EMPLOYMENT TRIBUNALS
London Central Region
Heard by CVP on 29 and 30 July 2021

Claimant: Mrs O Ajayi

Respondent: WGC Ltd

Before: Employment Judge Mr J S Burns

Representation
Claimant: Mr R Magara (Solicitor)
Respondent: Mr M Humphreys (Counsel)

JUDGMENT

1. The claim for breach of contract succeeds in the sum of £1131.63
2. The claim for unfair dismissal fails and is dismissed
3. The claim for a redundancy payment succeeds in the sum of £11345.40
4. The Respondent must pay the total sum of £12477.03 to the Claimant by her solicitor by 12/8/2021.

Reasons

1. The breach of contract claim for notice pay was conceded shortly before the hearing. The holiday and unauthorised deduction from earnings claims were settled shortly before the final hearing. The remaining live claims were for unfair dismissal and/or a redundancy payment. The Claimant contended that the reason for dismissal was redundancy and that it was procedurally unfair for lack of consultation. The Respondent contended that the reason for dismissal was SOSR namely the Claimant's refusal to accept the variation of her contract to include a zero hours provision.

2. Although during the hearing Mr Magara referred to TULCRA 1992 and to the TUPE Regulations 2006, these had not been referred to previously or in the agreed list of issues and hence I ruled that there were no claims under those provisions before me.

3. The documents were in a joint bundle. I heard evidence from the Respondent's witnesses Ms L Ballingall, Operational director, and Mirela Stratulat, Area Manager. The witness statement of a further Respondent's witness namely Dawn Richardson, payroll manager was agreed. I then heard evidence from the Claimant. I was referred to a note of relevant law compiled by Mr Magara and to an extract from Harvey produced by Mr Humphrey. I received oral final submissions.

Findings of fact

4. The Respondent provides outsourced hotel cleaning services and facilities management. The Claimants employment with 25 years continuity of service was TUPE transferred to the Respondent on 1/10/2020 by which time the Claimant was already on furlough. The Claimant had worked full time for a salary of £2048 per month as a Head of Housekeeping at the Thistle Hyde Park hotel under a contract which did not permit uni-lateral variations by the Respondent.

5. The Respondent at the relevant time (namely 1/10/2020 to 24/2/21) employed about 4000

employees.

6. The Respondent's business was badly affected from March 2020 onwards by the lockdowns caused by the Covid19 pandemic. The hotel where the Claimant had been working before lockdown, had closed, and remained closed during the relevant time. Thus the employer had ceased carrying on business at the place where the Claimant had been employed and its need for employees to carry out work of a particular kind namely servicing the hotels contracted to the Respondent had diminished. As a natural consequence of this the Respondent had suffered a severe drop in revenue.

7. The Claimant and many others had been placed on furlough under the government scheme by which they received 80% of normal wages

8. By 16 October 2020 the Respondent's directors decided that maintaining substantial numbers of employees on furlough represented an unacceptable operating cost and that it no longer wished to continue to employ employees under contracts for fixed working hours, when the work was not there to be done. This situation affected about 1000 employees. The directors decided to invite those employees to agree to a variation of their contracts to zero hours and failing agreement to dismiss any such employee, at the same time offering him or her a new zero hours contract.

9. The Respondent notified the Claimant who was one such employee of this by letter dated 16/10/20 The Claimant was told she needed to decide by 1/11/2020. Thereafter an Area Manager made several unsuccessful attempts to telephone the Claimant to discuss the matter with her.

10. The Claimant was worried about loss of income and had no faith in how much she would earn under a zero hours contract so she refused to accept the variation, and notified her decision by email dated 26/10/20. In response she was invited to and attended what was termed an "appeal meeting" on 30 October 2020 during which another Area manager Ms Stratulat re-iterated the options and listened to the Cs reasons for not agreeing to the requested variation. It was clear by the end of the meeting that the Respondent was not going to change its mind and that if the C maintained her stance she would be dismissed.

11. Ms Startulat followed up the appeal hearing with a letter to the Claimant dated 19/11/2020 in which Ms Stratulat reiterated the Respondent's position – namely that maintaining fixed costs of guaranteed hours was not economically viable for the Respondent at that time.

12. The Claimant did not change her decision so by letter dated 24/11/2020 the Respondent dismissed her with 12 weeks notice, which the Respondent erroneously backdated to start on 1/11/2020, and which ran from that date for 12 weeks thus ending the Claimant's employment on 24/1/21. The same letter offered the Claimant a zero hours contract to start immediately after the termination. The Claimant did not accept the zero hours contract and her employment with the Respondent came to an end on the expiry of her short notice on 24/1/2020.

<u>Relevant law</u>

13. S98(1)(a), ERA1996 states:
"*(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."*
(Subsection 2 includes the reason that "*the employee was redundant*")

14. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

"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 –

the fact that his employer has ceased or intends to cease –(i) to carry on the business for the purpose of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or

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"

15. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

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) –depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.'

16. Where redundancy is established, 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 Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.

17. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. R v British Coal Corp ex parte Price 1994 IRLR 72 at para 24.

18. It is not the function of the Industrial Tribunal to decide whether it would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

19. There is a statutory presumption of redundancy for the purposes of determining C's entitlement to a statutory redundancy payment as per s163(2) ERA:

"(1) Any question arising under this Part as to— (a) the right of an employee to a redundancy payment, or (b) the amount of a redundancy payment, shall be referred to and determined by an employment tribunal .

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy."

20. Section 141 ERA 1996 provides inter alia as follows:

(1)This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—

(a)to renew his contract of employment, or

(b)to re-engage him under a new contract of employment,

with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

(2)Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3)This subsection is satisfied where—

(a)the provisions of the contract as renewed, or of the new contract, as to—

(i)the capacity and place in which the employee would be employed, and

(ii)the other terms and conditions of his employment,

would not differ from the corresponding provisions of the previous contract, or

(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

Conclusions

21. The immediate cause of the Claimant's dismissal was her refusal to accept the requested variation of her contract to a zero hours contract. However, the real reason why she was requested to accept that variation was a cessation of the business where she had been employed and the overall severe diminution in the work of a particular kind.

22. The Respondent's hope that the cessation of business and diminution in work would be temporary is irrelevant and no part of the test in section 139. The question is whether, at the time of the dismissal, the prescribed conditions are met and the test does not require consideration of the employer's speculations about the future.

23. If the dismissal is wholly or mainly attributable to the conditions prescribed in section 139 – ie for redundancy - then as a matter of simple construction of section 98 it is wrong to categorise the cause as 'some other substantial reason', however substantial that reason may be. This is because the use of the word "*other*" means that this residuary category of potentially fair reasons can be applied only where none of the reasons in section 98(2) are applicable. If the reason is redundancy it cannot be some other substantial reason at the same time.

24. It follows that the first question must be whether or not the reason was redundancy. Only if the reason was not redundancy would it become necessary to consider whether it was for SOSR.

25. In many legal contexts the question of causation is relevant. The proper approach is to identify the real cause or what has been called the "*causa causans*" which may not necessarily have been the last act or omission in a chain of events.

26. Applying this approach, I find that the real cause of the Claimant's dismissal was the cessation of business and the diminution of need for work as defined by section 139(1). The Respondent's actions pertaining to the Claimant in October and November 2020 were

caused by a redundancy situation. Hence the reason for her dismissal was redundancy and not some other substantial reason.

27. The Respondent for obvious reasons did not want to face the costs of making a large number of redundancies and so tried to dress up the situation as something else, by focussing on the last link in the causal chain and trying to ignore the fact that the chain as a whole was forged by a mass redundancy situation.

28. There was substantial consultation and attempted further communications with the Claimant by the letter dated 16/10/2020, the attempted telephone calls from the Area Manager at around that time, at the meeting on 30/10/2020 and by the letter dated 19/11/2020. The fact that the meeting on 30/10/20 was termed an appeal does not detract from the fact that it was in substance a consultation about a redundancy dismissal which was subject to a resolutive condition.

29. In fact, there was not much to consult about beyond making sure that the Claimant was clear about the options she faced, and this was achieved.

30. The Respondent had been faced by an extreme and unprecedented situation, and had made a reasonable business decision to give about 1000 employees a "*take it or leave it"* choice. In the circumstances it was not to be expected reasonably that the Respondent could provide any individual with further personal consultation than that which it did provide to the Claimant. Furthermore, by the very nature of the situation the Respondent would have needed to act consistently and not allow exceptions.

31. No appeal was offered after the dismissal itself but in the circumstances, I find that none was reasonably required, as both sides had made their final decisions by the time of the dismissal. By then over a month had gone by and there was no prospect of any change.

32. If I am wrong in finding that an appeal after the dismissal was not reasonably required, I would have found in any event that it would have made no difference to the outcome.

33. For these reasons I find that the dismissal was for a potentially fair reason and that the procedure adopted was within a range of reasonable responses given the situation at the time. Hence the dismissal was fair.

34. Insofar as section 141 ERA is concerned, it does not follow merely from the fact that the Respondent was forced by economic circumstances to offer the Claimant a zero hours contract as the only alternative to dismissal, that a zero hours contract should be regarded as suitable for her. Personal considerations pertaining to the Claimant rather than the Respondent's requirements are at the forefront when considering suitability under this section.

35. The Claimant was a long-standing employee of 61 years of age at the time. She had fixed living expenses and could not accept, economically or psychologically, the uncertainty and possible low income associated with a zero hours contract.

36. The hopes and speculations of the Respondent that things would improve at some point in the future, and the vague suggestions that the Claimant might get significant hours under a zero hours contract, did not offer any certainty for her. From her point of view, a zero hours contract was no adequate substitute for the fixed hour contract she had enjoyed for many years. For these reasons I find that the offer of a zero hours contract by way of re-engagement was not suitable for her under section 141(3) and that the Claimant was and is entitled to a redundancy payment.

37. Any further remedy hearing is unnecessary. My judgment will be that the R must pay the Claimant £12477.03 to the Claimant by her solicitor by 12/8/2021.

J S Burns Employment Judge
London Central
30/7/2021
For Secretary of the Tribunals
Date sent to parties : 30/07/2021