EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L George	**v**	**London Borough of Brent**

Heard at: Watford **On**: 10 and 11 April 2017

Before: Employment Judge Liddington
Mr I Bone
Mr M Bhatti MBE

Appearances

For the Claimant: In person
For the Respondent: Mr E Kemp, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the tribunal is that, notwithstanding the respondent's failure to offer the claimant a four-week trial period, her subsequent dismissal for the reason of redundancy was not unfair. Her complaint of unfair dismissal fails and is dismissed.

REASONS

Background

1. The claimant's originating application (9 May 2012) brought complaints of race discrimination (direct and victimisation) and breach of contract (notice pay) arising from her dismissal on 10 February 2012 for the reason of redundancy. The breach of contract claim was later withdrawn and a complaint of unfair dismissal was allowed to be added.

2. Following a full merits hearing (heard by this panel on 18-20 December 2012) the complaints were dismissed in their entirety. We found that the respondent's failure to offer a four week trial period for the job of Customer Services Officer ("CSO"), the claimant having been unsuccessful in retaining

the position of Library Manager, "was not sufficient to render the offer unreasonable and the dismissal unfair". (para 34.1)

3. The claimant appealed the tribunal's findings to the Employment Appeal Tribunal. By a judgment promulgated on 27 May 2014 (His Honour Judge David Richardson presiding) the complaint of unfair dismissal was remitted to the same tribunal to consider whether the claimant was entitled under the respondent's policy to a trial period and, in light of its finding in that respect, to reconsider the fairness of the dismissal under the provisions of s.98(4) of the Employment Rights Act 1996 ("ERA").

4. The remitted hearing was held before this tribunal on 13 and 20 November 2014. In the judgment sent to the parties on 15 December 2014 it was held that although the claimant was entitled under the respondent's policies to a trial period, a fact conceded by the respondent at that hearing, the refusal of the respondent to allow the claimant to have a trial period did not make the dismissal unfair.

5. Unfortunately, the tribunal erred in law by having regard to the case of Software 2000 Ltd v Andrews and Ors [2007] ICR 825 [2007] IRLR 568 which was concerned with sections of the ERA which had been repealed by the time of the tribunal's decision and which, in any case, did not provide guidance on the question of the fairness of a dismissal but rather on the question of compensation in cases of unfair dismissal.

6. The claim was, therefore, remitted to this tribunal once again. Following a preliminary hearing by telephone (REJ Byrne presiding) the issue to be determined by the tribunal was set out by reference to the EAT judgment, (His Honour Judge Hand QC), namely:

> "33. In my judgment, the balance is tipped firmly in favour of the same Employment Tribunal now reconsidering on my direction whether the breach of contract that has been admitted as a circumstance made this dismissal fair or unfair, an analysis to be taken only by reference to, and within the terms of Section 98(4), although, I will direct that, if so advised, the parties can call evidence on the issue of why no trial period was offered to the appellant, and the appellant may call evidence as to why it would have been important to her for a trial period to be offered. Subject to that, no further evidence can be called.
>
> 34. So, this matter will be remitted to the Employment Tribunal with the same constitution as that which made the decision subject to the appeal to reconsider whether or not this was a fair or unfair dismissal in terms of Section 98(4) and in particular whether the breach of contract of refusing to offer a trial period, as a circumstance relating only to Section 98(4) was a significant circumstance so far as the determination of whether the dismissal was fair or unfair when looked at from the point of view of the employer's reason for not offering a trial period and the employee's position in relation to the offering of the trial period, the parties being at liberty to call further evidence confined only to the question of the failure to offer a trial period.
>
> 35. The Employment Tribunal considered that the failure to offer a trial period was not only a breach of contract but also a breach of statutory right (see paragraph

27.1 of the written reasons). Whether the concept of there being a breach of statutory right – and if so, what that statutory right might be, adds anything to the breach of contract matter is, to my mind, open to question, but when considering the trial period the Employment Tribunal on the remission should consider not only the trial period from the point of view of a contractual right but from the point of view of any statutory right, in so far as that makes any difference."

The Hearing

7. At the beginning of the remitted hearing, the above issues were revisited and agreed by the parties.

8. We heard evidence from the appellant ("the claimant") who had submitted a written witness statement which was taken as read and upon which she was cross-examined [C1]. For the respondent, we heard evidence from Ms Rashmi Agarwal where the same procedure was followed [R1].

9. There were produced three bundles of documents totalling 582 pages. References in this judgment to specific documents are to the numbered pages in those bundles.

10. Both parties submitted written skeleton arguments to which they spoke in their oral submissions.

11. The tribunal found the claimant's evidence to be frequently evasive, inconsistent and generally unsatisfactory. As an example, the claimant asserts that a trial period would have allowed her to have training to get to grips with coping with the CSO job. The claimant was reminded that at a previous hearing it was established that she had, in fact, covered for an absent CSO for a two month period (which she had complained about in her letter of appeal) [doc 526] and had trained CSOs whom she line managed as a Library Manager. In response the claimant now advances a "straw man" argument, namely that she never had the formal title of CSO because no title would need time. It has never been alleged that the claimant ever held the position of CSO. Wherever there was disputed evidence, we have preferred that of the respondent to that of the claimant.

The Facts

12. There is now no dispute that the claimant had a contractual right to a four week trial period in the new job of CSO and that it was not offered to her. We accept the evidence of Ms Agarwal that the reason for that was that she and Ms McKenzie (Head of Libraries at that time), acted in good faith upon erroneous HR advice that as the CSO post was two grades below that of the claimant's substantive past, and it was in the same service area and hence not covered by the applicable policies.

13. Ms Agarwal knew that the claimant was suitable to do the CSO job and indeed had done so from October until late December 2011 to cover the sickness absence of one of the CSOs reporting to her. The CSO job was, in

fact, "very similar to her existing role". She was familiar with the Kilburn library where she had previously worked. She knew that her salary would be protected for one year. In summary, Ms Agarwal's evidence is that "there was therefore nothing new in the CSO role the claimant was offered that might have been highlighted during a four week trial period, in respect of which management would have to judge her suitability." [R1/para 6]

14. Ms Agarwal met with the claimant on 14 November 2011 along with Ms Essie Williams of the respondent's HR department. The notes of that meeting [doc 545] record that they discussed:

> "
> - your status for 4 weeks trial period and the details of why this is not applicable in your case.
>
> - Clarified the managing change policy on redeployment…"

The note ends with an invitation to the claimant to "clarify any matters" which had been discussed.

15. The claimant did not raise the question of a trial period thereafter with anyone from the respondent, (subject to para 21 below) nor with her trade union representative nor in her lengthy and detailed letter of appeal. [docs 525-527]

16. The respondent had made it clear in a Questions and Answers document issued to all staff that an employee who refused a ring-fenced position (as here) would still be entitled to a redundancy payment [doc 116]. The claimant declined the offer of the CSO post on 9 December 2011 "… due to on-going associated problems." [doc 515] She subsequently received a redundancy payment of £11,789.64. Her employment terminated on 10 February 2012. [doc 518]

17. Turning now to the claimant's evidence on the importance/value of a trial period to her, she says that, first, it would have enabled her to have training to "get to grips with the new role" and would have given her and "the appointing manager" (whom we take to be her new line manager) the opportunity "to try out the new job". It would have allowed her to retain her job. The trial period was of "crucial" importance. She argues that:

> "The role of the alternative job of CSO was materially different from my substantive role of Library Manager in terms of scope, responsibilities, decision-making & salary band and it was crucial that I should have had the trial period to get to grips with the alternative role." [C1/para8]

18. The claimant also asserts that a trial period would have allowed her to "try out the relationship" with her new line managers, one of whom had, in the past, been junior to her and about whom she had at some point made a complaint. We note that all of the applicants for the two Library Manager posts were on the same grade when the restructuring took place and that at

a previous hearing when questioned about the likelihood of being able to be managed by two individuals who she had complained had been appointed through an unfair and biased process, she argued very strongly that as professionals any past differences would be set aside.

19. In her evidence, the claimant asserts that "the trial period was of particular importance and I can categorically state that had the respondent granted me a trial period; I would have retained my employment" [C1/para12]

20. There is, however, a marked disconnect between what the claimant now states to be the importance of the trial period ("On a scale of 0-to-10, 0 being the least and 10 being the highest scale, I would rate the value of a trial period in this instance to me to be 10") [C1/para 6] and what is reflected in contemporaneous documents (see para 25 below) and in particular the claimant's letter of appeal as well as her conduct at the time.

21. After the meeting on 14 November 2011 [see para 14 above] the claimant did not pursue the question of her entitlement to a trial period with management. She now asserts for the first time that she did raise it with an OH advisor. The notes of the Individual Stress Risk Assessment Plan (dated 18 November 2011) do reflect that "Ms George has decided to make decisions regarding the role offered but she needs some further clarifications". [doc 546] The Individual Risk Assessment Log of the same date records that:

> "Due to the restructuring and her demotion, she feels she has no control of what is happening in the restructuring process. Needs more clarity from Management in making final decisions regarding accepting the offered role." [doc 549]

There is no direct mention of a trial period.

22. That report went on to recommend a further meeting with management. There is no evidence before the tribunal as to whether this report was seen by any member of the management team. Certainly no formal follow up meeting took place although Ms Agarwal did speak with the claimant on a number of occasions after that assessment but it appears the issue of a trial period was never raised again.

23. On 7 December 2011, the claimant requested in an email to Ms Agarwal entitled "Staff location from January" [doc 551] that she be based at "Town Hall Library due to my health challenges as I would find moving very unsettling".

24. Ms Agarwal spoke to the claimant after receiving that email to explain the allocation of jobs and to undertake to see if there were any alternatives but before she could do so, the claimant declined the job offer (see para 16 above). On 16 December 2011 the claimant was given notice of termination [docs 553-554].

25. In her lengthy and detailed letter of appeal against the dismissal [docs 525-527] the claimant set out her grounds of appeal:-

    25.1 the wording of the redundancy letter was unfair and discriminatory as it referred to the fact that she had declined the offer of alternative employment which could affect any benefits to which she might have been entitled post-employment;

    25.2 management did not take steps to investigate the reasons for her rejection of the CSO position which included the question of where she would be based;

    25.3 management did not treat her with dignity as illustrated by the fact that she was given no notice of a handover/induction meeting;

    25.4 another CSO held a meeting with one of the claimant's members of staff about a matter the claimant had been dealing with;

    25.5 management leaked information about the claimant;

    25.6 the claimant had to cover the duties of her CSO as well as her own.

    In this detailed letter the claimant went on to raise complaints about the process for selecting the two Library Managers. There is no mention in the letter of what the claimant now states was the single most important reason for her refusal of the CSO post, namely the refusal of a trial period. The claimant's evidence is that when she wrote that letter she was in a "state of confusion". We do not accept that she was so confused as to omit any reference at all to what she now claims was the most important factor for rejecting the new job.

The Law

26. Where a permissible reason for dismissal is established as here, we must consider whether that dismissal was fair in accordance with the provisions in section 98(4) ERA:

    > "the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
    >
    > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    >
    > (b) shall be determined in accordance with equity and the substantial merits of the case."

27. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well as substantive aspects of the decision to dismiss. A tribunal must adopt an objective

standard and must not substitute its own view for that of a reasonable employer (Iceland Frozen Foods v Jones [1982] IRLR 439 EAT as confirmed in Post Office v Foley [2000] IRLR 234, CA; and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

28. The statutory provisions relating to a trial period contained in s.138(3) ERA are concerned with protecting the entitlement to a redundancy payment. As the claimant received a redundancy payment it is not necessary to consider those provisions further.

29. In the case of Elliot v Richard Stump Ltd [1987] IRLR 215 upon which the claimant relies, it was not held, contrary to the claimant's assertion, that failure to offer a trial period results in an automatically unfair dismissal. Rather it is one factor, albeit an important one, in the overall consideration of the fairness or unfairness of a redundancy dismissal.

Conclusions

30. Applying the law to the facts as found above, we conclude that notwithstanding the respondent's refusal on the mistaken advice of its HR department to offer the claimant a trial period in the job of CSO, the subsequent dismissal following the claimant's rejection of that offer was not unfair for the following reasons. The claimant:

    30.1 was familiar with the more limited duties of the CSO position having trained new CSOs and having covered for one of her CSOs who was on long-term absence;

    30.2 knew where she would be based (Kilburn) and had worked there in the past;

    30.3 knew that her salary as Library Manager would be preserved for one year;

    30.4 knew the managers to whom she would report and gave evidence that they were all professionals who could work together;

    30.5 knew, or should have known, that she would receive a redundancy payment even if she refused the offer of the CSO position.

31. We do not accept the claimant's assertion that the trial period was of crucial importance. The claimant is tenacious in pursuit of her rights and we are not convinced that the refusal on one occasion of what she, correctly, believed was her contractual right to a trial period would be sufficient to deflect her from continuing to assert that right. Instead, we find that the claimant was well aware of those facts set out above (para 30) and for that reason can now assert categorically that had she had a trial period she would have retained her employment. In other words, the results of a trial period were a foregone conclusion for the claimant. She was not disadvantaged by the respondent's failure to offer it.

32. Whilst we accept that in many, if not most, circumstances the failure to offer a trial period would be a very significant (although not determinative per se) factor leading to a finding of unfair dismissal, we do not find it to be so in this case for the reasons set out above and accordingly we find that the claimant's dismissal was not unfair.

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Employment Judge Liddington

Date: 21 July 2017……………………..

Sent to the parties on: ....

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For the Tribunal Office