2020 [34-36]. Her final pay slip appears at [37].

30. Subsequently, in July 2020, the claimant suggested to the respondent that she could have been considered to undertake other roles in the company, including that of administration assistant to Mr K Schofield (a role conducted by Melanie Pilling); with additional training, the roles of D Gaskell as Senior Coverhold Administrator and K Gardner as Scheme Coverhold Administrator; and without training, the role of Administration Assistant (L Bury) [21]. The Tribunal accepts Mr K Schofield's evidence that the claimant was neither sufficiently qualified nor adequately experienced to undertake these roles at the time of the termination of her employment in February 2020.

31. The Tribunal accepts Mr Schofield's evidence that the claimant, even with additional training, could not have undertaken the roles of D Gaskell or K Gardner. D Gaskell had 30 years employment and experience with Schofields. K Gardner had 10 years such employment and experience. Both were approved by Lloyd's of London as authorised signatures on the respondent's binding authorities. They are authorised to carry out the roles required by the delegated authority to underwrite and bind risks on behalf of Lloyd's. This is supported by a document attached to the respondent's statement of evidence, which is a Schedule to the relevant Lloyd's agreement with the respondent. The Tribunal accepts that the claimant was supervised by both these employees and J Schofield. The claimant was required to refer customer policy queries and coverage clients made by telephone or email. All quotations provided by the claimant had to be signed off by D Gaskell or J Schofield.

32. The Tribunal also accepts Mr Schofield's evidence regarding the suggestion that the claimant should have been considered for the role carried out by M Pilling. That employee had been employed some 8 years previously from a corporate broker to assist Mr Schofield. The respondent's commercial account is run as Schofields Ltd, while the Lloyd's binding authorities are managed as Schofields Underwriting Agencies. When Mr Schofield reached his retirement age, the decision had been made to "run off" his account of commercial, private and corporate clients to which he had provided a personal service since incorporating the company in 1984. He subsequently reduced his working week to 3 days. M Pilling had always been employed on a part-time basis working 9.30 am to 3.00 pm, 4 days a week, and was paid on an hourly rate basis. During the 8 years period in question her workload had reduced accordingly. The "run off" of clients was almost complete and was to be achieved by the respondent's current year end. At that time it is expected that the role will be redundant. In addition, Mr Schofield controlled complex corporate risks, while the claimant's previous experience had been with brokers dealing with private lines, shops, small businesses and the like. In Mr Schofield's not unreasonable view, the claimant did not have the experience necessary to assist him.

33. The Tribunal also accepts Mr Schofield's evidence regarding L Bury. She was employed shortly before the claimant, not long after she had left school. She is the office junior. Her roles are reflected in such a job title and she is paid accordingly. In contrast, the claimant was employed as an administrator or at best a "trainee underwriter". She was tasked to train to underwrite overseas holiday homes of UK residents abroad via the Lloyd's agreement. She carried out this task from the commencement of her employment under the supervision of J Schofield (primarily) and D Gaskell (in the former's absence). The claimant is not an authorised name specified on the binding authority (unlike D Gaskell and K Gardner).

34. There is insufficient evidence to suggest that as at April 2020 the respondent had employed a person named as "Adam". That suggestion has not been made good.

35. There is a dispute in the evidence as to whether the respondent continued to offer insurance cover to overseas properties after February 2020 and whether it was possible to obtain quotations for such cover via the respondent's website. Again,

the Tribunal prefers Mr Schofield's evidence to the effect that since the first week of January 2020 the website home page states that the respondent is no longer able to provide quotations to insure holiday homes abroad. The respondent no longer transacts overseas business, but does continue to transact UK business.

36. The Tribunal is unable to accept that there is any evidence of substance that the termination of her employment was due to any personal disliking towards her.

37. Evidence of the claimant's efforts to find new employment appear at [42-51]. Mitigation of loss has not been put in issue.

Submissions

38. The claimant's counsel submitted that the dismissal of the claimant was both substantively and procedurally unfair. There was no warning or consultation. She had not been aware of the email of 24 December 2019. There was no reference to redundancy. The cases of *Williams v Compair Maxam* [1982] ICR 156 EAT and *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 HL emphasise the importance of procedure in redundancy exercises. Although this employer is a small business, it is not relieved of its substantive and procedural failures. This gives rise to a question of whether there was a redundancy at all given that the respondent has produced no financial evidence or other documentation that disclose a downturn in its business. Its website remained active and there were other indications that suggested that this was not a true redundancy situation. The burden is upon the respondent to show both the reason for and the fairness of the dismissal. Here there was a selection pool of one and other employees were not considered. There was no consideration of the appropriate pool. The claimant was singled out. There was no consultation with her and no consideration of her skills. Her transferable skills were not taken into account.

39. Mr Schofield's submission accepted my invitation to him that he might rely upon the respondent's response to the claim and his statement of evidence. His submission took me back over that evidence and, quite understandably, did not add anything to what have already heard in evidence. I have not recorded his submission in greater detail here.

Relevant law

40. The Tribunal has directed itself in accordance with the test of an unfair dismissal set out in sections 98(1), (2) and (4) of the Employment Rights Act 1996; the definition of redundancy in section 139 of the Act; the leading authorities of *Williams v Compair Maxam* [1982] ICR 156 EAT and *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 HL; and the relevant and well-known Acas guidance on handling redundancy dismissals.

Discussion and conclusion

41. The Tribunal starts with the question of whether the respondent has shown the reason (the principal reason) for the dismissal as required by section 98(1)? The respondent relies upon redundancy as the reason. That is a reason that falls within

section 98(2)(c) as being a reason capable of justifying the dismissal of an employee holding the position which the claimant did.

42. Section 139 provides that, for the purposes of the 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 her employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by it, 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.

43. On the Tribunal's findings of fact, this is a redundancy dismissal that falls within section 139(b)(i). When the respondent's contract was renegotiated with Lloyd's on less generous terms than previously the respondent took a decision to withdraw from its previous activity of providing insurance cover to holiday homes overseas. That was the work to which the claimant was primarily and mainly assigned. Thus her dismissal was wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish.

44. The Tribunal is satisfied that the respondent has shown that the principal reason (indeed, only reason) for the dismissal was redundancy. The Tribunal is not satisfied that that was not the true reason or that it was a sham reason or that there was some other reason for the claimant's dismissal. Although the claimant has questioned whether this was a redundancy situation at all, the evidence of the respondent's decision following the renegotiation of the Lloyd's agreement is more than sufficient to establish a redundancy situation of the kind that employers frequently face in comparable circumstances.

45. Then the second question is, given that this is a reason capable of justifying her dismissal, whether the dismissal of the claimant was fair or unfair in accordance with the test in section 98(4), having regard to that reason. That 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 must be determined in accordance with equity and the substantial merits of the case.

46. The essence of a fair dismissal for redundancy expects advance notice of possible redundancy, consultation with trade unions or employee representatives (where required), a choice of objective selection criteria, proper application of those selection criteria, individual consultation and consideration of alternative employment: *Williams v Compair Maxam* [1982] ICR 156 EAT. These are guidelines rather than rules, but nevertheless they are well-established measurements of a fair redundancy dismissal. The emphasis upon procedural fairness and upon consultation cannot be in doubt: *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 HL.

47. It is clear that the respondent did not provide advanced notice of redundancy. The email of 24 December 2019 was insufficient for that purpose. It might have served as a preface to a later warning of redundancy, but that is not what it achieved in its terms. Between 24 December 2019 and 5 February 2020 there was no communication with the claimant, either as an individual or as part of the wider workforce, that might have led her to believe that her job was at risk of redundancy.

48. This was not a situation where consultation with trade unions or employee representatives arose. This is not a factor to be considered here.

49. Much has been made of the claimant comprising a selection pool of one and the fact that there were no selection criteria in play. An employer should always begin by identifying the group of employees from which those at risk of redundancy will be drawn. This is the pool for selection to which the selection criteria will be applied.

50. However, this was and is a small employer. To the extent that Mr Schofield gave the matter any consideration at all, he was entitled to conclude that the decision to cease doing new business for overseas properties meant inevitably that the employee who was primarily assigned to that work, and the majority of whose duties and time was dedicated to that part of the business, should comprise a pool of one. It would be unrealistic to expect a reasonable employer in these circumstances to construct a larger artificial pool consisting of other more senior or longer-serving or more experienced employees whose work encompassed other duties or a wider range of responsibilities. There are always redundancy situations where the closure of a particular part of a business will obviate the need to identify a pool for selection. This was one such case. Mr Schofield's evidence as to why other employees were not suitable candidates for inclusion in a wider and deeper selection pool is accepted. His decision or action, passive though it probably was, fell within the range of reasonable responses.

51. Nevertheless, not only was there no advanced notice or individual warning of redundancy, the claimant also was afforded no individual consultation before she was summarily dismissed by reason of redundancy. Making a payment in lieu of notice or not requiring her to work her notice period does not disturb that conclusion.

52. As already noted, between 24 December 2019 and 5 February 2020 there was no communication with the claimant, either as an individual or as part of the wider workforce, that might have led her to believe that her job was at risk of redundancy. On 5 February 2020, the claimant was asked to meet Mr Schofield. He informed her for the first time that her role was no longer required and that the company was ceasing to provide quotations for holiday home insurance for overseas properties. He referred to his email of 24 December 2019. There was no discussion. That position was then confirmed to the claimant in writing on the same day. She was not required to work her notice. She was afforded no opportunity to discuss the need for a redundancy, why she had been selected, what suggestions she might have to avoid redundancy or what alternative employment (or alternatives to redundancy) might have been considered.

53. It follows that for these reasons the dismissal of the claimant by reason of redundancy, although otherwise capable of being justified, was unfair in accordance with the test in section 98(4), having regard to that reason. In the circumstances (including the size and administrative resources of the employer's undertaking) the respondent employer acted unreasonably in treating it as a sufficient reason for dismissing the claimant, determining that question in accordance with equity and the substantial merits of the case. In adopting the procedure that it did (or more accurately, adopting little or no procedure) the respondent acted outside the band of reasonable responses.

54. As a result, the claimant is entitled to a finding that she was unfairly dismissed.

Remedy

55. The claimant is entitled to a basic award, which also serves to subsume her right to a statutory redundancy payment. The claimant had 2 years service and was aged 56 years at the relevant date. The claimant's gross salary was £24,960 per year or £2,080 per calendar month or £480 per week. Her **basic award** is thus 2 x 1.5 x £480 = **£1,440.00**.

56. So far as the compensatory award is concerned, the starting point is compensation for loss of statutory rights, for which the Tribunal awards £525.

57. The Tribunal then turns to whether the claimant should be compensated further.

58. The Tribunal takes the view that there has been a failure to consult with the claimant. A proper consultation process might have taken 2 weeks to complete given that this is a small employer. However, on the evidence that the Tribunal has heard it considers it unlikely that the claimant would have been able to persuade the respondent that a decision to make her redundant should be reversed; or that a reasonable employer acting within the range of reasonable responses would have considered on the material before it that the claimant should be retained; or that another employee should be selected for redundancy in substitution for the claimant; or that the claimant should be offered alternative employment in circumstances where there is no evidence of any such alternative employment being available (other than by bumping another employee to save the claimant which, as explored in the evidence above, was improbable and impracticable).

59. Thus the claimant's **compensatory award** amounts to 2 weeks net pay or £788.77 plus £525.00 (loss of statutory rights) = **£1,313.77**.

60. Although the respondent appears to have paid the claimant up to the end of March 2020, the Tribunal does not give the respondent credit for that sum. It is not clear from the contract of employment what period of notice the claimant was entitled to. It is entirely unclear whether that was designed to be a payment in lieu of notice and/or a redundancy payment. It is more likely to be an *ex gratia* payment designed to smooth the claimant's exit from the business. It also includes an element of accrued holiday pay. The Tribunal can see no obvious basis upon which that sum or any part of it should be offset against the claimant's compensation for unfair dismissal.

61. The recoupment regulations do not apply to the award.

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Judge Brian Doyle
DATE 18 December 2020

JUDGMENT SENT TO THE PARTIES ON

21 December 2020

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2403948/2020**

Name of case: **Mrs D Birch** v **Schofields Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment 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 judgment day" is: **21 December 2020**

"the calculation day" is: **22 December 2020**

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

For and on Behalf of the Secretary of the Tribunals