



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr V Potts

v

Birmingham Metropolitan College

Heard at: Birmingham

On: 19 & 20 November 2018 and
4 December 2018 (in chambers)

Before: Employment Judge Broughton

Appearances:

For Claimant: in person

Respondent: Mr D Northall, counsel

JUDGMENT

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

The Facts

1. The claimant was employed by the respondent as a full time lecturer in business studies and economics from 8 February 1988 until his dismissal on grounds of redundancy with effect from 1 December 2017.
2. The claimant had apparently taught a range of business related subjects over the years but latterly he exclusively taught AS and A level economics. He had a lengthy period of sickness absence in 2016 when his teaching hours were covered by other staff. Following a phased return the claimant was, once more, the sole teacher of A level economics.
3. The claimant was also branch officer for UCU and suffered from type 1 diabetes. Whilst these matters were referenced in his evidence he confirmed that the only claim he was making was for ordinary unfair dismissal.

4. In the 2016 / 2017 academic year the college failed to meet its student recruitment and income targets for the year and the projections for the following year suggested that those targets would be missed again.
5. The college reviewed their support functions and was able to make savings of around £500,000 but they needed more. The claimant disputed some of the respondent's budget choices, such as the expenditure on training but, ultimately, those are management decisions outside the jurisdiction of this tribunal.
6. The college then determined that they would need to review their curriculum offer to make further savings. They looked at recruitment and retention trends as well as achievement rates and identified a need to make a reduction of 26.6 FTE posts. Economics was identified as one of the subjects which no longer appeared viable.
7. Achievement rates were consistently below the national average, although that was true of a number of departments. In addition, in economics at AS level they were declining although there was apparently some improvement at A level.
8. Enrolments had recently declined and the projections were for further decline, although the claimant suggested that this could not be accurately predicted until GCSE results in August. That was a fair point but, equally, the respondent could not wait until only a couple of weeks before the start of the new academic year to make their decisions.
9. Perhaps most tellingly the projections for students progressing to the second year of the A level course were such that the course did not appear to be viable. As it turned out the success rates were even lower than predicted and only 4 students were due to progress, seemingly confirming the view of the college.
10. The claimant took some of these indicators personally and pointed to his sickness absence and the fact that the performance of his department had not been formally raised with him previously. That was understandable but, at this stage, the college was only seeking to objectively look at the cold statistics to assess the likely future viability of subject areas. The claimant subsequently suggested that the college should have done more to support the department. He may be right but there was no suggestion that the college had deliberately not done so, nor that they had treated other departments differently.
11. On 7 June 2017 the college informed staff, including the claimant, and the unions of their proposals to make redundancies. An HR1 was issued. A draft selection matrix was provided. A follow up letter was sent confirming the commencement of collective consultation and seeking volunteers for redundancy.

12. The following day the claimant met with his manager, James Matthias, and was informed of the proposal to remove A level economics from the college curriculum. He was handed a letter confirming that he was “at risk” of redundancy but emphasising that everything remained subject to individual and collective consultation. The other business studies lecturer in the department received the same letter.
13. The claimant asserted that if this were a formal consultation meeting he ought to have been allowed to be accompanied in accordance with custom and practice. The respondent suggested that this meeting was informal and designed to give staff as much notice as possible of the process to follow.
14. The claimant and the unions felt that identifying those at risk was somewhat premature given that they had not, at that stage, had an opportunity to respond to the consultation and suggest ways of avoiding redundancies.
15. On the face of it that appeared to be a fair criticism. However, the college had, apparently, previously been criticised for not giving staff enough warning of potential redundancies. They emphasised that nothing had been decided and that everything was potentially subject to change through the individual and collective processes.
16. As it turned out many changes were made in relation to, for example, the selection matrix and vacancy availability. Ultimately, only 4 compulsory redundancies were necessary, seemingly confirming the college’s position. The unions did not bring any claim in relation to any alleged failings in the collective process, nor did the claimant call any union witnesses.
17. I saw evidence of various collective consultation meetings and email exchanges where additional information was provided and changes were made to the proposals.
18. I also saw extensive email correspondence between the claimant and the college seeking further information. The claimant suggested that he had not been provided with the data that resulted in the decision to discontinue A level economics but this was provided on 13 June 2017.
19. On 12 June 2017 the claimant was invited to a meeting with Mr Matthias. At that stage the claimant did not unequivocally accept and he continued to put his questions electronically which were, seemingly, answered to the best of the college’s ability, albeit not always to the claimant’s satisfaction.
20. The claimant also emailed the relevant managers in the vocational business studies and accountancy departments, which were in a separate directorate, to ascertain whether they may have any hours available for him. There was no dispute that, if there were such hours available, the claimant may have been suitable to undertake at least some of them, having previously worked in those departments.

21. Regrettably he was informed that there were no such hours available.
22. Mr Matthias met the claimant, accompanied by his union representative, on 19 June 2017.
23. The claimant challenged the rationale for removing economics and Mr Matthias responded in the meeting and, where he didn't have the answers, these were forwarded to relevant managers to respond via email. The claimant refused to discuss the selection criteria as they remained subject to the collective consultation process at that stage.
24. That was not unreasonable and, in fact, the selection criteria were subsequently changed and agreed with the unions.
25. Email enquiries and responses continued.
26. On 22 June 2017 the claimant was informed of potential vacancies for progress and learning coaches (PLCs), a management post supporting other lecturers to improve their performance. He felt he met "nearly all" of the requirements but his application was unsuccessful.
27. This was a significantly different role but the college agreed, following union representations, that potentially displaced candidates would be given priority over equally strong external candidates, even though a recruitment process was already underway.
28. The claimant was subsequently given feedback regarding why his application had been unsuccessful. He was given a further opportunity to apply but elected to submit the same application. Unsurprisingly, therefore, he was unsuccessful again. In any event the claimant's performance statistics were not ones that would evidence that he would be an obvious choice to mentor others to improve their own.
29. A significant number of the proposed compulsory redundancies were reduced as a result of the consultation processes and the request for volunteers. However, on 4 July 2017, the claimant was informed that his role remained at risk of redundancy. He was subsequently provided with the agreed selection matrix.
30. Mr Matthias met with the claimant and his union representative on 13 July 2017 to discuss his scores. The claimant was able to evidence a teaching qualification that had not been recognised and his score in that regard was changed.
31. He also challenged his attendance score, which utilised the Bradford Factor, suggesting that his lengthy absence for work related stress the previous year should be discounted. Whilst under no obligation to do so, the college agreed.

32. In any event, the other lecturer in the pool scored significantly higher in relation to continuing professional development (CPD) and performance. The claimant acknowledged that he had done no more than the mandatory CPD, suggesting that he was so experienced that it was unnecessary. Nonetheless this was an objective, agreed criteria and the college was entitled to reward additional, voluntary CPD.
33. Similarly, the performance scores were based on objective, agreed statistics. The claimant's absence was discounted and he was unable to suggest any basis on which he should have scored higher, either internally or before me despite a suggestion that the score was "insulting".
34. Whilst the claimant suggested that the fact that his initial scores were wrong indicated unfairness, it seemed to me that the fact that they were amended supported the respondent's assertion that they acted reasonably and consulted meaningfully.
35. As a result, the claimant was fairly selected from the agreed criteria. At one stage he suggested that, as it was his subject that was axed, he should have been in a pool of 1. That would not have been unreasonable but hardly supports his case.
36. He also suggested that the pool should have been wider and included the vocational business studies lecturers in another directorate. The claimant said that he was able and experienced enough to be interchangeable with at least some of them. That may be right and it may not have been unreasonable for the college to utilise such a wider pool.
37. That said, it was not unreasonable for them to proceed as they did, not least because the union did not raise any challenge to the pool, nor did the claimant suggest an expansion during individual consultation. It was, therefore, reasonable for the college to pool the two business studies lecturers in the humanities department once economics was identified as a subject to be discontinued.
38. Further queries were raised by the claimant which the respondent subsequently replied to by email. The claimant felt the response was inadequate and a further response was provided on 2 August 2017.
39. The other business studies lecturer was informed that she was no longer "at risk". The claimant continued to be sent updated vacancy lists.
40. The claimant also asked whether he could continue to teach the remaining second year A level students and make up the hours elsewhere but neither party were able to identify where such hours may be available at that stage. Moreover, with only 4 students the second year A level course was clearly not financially viable. At least twice as many students were required.

41. The claimant was invited to a couple of further meetings in August 2017. He objected on the basis of alleged short notice, his suggestion that he was away on holiday and regarding the availability of his union representative. There was also some confusion over the dates of the claimant's availability
42. It seems to me that it was not unreasonable for the claimant to be invited to such meetings, nor was it unreasonable for him to decline. He continued to raise enquiries by email.
43. Ultimately the claimant was invited to a meeting on 1 September 2017, having said he was available after 24 August 2017 but he ultimately declined the invitation saying he was unwell. He was also under the impression that he was entitled to representation by a regional union representative, who he said was unavailable.
44. The claimant felt there was, in any event, no point in attending as he was aware of the likely contents of the meeting from those where he had represented colleagues.
45. The claimant was issued with notice of termination of employment on 3 months' notice that day and offered the right of appeal.
46. The claimant exercised his right to appeal and continued to send emails about ways to potentially avert his redundancy.
47. His appeal was heard on 20 September 2017 and he was encouraged to submit a revised application for the PLC roles. However, as mentioned, he simply resubmitted his previous unsuccessful application which was, unsurprisingly, rejected.
48. The claimant's appeal was not upheld and this was confirmed in some detail in writing on 2 October 2017.
49. The claimant continued to receive vacancy lists and took exception to the fact that these included all vacancies, many of which he considered to be completely unsuitable. He expressed these views forthrightly in an email in terms which the respondent understandably considered to be unacceptable given that the claimant used phrases such as "a minion deep within the bowels of HR".
50. The claimant was aware that the vocational business studies team had lost 3 lecturers over the summer and enquired, on 15 October 2017, about how those hours had been filled. For reasons that were not explained he received no response to that enquiry.
51. Before me there was some dispute over the exact number of hours released by these departures but it appeared to be 2 FTE, or 50 teaching hours. On the face of it this, at first, appeared to suggest that the claimant may have been overlooked.

52. However, the respondent gave unchallenged evidence that all of those hours would have been within the redundancy process had the employees not left the college. 37.5 hours were simply not replaced and the remaining 12.5 hours were covered by other members of the vocational department who needed to make up their own hours following the restructured curriculum offer. The respondent was not obliged to effectively take those hours from existing members of the department to create a role for the claimant.
53. The claimant suggested that one of the departing employees had returned earlier this year. There was no evidence, however, that this was to do anything other than fill hours that subsequently became available for whatever reason.
54. The respondent appears to have misunderstood the claimant's objections to receiving the vacancy lists and, as a result, did not send the next updated vacancy list which would have included a 0.4 FTE vacancy that had arisen in vocational business studies following a flexible working request. Whilst the request had been made in September there was a process to follow and the existence of that vacancy did not become "live" until 17 October 2017.
55. Fortunately the claimant became aware of the vacancy almost immediately. Nonetheless he elected not to apply. Whilst he was willing to consider a reduction in hours to 0.5 FTE, he did not consider anything less to be financially viable for him. That was understandable.
56. Whilst he did not raise the issue at the time, the claimant suggested before me that the respondent should have combined these hours with the hours required to teach the remaining 4 second year A level economics students to create a viable role for him.
57. This ignores the fact that the hours required to teach the remaining 4 were not financially viable. Moreover, the respondent had made arrangements for the 4 to be taught elsewhere and, putting the students' interests first, it was not unreasonable for them to be unwilling to cause the students further disruption by recalling them half way through the first term.
58. The claimant's employment ended on 1 December 2017.

The issues and the law

59. The claimant claimed unfair dismissal and the respondent relied on the potentially fair reason of redundancy.
60. In that regard I have considered the provisions of sections 98 and 139 Employment Rights Act 1996.

61. In short, I need to determine whether the respondent had a reduced requirement for employees to carry out work of a particular kind and, if so, whether they acted reasonably, in all the circumstances, in dismissing the claimant as a result.
62. It was agreed between the parties that the principal issues for me to consider in that regard were, in accordance with established case law:
- Was there a genuine redundancy situation?
 - Was the claimant given adequate warning?
 - Were the collective and individual consultations commenced in good time and meaningful?
 - Was the selection of the pool reasonable?
 - Was the selection of the claimant fair?
 - Were adequate steps taken to avoid the redundancy?
 - Were there any suitable alternative vacancies and was there reasonable consideration of any other vacancies?

Decision

63. I have largely already answered the issues in this case in my findings of fact.
64. I am satisfied that there was a genuine redundancy situation. The claimant acknowledged that the respondent was in significant difficulties. The respondent identified a need to make significant savings and, having made some and looked at other options, regrettably concluded that they needed to make redundancies among the teaching staff. It is not for me to unduly investigate all of their spending choices and evaluate whether savings could have been made elsewhere.
65. The respondent used objective measures of viability to determine where the savings should be made and identified a proposal for over 20 redundancies.
66. They put this proposal to the unions and the potentially affected staff at the same time, almost 3 months before the claimant's redundancy was confirmed and almost 6 months before the effective date of termination of his employment.
67. Whilst this is a relatively unusual approach which may have resulted in more staff fearing for their jobs, I accept the respondent's explanation that they wanted to give staff as much warning as possible. It was considerably more than the minimum required of a reasonable employer.
68. It was made clear that all of the proposals were provisional and subject to consultation.
69. In relation to the collective process the principal challenge was that there should have been some collective consultation before individuals were

identified as “at risk”. That would, ordinarily, be the case. However, I accept the respondent’s explanation.

70. Moreover, it appears clear that the collective process was meaningful. Whilst the unions initially objected to the timings and the provision of information, this was subsequently rectified. As a result, selection criteria were amended and agreed, alternative vacancies were made available.
71. There were several meetings and email exchanges which all appeared to illustrate a fair and meaningful process that resulted in only 4 compulsory redundancies. Given that the principal purpose of such consultation is, arguably, to reduce the need for the compulsory redundancies, it was a successful exercise.
72. There were no union complaints about the process outstanding at the end. No such complaints were brought to the employment tribunal by any of the unions, either separately or before me.
73. In relation to the individual consultation, the claimant was made aware that he was at risk on 8 June 2017. Thereafter he raised numerous issues via email over the following weeks and months and the respondent, largely, responded promptly, in detail and to the best of their ability.
74. There were meetings in June and July and further meetings offered in August and September. There was also an appeal.
75. The individual consultation was also meaningful as evidenced by the claimant’s scores being amended and the attempts made to help him improve his application for the PLC role.
76. The process was not flawless but the respondent did significantly more than the minimum required of a reasonable employer.
77. The respondent fairly and objectively identified A level economics as one of the subjects that was no longer likely to be financially viable. They needed to commence the process when they did to ensure all students would know where they stood by the start of the autumn term.
78. It would not have been unreasonable for the respondent to select the claimant as being in a pool of one, as the only A level economics teacher at the relevant time.
79. However, he had previously taught business studies and the business studies lecturer had previously taught economics. It was not, therefore, unreasonable for the respondent to pool the only two “business studies lecturers” in the humanities department together, although clearly there would have been some disruption to the second year business studies students if the claimant had taken over their tuition.

80. Equally it was reasonable to not include vocational lecturers from a different department in the pool. Whilst the claimant was doubtless able to have taught at least some of the hours in that department, he had not done so for some time. Moreover, there would be additional disruption for students. In any event, it was objectively reasonable to limit the pool in the way in which the respondent did.
81. The selection matrix was amended and agreed with the unions, as was the weighting and scoring. It was almost entirely objective and quantifiable.
82. There were errors in the claimant's scores that were amended. However, on the evidence before me he would always have scored lower on CPD and performance than his peer and, given that all their other scores were the same, he would have been selected even if he were able to argue for marginal increases in those scores.
83. The respondent took considerable steps to avoid compulsory redundancies. From an initial proposal of 26.6 FTE only 4 compulsory redundancies were made. This was as a result of the consultation processes, the volunteers and other departures.
84. They also took steps to avoid the claimant's redundancy, principally by offering him a second opportunity to apply for the PLC roles, having amended his application in light of the feedback. Resubmitting the same application effectively sealed his fate.
85. I do not consider that those roles were sufficiently similar that the claimant should have simply been offered one of them, even though ultimately a couple were filled externally. They were management positions that required the mentoring of lecturers to improve their performance. Whilst the claimant had significant experience he did not meet all of the essential criteria and his performance statistics did not suggest that he was ideally placed to improve the performance of others. The fact that he did not respond positively to the initial feedback on his application only confirms this.
86. In relation to other alternatives I am satisfied that the only hours that became available in vocational business were those that arose in October 2017. The claimant did not apply, nor did he ask for the hours to be combined with the return of his year 2 A level economics students. That was not viable in any event and it would not have been unreasonable for the respondent to refuse to cause further disruption to those 4 students who, I am pleased to report, had excellent outcomes from their revised arrangements.
87. As a result, whilst the claimant represented himself ably and made a number of valid points, the respondent's failings were relatively minor and, overall, their approach to the redundancy situation was well within the band of reasonable responses.

88. It is, of course, always regrettable when an employee faces redundancy, particularly a long serving one such as the claimant. However, the claimant's claim of unfair dismissal must fail and is dismissed.

Employment Judge Broughton

Date: 7 December 2018