



EMPLOYMENT TRIBUNALS

Claimants: (1) Mrs S Wilcox
(2) Miss E O'Monaigh

Respondent: Powys County Council

Heard at: Cardiff via CVP **On:** 29 and 30 March 2021

Before: Employment Judge S Jenkins (sitting alone)

Representation:

Claimants: In person

Respondent: Mr J Walters (Counsel)

JUDGMENT having been sent to the parties on 31 March 2021 and reasons having been requested by the Claimants in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider claims brought by the two Claimants alleging unfair dismissal arising from the same redundancy exercise. I heard evidence from Rachael Lingard, at the time HR Business Partner; Lynette Lovell, at the time Senior Challenge Adviser; and Aneurig Towns, Senior Challenge Adviser, on behalf of the Respondent, and from the two Claimants on their own behalves. I considered the documents in the hearing bundle to which reference was made by the parties and also had regard to a brief statement of agreed facts.

Issues and law

2. The issues to be determined were summarised by Employment Judge Sharp at paragraphs 14 and 15 of her Preliminary Hearing Summary sent to the parties on 17 September 2020, following a hearing on 21 August 2020. They encompassed the following points subject to some slight further modifications
 - (a) What was the reason for dismissal and was it a potentially fair reason? The Respondent asserted it was redundancy, and the Claimants accepted that the reason was indeed redundancy contending that dismissal for that reason was unfair.
 - (b) Were the dismissals fair or unfair in all the circumstances? This encompassed a number of matters.
 - a. Was there a genuine redundancy situation falling within Section 139(1) of the Employment Rights Act 1996? In essence this involved consideration of whether the requirement on the part of the Respondent for employees to carry out work of a particular kind had ceased or diminished or was expected to cease or diminish.
 - b. Was the pool for selection within the range of reasonable approaches available to the Respondent in the circumstances?
 - c. Were the selection criteria objectively chosen and fairly applied, although in this case as the entire pool was selected for redundancy, albeit that two of the five involved were not dismissed, alternative employment having been found for them, there was no question of selection criteria being used, and in this case the more fundamental question revolved around the pool for selection.
 - d. Was there need for consultation? Was the view of the Union sought and was suitable alternative work available?
 - e. Was the procedure used fair?
 - (c) If I found that either or both dismissals was unfair then I would need to consider what compensation to award, taking into account the fact that the Claimants had received a redundancy payment at an enhanced level exceeding their statutory entitlements. I would also need to consider the application of the *Polkey* principle, i.e. assessing, if any finding of unfairness had arisen due to a failure to take any appropriate procedural step, whether, had that step been taken, a fair dismissal

would have taken place, and, if so, when it would have taken place and/or what prospect, in percentage terms, there would have been that it would have taken place fairly.

3. The applicable law was largely captured by the List of Issues, but I was conscious of the following additional points.
4. First, that the focus in a redundancy situation is not on whether work has diminished, but on whether the employer's need for employees to carry out work of that particular kind has ceased or diminished. That cessation or diminution can be either permanent or temporary, and I was conscious that there is actually no need for the work itself to disappear, and in fact there can be situations where redundancies can arise even where work has increased, because the key factor is whether the employer's requirement for individual employees to carry out work of that particular kind has ceased or diminished. That cessation or diminution may arise where work is taken on by other employees, as long as the employer can show that the need for the employees to do work of the kind previously carried out has reduced.
5. I was also mindful that the approach of any employment tribunal in this context is not to assess whether the employer's decision was right or wrong, but whether, at all stages, its approach was one which was open to a reasonable employer in the circumstances, i.e. the test of a band or range of reasonable responses. I was also conscious that the Employment Judge must take care not to substitute his or her own view for that of the employer.
6. With particular regard to the question of whether a redundancy dismissal is fair, I was mindful of the guidance provided by the Employment Appeal Tribunal, in Williams and others -v- Compair Maxam [1982] ICR 156, in which guidelines were laid down that a reasonable employer might be expected to follow in making redundancy dismissals, applying the range of reasonable responses tests. These were largely covered by the issues identified by Judge Sharp, and were: whether selection criteria were objectively chosen and fairly applied; whether the employees were warned and consulted before the redundancy was implemented; whether, if there was a union, its views were sought; and whether any alternative work was available.
7. In this case however, bearing in mind that the entire pool was identified as potentially redundant, the focus of the first guideline was not on selection criteria but on the formation of the pool. In that regard I was mindful of the direction provided by the Court of Appeal, in Thomas and Betts Manufacturing Company -v- Harding [1980] IRLR 255, which made clear that employers have a good deal of flexibility in defining the selection pool;

they need only show that they have applied their minds to the problem and acted from genuine motives. I had to be satisfied however, of the reasonableness of the Respondent's approach, taking into account whether other groups of employees were doing similar work, where their jobs were interchangeable with others, and whether any pool had been agreed with any union.

Findings

8. There was no significant dispute between the parties about what happened as a matter of fact, and my findings relevant to the issues, on a balance of probabilities where there was any dispute, were as follows:
9. The Claimants were employed as Special Educational Needs ("SEN") Advisory Teachers by the Respondent; the Second Claimant as a Senior Advisory Teacher, in the Respondent's Learning and Inclusion Support Team known as "LIST". LIST was formed in 2015, and both of the Claimants came to their roles from a background of having been teachers with special educational needs responsibilities.
10. The Respondent's School Services were split into three teams, Additional Needs and Inclusion, School Improvement, and Central Services and Schools Transformation, only the first two having relevance for this case. The Claimants, within the LIST Team, fell within the School Improvement team, with the First Claimant and three other SEN Advisory Teachers reporting to the Second Claimant, the Second Claimant reporting to a Challenge Adviser, and the Challenge Adviser in turn reporting to Mrs Lovell and Mr Towns as Senior Challenge Advisers.
11. In the other relevant team, the Additional Needs and Inclusion team, there were three Additional Learning Needs ("ALN") Managers covering three specific areas of responsibility, a Statementing Officer, a Behaviour Manager, and a Safeguarding Lead. Two of those three were also teachers from an SEN background.
12. In early 2019, the Respondent, alongside many public sector employers, was facing difficult economic challenges, and looked at ways of making efficiencies and saving costs. This included its education service, and a business case for the restructure of the Schools Service was produced in March 2019. This identified, as far as the SEN Advisory Team was concerned, that much of the work undertaken by the LIST team had been completed successfully. It appeared that the focus of that view was on the auditing and register of SEN requirements within the Authority and the preparation of an overall SEN strategy, both of which the Respondent considered had been completed.

13. The business case proposed that the SEN Advisory Team would be reduced from five officers to three, would move to the ALN and Inclusion Team to be managed by the Senior Manager of that team, and would be retitled as Inclusion Officers.
14. The Second Claimant, as the Senior SEN Advisory Teacher, was notified informally of the proposal on 6 March 2019 by Mrs Lovell and Mr Towns, and she informed her team subsequent to that. An informal meeting took place with the relevant trade unions on 11 March 2019, and a formal consultation meeting took place on 18 March 2019. At that stage, no information was available on the level of salary applicable to the Inclusion Officer roles as it had to go through the Respondent's job evaluation process, but it was understood that it would be likely to be less than the salary of the SEN Adviser roles.
15. Formal notification of being at risk was then given to the Claimants by letter dated 19 March 2019, proposing a consultation period of 28 days. Further consultation meetings took place, including individually with the First Claimant on 4 April 2019, and the Second Claimant together with her Trade Union Representative on 12 April 2019.
16. At around that time, the job evaluation process was completed, and it became clear that the view of the Senior Manager of the ALN and Inclusion Team was that the Inclusion Officer roles did not require qualified teacher status, and the outcome of the job evaluation process was therefore that the salary for the Inclusion Officer roles was to be some £28,000.00 per annum, as opposed to the salaries of the SEN Advisers, which were in excess of £40,000.00 per annum.
17. It was represented by the trade unions, and was accepted by the Respondent, that, in view of the difference in salaries, the Inclusion Officer roles would not be viewed as suitable alternative employment, such that the SEN Advisers would be required to apply for them, but that if they did not they would then lose their redundancy entitlements.
18. Various points were raised by the SEN Advisers and/or their Trade Unions, which led to the consultation period being extended to the end of September 2019. The focus of the points being raised, and any challenge to the redundancy proposals, appeared to be on the basis that the core of the jobs undertaken by the SEN Advisers remained, with the job description and person specification for the Inclusion Officer role being broadly similar. No points were raised about the particular pooling, or the potential to pool, the SEN Advisers with the ALN Managers, and potentially therefore for one or more of the SEN Advisers to take one of the ALN Manager's roles if successful in a selection exercise.

19. Ultimately no alterations were made to the proposals, and both Claimants were issued with a formal notification of termination of employment on 30 September 2019. For the Second Claimant this expired on 31 December 2019, and for the First Claimant it expired on 29 January 2020, she having been given a little extra notice to enable her to accrue an extra complete year of service.
20. In terms of possible alternative employment opportunities, the Claimants were notified early on in the process of three possible alternative secondment opportunities. They were not pursued by the Claimants as they were felt not to be suitable, and no point was taken by the Respondent about that with regard to their redundancy entitlement. It appears that no other potentially suitable alternative employment arose during the consultation process.
21. With regard to appeals, both Claimants appealed against their dismissals at the start of January 2020. Due to issues relating to the formation of panels of Council Members, there were delays in hearing the appeals, and in fact no appeal was scheduled for the First Claimant. The Second Claimant's appeal was scheduled for 26 March 2020, but could not then take place due to the onset of the COVID-19 pandemic. Restrictions were then in place around the scheduling of such meetings and matters were complicated by the very unfortunate contraction of COVID-19 of the HR Manager with responsibility for the process, and her later sad death from that. Ultimately it was only in March 2021 that the possible potential of an appeal hearing resurfaced, with the Claimants being offered appeal hearings a week before this hearing, to which they responded that they did not think that an appeal was any longer appropriate.
22. In terms specifically of the evidence I considered with regard to pooling, I noted that Mrs Lovell confirmed that the only pooling options explored were within the School Improvement Team, as that was the area she and Mr Towns managed and in which the cost savings were being made. She confirmed that she felt that no other members of that team were comparable with the SEN Advisers, and she also confirmed that there were no discussions about pooling across the other education teams.
23. In the event, with regard to the SEN work undertaken by the Respondent, following an Estyn inspection published in September 2019, which was broadly critical of ALN provision within the Respondent organisation, the Inclusion Officers were not recruited, with the Respondent's Pupil Referral Unit and Special Schools dealing with SEN work from that point on. That appears to be the delivery model the Respondent is intending to operate going forward to address additional learning needs, which it was accepted by the Respondent still remain. Indeed it was noted that the Respondent

in 2021 has advertised for SEN advisory roles which require teaching experience.

Conclusions

24. Turning to my conclusions and applying the findings I made to the issues I identified at the outset, my conclusions were as follows.
25. First, as agreed by the parties, the reason for dismissal was redundancy, which is a potentially fair reason for the purposes of Section 98 of the Employment Rights Act 1996. I was then satisfied that there was indeed a redundancy situation within the School Improvement Team of the Respondent's School Service.
26. Whilst the overall need to provide the Special Educational Needs service remained, I was satisfied that the character of how it was to be provided had changed such that there was a reduction in the Respondent's requirement for employees to carry out work of the particular kind undertaken by the SEN Advisory Teachers. Some, although by no means all, of the work undertaken by the LIST Team had been completed, with strategies and registers having been put in place, and the Respondent's approach going forward seemed to me to be going to be more of an operational approach than a strategic one.
27. Indeed whilst there was very little difference between the job description of the SEN Advisory Teacher role and the Inclusion Officer role, I could see that the first principal responsibility had changed from, in the former case, "*To provide advice and guidance on the management of SEN provision within schools*", to, in the latter case, "*To provide advice and support on the provision within schools for pupils with ALN*". Whilst the difference between "guidance" and "support" is potentially only slight, it was nevertheless in my view a substantive distinction, the former being more directive, and thus requiring more from the person carrying out that role than the more reactive role of the latter.
28. In terms of assessing whether dismissal of the Claimants in light of that redundancy situation was fair, I considered that ultimately it was. I considered closely the issue of selection pools and had to say that I had misgivings about the pool used by the Respondent.
29. Bearing in mind that two of the three ALN Managers in the ALN and Inclusion Team had come from a similar background to the two Claimants, it was certainly arguable that a pool encompassing the ALN Managers and the SEN Advisors might have been a better option. However, I was very conscious that it was not my role to assess the right option, or even to decide which was the better of two competing options, but only to decide

whether the option chosen was not unreasonable, i.e. that it did not fall outside the range of reasonable responses.

30. I noted the approach taken by the Respondent to focus on its School Improvement Team, and I also took into account that the ALN Managers all undertook distinct roles. I also noted that the Claimants and their Trade Unions had not raised any issue of potential pooling with the ALN Managers at the time, or indeed in their claim forms, and I concluded that the Respondent's approach, whilst perhaps not one with which I agreed, did not fall outside the range of reasonable responses.
31. In terms of consultation, I also had some misgivings about the quality of parts of the consultation process. Certainly, it seemed to me that there could have been more feedback, and certainly more express written feedback, of the Respondent's responses to the issues raised by and on behalf of the Claimants. However, I was satisfied that the Claimants had had an appropriate opportunity to consult on the redundancy proposals and that that consultation was meaningful.
32. With regard to union involvement, I noted that the Second Claimant was a Trade Union Member, and whilst the Trade Union did not appear to play an active role beyond the start of the consultation process, it was clear that they were involved and that their view was sought.
33. In terms of suitable alternative employment, I concluded that the Respondent had put forward the options to the Claimants of being considered for the only roles which were potentially suitable, although not in the sense of it being clear that they were indeed suitable, noting that no point was taken, quite rightly in my view, by the Respondent about the Claimants' decision not to show any interest in them. I noted that the Claimants accepted that, as far as they were aware, there were no other available roles which were able to be put to them, and I therefore concluded that the Respondent had satisfied its responsibilities with regard to suitable alternative employment.
34. Finally with regard to procedure, I noted that the Claimants had expressed concern over which of various possible written policies had been applied to them. Indeed it seemed to me that possibly a hybrid approach had been followed, with the Claimants being given the benefit of extra notice provisions applied by one policy. Overall however, I was satisfied, in terms of the process of the provision of information and the holding of formal meetings, that appropriate steps were taken up to the confirmation of the dismissal by reason of redundancy at the end of September 2019.
35. I did have concerns about the appeal process however, as certainly appeal hearings could possibly have been arranged more quickly, such

that the obvious consequences of the COVID-19 pandemic could have been avoided. However, I noted that the appeals needed to be considered by Council Members which, for an authority with a geographical spread of the Respondent, would not always be easy to arrange. I also noted that once the point of the middle/end of March 2020 was reached, obvious difficulties arose due to the COVID-19 pandemic, exacerbated by the unfortunate illness and death of the relevant HR Manager.

36. Overall therefore, whilst, as I have said, I had misgivings about the Respondent's handling of the appeals, I did not consider that those misgivings took the Respondent's actions outside the range of reasonable responses.
37. Overall therefore, I considered that the dismissals were fair and that the Claimants' claims should be dismissed.

Employment Judge S Jenkins
Dated: 24 May 2021

REASONS SENT TO THE PARTIES ON 26 May 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche