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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Winer**

Respondent: **First4Skills**

Heard at: **East London Hearing Centre** **On: 3 March 2017**

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

Representation

Claimant: Mr M Cole (Counsel)

Respondent: Mr M McNally (Solicitor)

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The Respondent unfairly dismissed the Claimant because of redundancy.

(2) It was 50% likely that the Respondent would have dismissed the Claimant fairly, following a fair procedure.

(3) The Respondent shall pay the Claimant £4,890.20 in compensation by way of a compensatory award for unfair dismissal.

(4) The Respondent shall pay the Claimant's Employment Tribunal fee costs of £1,200.

REASONS

Preliminary

1 The Claimant brings a claim of unfair dismissal against the Respondent, his former employer. The parties agreed the issues to be decided at the start of the

hearing. They were:-

1.1 The Claimant accepts that he was dismissed by reason of redundancy and that this was a potentially fair reason for the dismissal.

1.2 Was the decision to dismiss fair in all the circumstances, having regard to *s98(4) Employment Rights Act 1996,* in particular:-

1.2.1 Did the Respondent genuinely apply its mind to the selection of a pool of those at risk of redundancy?

1.2.2 Should the pool have included the Claimant's colleague Matthew Beasley?

1.2.3 Did the Respondent adequately consult as to the constitution of the pool?

1.3 If the Tribunal finds that the dismissal was unfair, what is the likelihood that the Respondent would have dismissed the Claimant fairly?

2 I heard evidence from the Claimant and from Amanda Kerr for the Respondent. There was a bundle of documents and both parties made submissions.

Findings of Fact

3 The Claimant was employed by the Respondent from 6 January 2014 as an Area Sales Representative. When he was first employed, his manager was Matthew Beasley, Regional Sales Manager.

4 The Respondent is a national training provider, providing apprenticeships, traineeships, employability skills and training solutions.

5 The Respondent undertook a restructure in 2015. Following the restructure, the Claimant became Regional Sales Manager and Mr Beasley became National Sales Manager. Mr Beasley was no longer managing the Claimant after that time. Both men reported directly to Amanda Kerr, Head of Client Services.

6 The job description for Regional Sales Manager was at page 45 of the bundle and, for National Sales Manager, at page 43 of the bundle.

7 The vast majority of the tasks and responsibilities for the two roles were the same. The National Sales Manager had two extra tasks compared to the Regional Sales Manager: they were, managing relationships with key external stakeholders and partners and providing reporting of sales activity and forecasts.

8 Ms Kerr told the Tribunal that Mr Beasley was paid at a higher band than the Claimant; however there was no documentary evidence that Mr Beasley received more than the Claimant, once the Claimant's car allowance had been considered.

9 In evidence to the Tribunal Ms Kerr, their manager, agreed that both men's role

was to generate new business and engage with employers who were medium and large in size, with multiple apprenticeship opportunities. This had also been said at various points during the redundancy and grievance exercises (pgs.125 and 136). I find, in particular, that Ms Kerr agreed that there was no difference between the size of the employers with which Mr Beasley and the Claimant worked. Ms Kerr agreed, in evidence, that the Claimant's role related to London and the South East Region and that Mr Beasley's role covered the rest of England and Scotland and had national reach. She said that, occasionally, Mr Beasley dealt with London and South Eastern work.

10 After the Claimant's dismissal, the Claimant's role was in fact absorbed into Mr Beasley's role.

11 Ms Kerr told the Tribunal that Mr Beasley spent 85% of his time on his sales role. She said that he spent 15% of his time on responsibility for the Respondent's CRM IT system and Tender Portals. She said that these were Portals which large employers utilised to indicate opportunities to suppliers for tendering. Ms Kerr did not produce any evidence of the breakdown of work undertaken by Mr Beasley, nor any documentary evidence of Mr Beasley actually carrying out these job functions.

12 The Claimant disputed the contention that Mr Beasley carried out any significant CRM or Tender Portal work. He told the Tribunal that the CRM system was internally developed, was a Microsoft share point and was developed by IT engineers, not Mr Beasley himself. He said Mr Beasley tested it and, thereafter, all the team members, including the Claimant and Mr Beasley, used it. The Claimant said that Mr Beasley showed the Claimant how to use it, initially, but thereafter the Claimant used the system himself with ease. The Claimant said that Mr Beasley had daily discussions with the Claimant about the work that Mr Beasley was doing and never mentioned Portal work, to the Claimant's recollection.

13 The Claimant told the Tribunal that Mr Beasley may well have been undertaking Portal work after the Claimant's dismissal, but that that was different to work that they had both been doing at the time that the Claimant was employed.

14 I decided that I preferred the Claimant's evidence. He had detailed knowledge of the CRM system and described its development and use to the Employment Tribunal. He also plainly had day to day knowledge of Mr Beasley's work, from daily discussions with him. On the evidence, I did not consider that Ms Kerr had such familiarity with the work that Mr Beasley was actually undertaking on a daily basis. I decided that both the Claimant and Mr Beasley used the CRM system and that Mr Beasley's initial testing of the system was time limited. I decided that, at the time when the Claimant and Mr Beasley worked together, Mr Beasley carried out very little, if any, Tender Portal work.

15 The Respondent decided to undertake a further restructure in 2016, refocusing on providing apprenticeships within particular business and sectors, rather than in particular regions. The Respondent decided that the regional focus of the Claimant's job was not required and that it was necessary for the Respondent to have a national focus for sales in the future. It decided to delete the Claimant's role.

16 At a management team meeting, the Respondent briefly considered deleting Mr Beasley's National Sales Manager role, but decided against this. The meeting did not consider putting the Claimant and Mr Beasley in a pool for selection for the National Sales Manager role.

17 On 3 March 2016, the Respondent told the Claimant that his role was at risk of redundancy and that he was entering a period of consultation. The Claimant was invited to make counter proposals (pgs. 76-77 and 80).

18 The Claimant met with Ms Kerr for a first consultation meeting in a restaurant on 9 March 2016. The Claimant raised various matters and, in particular, said that he did not consider that it was fair that Mr Beasley had been omitted from risk of redundancy.

19 The Claimant raised a grievance on 11 March 2016. In it, he said that he undertook exactly the same role as Mr Beasley and did not understand why the Claimant was at risk of redundancy, when Mr Beasley was not, or why he had not been given the opportunity to interview for the single remaining sales role.

20 The redundancy questions in the Claimant's grievance were investigated by Clare Connell, HR Business Partner, as part of the redundancy process. Ms Connell wrote to the Claimant on 18 March 2016. She said that the Claimant's role was to generate new business and engage with employers who were medium to large in size with multiple apprenticeship opportunities across the London and South East area. She said that Mr Beasley's role was to generate new business and engage with employers who were medium to large in size with multiple apprenticeship opportunities, with potential to become corporate clients, across the whole of the UK. She said that, as Mr Beasley's role formed part of the new structure, he had not been part of the consultation process. Ms Connell did not address the Claimant's question about why the Claimant had not been permitted to interview for the remaining role.

21 I decided, as Ms Kerr accepted in evidence, that Ms Connell was saying that the Claimant had a sales role which related to London and the South East and Mr Beasley's role related to the rest of the UK.

22 The Claimant submitted a grievance appeal on 28 April 2016 (p.139). He reiterated that Mr Beasley and he were doing the same role. He said that there was no evidence that Mr Beasley was looking for employers to become corporate clients.

23 By letter of 10 May 2016 the Claimant was invited to a final redundancy consultation meeting, to take place on 13 May.

24 The day before that, on 12 May, Jackie Ashford, People Manager, sent a grievance appeal outcome to the Claimant. She said that she had obtained further clarification on the roles of the Claimant and Mr Beasley. She said that the remit of the Claimant's role was to contact clients who had a head office within London and Mr Beasley's role was to contact clients who had an office not based in London. She said that Mr Beasley also covered additional responsibilities such as CRM and Tender Portals. Ms Ashford said that in the future sales roles need to be national. She said that, as Mr Beasley's role formed part of the new structure and he already undertook national duties, he has not been part of the consultation process.

25 The Claimant attended a final consultation meeting on 13 May, when he was given notice of redundancy with one month's notice (p.170).

26 Ms Kerr told the Tribunal that, if the Claimant and Mr Beasley had been put into a pool for selection, they would have been interviewed with competency-based questions. They would also have been assessed on past performance, looking, for example, at their success in converting business to "generated starts" and on the income they had brought to the company. She said they would have been assessed on their industry and sector knowledge and their understanding of the apprenticeship sector and making proposals to clients. She said that Mr Beasley had long experience in the apprenticeship sector and had more industry and sector knowledge then the Claimant. Mr Beasley had worked for the Respondent for 11 years. Ms Kerr said that the Claimant had been new to the sector when he joined the Respondent in January 2014. Ms Kerr told the Tribunal that Mr Beasley had brought more business to the Respondent and had had better success rates and more physical starts than the Claimant. Ms Kerr did not produce any documentary evidence, or statistics, to support that oral evidence.

27 The Claimant told the Tribunal that, before the 2015 changes, he had been the Respondent's best sales person for 10 months in a row. He told the Tribunal that he had 20 years sales experience and that he considered that he was a better sales person than Mr Beasley. He said that he was confident that, at interview, he would have been appointed.

28 There is no question, on the facts, that the Claimant was a good employee. Ms Kerr assured the Tribunal that his redundancy had nothing to do with his performance.

Relevant Law

Unfair Dismissal

29 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

30 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Redundancy is a potentially fair reason for dismissal.

Redundancy

31 Redundancy is defined in *s139 Employment Rights Act 1996.* It provides, so far as relevant, " ..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."

32 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider

whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

33 *Williams v Compair Maxam Ltd* [1982] IRLR 83, sets out the standards which guide tribunals In determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

34 In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

Consultation

35 "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

Pool

36 There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding* [1980] IRLR 255. In that case, an unskilled worker in a factory could easily have been fitted into work she had already done at the expense of someone who had been recently recruited. Equally, however, there is no principle that the employer is never justified in limiting redundancy selection to workers holding similar positions to the claimant (see *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55, EAT).

37 In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

38 In *Capita Hartshead Ltd v Byard* [2012] ICR 1256 the EAT held that the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer, to determine if he has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy. Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it would be difficult, but not impossible, for an employee to challenge it.

Procedural Unfairness

39 If an employer has dismissed an employee in a way which is procedurally unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v AE*

Dayton Services Limited [1987] 3 All ER 974.

40 In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment, Tribunals should apply the following principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.
(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case, that requires it to assess for how long the employee would have been employed but for the dismissal.
(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself.
(3) There will, however, be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
(4) Whether that is the position is a matter of impression and judgment for the tribunal; but in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
…
(7) Having considered the evidence, the tribunal may determine:
(a) that there was a chance of dismissal ….., in which case compensation should be reduced accordingly;
…….
(c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, or
(d) employment would have continued indefinitely.

41 The Tribunal must assess what the actual employer would have done, acting fairly, not a hypothetical employer, nor the Tribunal itself, *Hill v Governing Body of Great Tey Primary School* [2013] 274, EAT.

Discussion and Decision

42 Applying the law to the relevant facts, I find that the Claimant was dismissed for redundancy when his role was deleted from the Respondent's structure.

43 I have decided that the Claimant was performing the same role, or essentially

the same role, as Mr Beasley, with minimal differences in their day to day job functions. Both were generating business and engaging with medium to large employers with multiple apprenticeship opportunities.

44 The differences between the roles were that the Claimant's role related to clients whose head offices were in London and the Greater M25 area; whereas Mr Beasley's role related to the rest of the country.

45 I find that the Respondent deleted the Claimant's role and that, after the Claimant was dismissed, Mr Beasley took on the Claimant's geographical area. I find that the Respondent did not consider whether to pool the Claimant with Mr Beasley. It did not do so in its management meeting and I find that it did not do so, either in the grievance, or the grievance appeal.

46 In both the grievance process and the appeal process I conclude that the decision-makers simply said that, because Mr Beasley's role formed part of the new structure, he had not been part of the consultation process.

47 I remind myself that an employer must act fairly when making a decision with regard to pool. However, I remind myself that, as *Capita Hartshead Ltd* has said, an Employment Tribunal is entitled to consider carefully the reasoning of the employer to determine if he has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy.

48 I find that, in simply saying that because Mr Beasley's role formed part of the new structure, he was not part of the consultation process, the Respondent did not apply its mind genuinely to the question of whether or not he should have been pooled with the Claimant. That statement that Mr Beasley's role formed part of the new structure and therefore he had not been part of the consultation process ignored the plain fact that Mr Beasley was taking on the Claimant's role after the restructure. His job was not remaining the same. It was absorbing the region of London and the South East. It ignored the fact that, if the Claimant had been retained, he, equally would have taken on Mr Beasley's role, absorbing the region outside London and the South East. His role would have changed in the same way as Mr Beasley's role would change, absorbing the other employee's region.

49 The Respondent never turned its mind to this and simply repeated to the mantra that Mr Beasley's role formed part of the new structure.

50 The Respondent did not consider the pool for selection and it acted outside the range of reasonable responses in failing to do so.

51 In any event, I find that, if the Respondent had considered the pool, it would have been outside the band of reasonable responses not to put the Claimant and Mr Beasley in a pool together for selection, when they were carrying out essentially the same role, but in different regions.

52 Seeing that the Respondent did not make any fair or reasonable selection of a pool, I conclude that the Claimant was unfairly dismissed when the Respondent failed to undertake a fair redundancy process.

53 I therefore go on to consider what was the likelihood that this employer would have dismissed the Claimant fairly, following a fair process, and following the Claimant having been put into a pool of selection with Mr Beasley. I remind myself that I must look at all the evidence.

54 The Claimant contended that a fair process would have taken a month longer and, so, that he ought to recover his full loss of earnings for an extra month. I note that the redundancy consultation process started on 3 March 2016 and ended on 13 May 2016. That process was quite a lengthy one, lasting over two months. I conclude that, if the Respondent had acted fairly, it would have had time, within that period, to put the Claimant and Mr Beasley in a pool and make a selection from it, including undertaking an interview process. I therefore do not award the Claimant any period of full economic loss.

55 I go on to consider what was the likelihood that the Respondent would have dismissed the Claimant following a selection process. It is correct that Mr Beasley had more experience of this particular sector and this industry and had worked for the Respondent for 11 years. I observe that there was no corroborating evidence of either Mr Beasley or the Claimant's sales success rates. The Respondent did not produce evidence to justify its contention that Mr Beasley would have been retained - and not the Claimant. I find that the Claimant had long experience as a salesman, for 20 years, and he was an impressive witness at the Tribunal. I consider that the outcome of the interview process would very much have depended on the candidates' performance in interview. Length of service with a particular employer is not necessarily an indication of likely success at interview. I remind myself that the process would have to have been fair, in order for there to have been a fair dismissal.

56 I find that the evidence is not compelling either way. The Claimant was clearly a good employee, with experience, as was Mr Beasley. On the evidence, therefore, doing the best that I can, and accepting that there is a degree of speculation, I find that it is as likely that the Respondent would have retained the Claimant as it would have retained Mr Beasley. Therefore I consider that there was 50% likelihood that the Respondent would have dismissed the Claimant fairly. Accordingly it is appropriate to reduce the Claimant's compensatory award by 50%.

57 With regard to remedy, there was no dispute between the parties that the compensatory award, at full compensation, would have been £9,780.40. 50% of that is £4,890.20. The Claimant received a redundancy payment and so his basic award is nil. The Respondent did not dispute that, if the Claimant succeeded, then the Respondent should pay the Claimant's ET fee costs of £1,200.

58 I therefore order the Respondent to pay to the Claimant compensation for unfair dismissal by way of a compensatory award of £4,890.20, as well as his Tribunal fee cost of £1,200.

Employment Judge Brown

20 March 2017