



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON CENTRAL

**BEFORE:** EMPLOYMENT JUDGE F SPENCER

**MEMBERS:** MR J WALSH  
MS S BOYCE

**BETWEEN:** MR J LOPES CLAIMANT  
AND  
LONDON BOROUGH OF CAMDEN RESPONDENT

**ON:** 20-21 November 2019

## **Appearances**

**For the Claimant:** Ms M Grell, counsel  
**For the Respondent:** Mr S Cheetham QC, counsel

## **JUDGMENT**

The Judgment of the Tribunal is that the Claimant was not unfairly dismissed.

The claim for race discrimination and harassment is dismissed on withdrawal.

## **REASONS**

*These written reasons are given at the request of the Claimant following oral reasons delivered in Tribunal.*

1. The Claimant Mr J Lopes complains that he has been unfairly dismissed. The Respondent's case is that the Claimant was fairly dismissed for redundancy. A complaint of direct race discrimination and harassment was withdrawn at the start of the hearing

2. It is common ground that the Claimant received his statutory redundancy pay and his notice and those claims therefore fall away.
3. The Claimant challenges
  - whether there was a genuine redundancy situation.
  - whether the reason for his dismissal was in fact redundancy. and
  - the fairness of the process by which his redundancy was effected.

#### Relevant law

4. There is no dispute between the parties as to the applicable law in this case. The definition of redundancy set out in section 139(1)(b)(i) of the Employment Rights Act 1996 (the ERA) which provides that:-

“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 the requirements of the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.”
5. Section 98 of the ERA, requires the Respondent to show the reason for the dismissal and that it is a potentially fair reason for dismissal within the terms of section 98(1)(b). A dismissal for redundancy is a potentially fair reason for dismissal. Once an employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason “... 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 that question shall be determined in accordance with equity and the substantial merits of the case.” (Section 98(4) of the ERA).
6. In cases of redundancy, it is well-established law that an employer will not normally be deemed to have acted reasonably unless he warns and consults any employees affected, and takes such steps as may be reasonable to minimise the effect of redundancy by redeployment within his own organisation. If there is a selection process, it should be based, as far as possible, on objective criteria and fairly applied
7. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Lord Justice Gwydewell approved the following test of what amounts to a fair consultation. “Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.” In other words, fair consultation involves ensuring that the person consulted has a fair opportunity to understand fully the matters about which he is being consulted and to express his views and the person consulting him is obliged genuinely to consider, though not necessarily to accept, those views. In Mugford -v- Midland

Bank [1997] IRLR 208, the Employment Appeal Tribunal stated that it would be "...a question of fact and degree for the employment tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of determination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."

### Evidence

8. The Tribunal heard evidence on behalf of the Respondent from the head teacher, Ms Bannon, and from Ms L'Esteve and Ms Bhardwaj, both of Camden HR. We also heard from the Claimant. There was an agreed bundle of documents.

### Facts.

9. The Claimant was employed as Premises Manager at Richard Cobden School from 16 April 2007 until 31<sup>st</sup> August 2017. He was given formal notice of redundancy on 20 June 2017 and was given 10 weeks' notice of termination.
10. The Claimant was required, as part of his job, to live on site. He was given tenancy of a house on the school premises which was rent free, though the Claimant was required to pay utility bills. In 2016, following marital problems, the Claimant moved out of the school premises for 2 weeks, and Ms Bannon wrote to him reminding him of the requirement to live on site and stating that if he could not do so, the school would need to review the requirement for the post to be residential.
11. The premises team at the Respondent was made up of two individuals. The Claimant, who was on pay scale 6, and a Site Services Manager (Mr Elliot) who was on pay scale 4. The Claimant's role included management of site service staff and "line management and motivation of the premises team" i.e. Mr Elliott.
12. For some time the Respondent had had concerns over the quality of the Claimant's performance. An informal meeting to discuss those concerns took place in December 2016 at which the Claimant was accompanied by his trade union representative, Mr McNulty. On 10 February 2017 (334) the Respondent wrote to the Claimant commencing performance monitoring and he was warned that, if there was no improvement, formal capability procedures would begin.
13. It is common ground that the Claimant had been complaining about failures by the Respondent to maintain the house in which he lived. He had

also had marital problems, which had caused some managerial issues for the school, as the Claimant's wife also worked at the school.

14. During this period the Respondent was facing budgetary pressures. The Respondent decided that they would need to make redundancies. A school staff restructure paper was drawn up (347) which proposed the deletion of 6.8 FTE posts. It needed to cut costs and considered that the only way enough money could be saved from the budget was to cut staff costs and delete some posts from the structure. We are satisfied that there was a genuine redundancy situation at the Respondent.
15. In deciding which posts should be deleted the Respondent's focus was to protect, as much as possible, frontline posts with direct contact with children. The restructuring paper notes that key objective for the review was to ensure that negative impact on learning and welfare was limited.
16. The leadership team identified, as we have said, 6.8 posts to be deleted including the Claimant's post, 2 teaching assistant posts, one administration post, one pupil premium equivalent and 1.6 SEND teacher posts. The restructure also envisaged the recruitment or creation of a new post to assist with premises issues. The new role was called General Assistant and was part time (0.7 or 39 weeks a year). It was at point 2 on the pay scale.
17. In deciding to delete the Claimant's role the Respondent considered both the Claimant's role and the role of Mr Elliot, the Site Services Manager to identify which post would have the least negative impact on the running of the school. Both posts, the site service officer post and the Premises Manager post had general maintenance, repairs and premises facilitation aspects but that the premises manager's role carried the greater management responsibility. Ms Banon's evidence was that while members of the leadership team could not be available to do the day-to-day routine manual aspects of the job they could cover the more managerial aspects of the role particularly as, given the Claimant poor work performance, some of those responsibilities were already been undertaken by the senior leadership team in any event.
18. Ms Bannan informed the Claimant by phone towards the end of February of the proposal that his role be deleted. This was followed up by a meeting with Ms Bannan and the school's Business Manager Ms Meah on 28<sup>th</sup> February. The Claimant attended that meeting with Mr McNulty and was told that his role was in scope for deletion and why. There are no notes of that meeting.
19. On 2 March there was a whole school consultation meeting during which Ms Bannan explained the restructuring proposals, as set out in the restructuring paper. Staff were told that they could meet with the Head

individually to discuss any concerns or questions that they had, but there were no further specific invitations issued to affected member of staff. The Claimant attended with Mr McNulty.

20. On 21 March Mr McNulty wrote to the chair of governors of the school complaining that the Claimant had not been properly consulted and listing a number of points that he “would have made” had he been properly consulted. In particular he said that that the proposal was to delete a post which was essential for the school and that the Claimant’s role continued to exist in the new structure, it had only been “renamed”. He was referring to the General Assistant role. He also referred to the importance of the residential role and the fact that the redundancy would result in the Claimant losing his home. The letter contained no positive suggestions about other ways to save costs while retaining the Claimant’s post.
21. It has been a significant part of the Claimant’s case that his role was not redundant and that the Respondent simply replaced the Claimant’s role with the role of the General Assistant on less pay and 4 points lower on the pay scale, but that both jobs were fundamentally the same.
22. We do not accept that. The Claimants job description is markedly different from the job description of the General Assistant. As well as line management of Mr Elliott, the Claimant’s duties included duties that were administrative and managerial in nature such as preparing specifications for quotes by external contractors, checking quotes from external contractors, monitoring standards of work, ensuring health and safety, asbestos monitoring and attending planning meetings with the local education authority staff on premises matters. The General Assistant duties (90) did not contain any such tasks but were essentially manual tasks.
23. The person specification for the Claimant’s role required that the Premises Manager have experience of handling/liaising with different agencies carrying out building work on site, experience of supervising staff, experience of managing lettings and numeracy skills. The person specification for the General Assistant did not require the same level of experience.
24. Although not in his witness statement, the Claimant’s evidence to the tribunal was that as a matter of fact, he did not do many of the more managerial or administrative tasks that were set out in his job description and that in practice the role that he was carrying out was primarily a manual one. Ms Bannon’s evidence was that it was the Claimant’s failure to complete the more managerial aspects of his role that led to their performance concerns. We are satisfied that, even if the Claimant was not in fact doing all of the tasks in his job description, they were tasks that

were a significant part of the role and that he was required to do them. It was for that reason that the job was at point 6 of the pay scale. The role of the General Assistant was very different to the role that the Claimant had been employed to undertake.

25. On 30 March 2017 the Respondent wrote to the Claimant informing him that his role of premises manager would be deleted. The only new post in the structure was the post of the General Assistant point 2 and the Claimant was invited to apply. He was informed that if he could not get a new post in the structure he was at risk of redundancy, and then the Respondent would try to redeploy him more widely within the London Borough of Camden. The Claimant did not apply for the General Assistant role.
26. Ms Bannon replied to Mr McNulty on 12<sup>th</sup> April rebutting most of the points made, but she does not deal with the point that the Claimant's post had simply been renamed. In the meantime the Claimant had lodged a grievance, (though the Tribunal heard no evidence about the grievance and in any event it is not relevant to the issues before us).
27. On 20<sup>th</sup> June the Claimant was sent formal notice of redundancy and informed his last day of service would be 31 August 2017. The Claimant was informed that during the period of his notice the Respondent would try to find suitable alternative employment for him. The same day Ms Bhardwaj wrote to the Claimant explaining that she would be carrying out a redeployment search and setting up meetings for him to discuss them. The Claimant did not engage in that process. Despite this the Respondent continued to send the Claimant weekly vacancy lists and to carry out regular job matching exercises. The Respondent did not have or use the Claimant's CV for this purpose but carried out the matching exercise by matching the Claimant's job description against other advertised vacancies. Ms Bhardwaj told us that there were no such matches. The Claimant accepted in evidence that he had not identified any possible suitable job opportunities within the London Borough of Camden.
28. Accordingly, the Claimant's employment came to an end on 31 August 2017. Since then the General Assistant role has been undertaken by an agency staff member. He has in the event worked full time but that was a temporary to deal with a one off problem of asbestos.

#### Submissions and Conclusions

29. It was not disputed that there was a genuine redundancy situation at the Respondent, in that the Respondent needed to reduce its headcount in order to save costs. However, Ms Grell submits that:

- a. The Claimant's role was not redundant. The requirement for someone to carry out the work that the Claimant's role involved had not ceased or diminished. The role remained- it had just been renamed.
  - b. Redundancy was not the real reason why the Claimant's post was selected for removal from the structure. She submits that the Claimant's role was selected for deletion because he was a difficult employee who made ongoing complaints about the condition of his house and was having marital difficulties. It was also to avoid the necessity of going through unpleasant and difficult performance management procedures.
  - c. The Claimant was not adequately warned and consulted
  - d. Insufficient efforts were made to find alternative employment.
  - e. The Respondent did not properly apply its mind to who should be in the pool for selection
30. The Respondent submits that the Claimant was fairly dismissed for redundancy.
31. As to the submission that the Claimant's role was not redundant, the issue is not whether the work has diminished but whether the employer's requirements for employees to do the work of the kind that the Claimant did had diminished. The Respondent had to cut costs. In the light of that they decided that it no longer needed an employee to do the work of a Premises Manager. It reallocated his managerial duties amongst the senior management team. (The Respondent did not suggest that the work had ceased merely that they would, in the light of the budgetary constraints, have to reallocate the work to save money.) The manual aspects of the role would be shared between Mr Elliot and the General Assistant.
32. We do not accept that his role was the same as that of the new post of General Assistant and that the post remained but was simply renamed. We do not accept that the fact that the agency member of staff currently undertaking that role has to date been full time means that the General Assistant role is the same as the Claimant's role of premises manager.
33. We find that the Claimant's role was selected for deletion because it was not a teaching post and because the Respondent wanted to protect, as much as possible, frontline posts with direct contact with children and the greatest impact on teaching. We accept that evidence as being both plausible and a sensible approach for a school to take.

34. As between the Claimant and Mr Elliott we also accept the Respondent's evidence that there was a real difference between the Claimant's role and that of Mr Elliot (and a 2-grade difference in the pay point). It was reasonable for the school to consider that the Claimant was in a pool of one. The issue of selection did not arise. Further we accept that the school genuinely and reasonably believed that it was easier to reallocate the managerial and administrative tasks inherent in the Claimant's role than it was to reallocate the manual tasks inherent in Mr Elliot's role. They therefore had good reason for selecting the Claimant's role for redundancy.
35. Nor, for the same reason, (though this was not part of the Claimant's case) do we consider that the Respondent should have considered "bumping" Mr Elliott to make way for the Claimant.
36. Although there plainly were performance issues, we do not accept that this was why the Respondent chose to delete his post, (though we accept that this is what the Claimant believed). The restructuring paper notes that key objective for the review was to ensure that negative impact on learning and welfare was limited.
37. We find that there was a genuine redundancy situation at the Respondent, that the Claimant's post was selected for redundancy for genuine reasons and that the reason for the Claimant's dismissal was redundancy.
38. It is the Claimant's case that he was not adequately consulted during the redundancy process. The Respondent met with the Claimant and his trade union representative before the proposals were announced to the members of staff generally. The Claimant and Mr McNulty also attended the group meeting during which Ms Bannon went through the restructuring report in detail. Members of staff were told that they could come and see the head to discuss the proposals at any time, although the Claimant did not do so. Mr McNulty wrote to Ms Bannon to set out a number of points that Mr Lopes would have made "had he been consulted" and received a detailed response.
39. The Tribunal had some concerns that about the adequacy of the consultation which it was not as full as it could have been. Nonetheless, we find, on balance, that it was sufficient to enable the Claimant to understand the proposal, the reasons for it and that it gave him a chance to make representations about the deletion of his role and possible alternatives, at a time when the final decision had not been made.
40. Finally, a reasonable employer is required to look for alternative vacancies so that an employee can remain in employment if possible. The



Respondent sent the Claimant weekly vacancy lists, sought to match his job description with other available jobs and notified him that he was able to apply for the General Assistant job. We do not accept that the Respondent acted unreasonably by conducting the job matching exercise without the Claimant's CV. The Claimant also told the Tribunal that he had been unable to identify any suitable vacancies from the list that he had been sent.

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Employment Judge Spencer  
21st January 2020

JUDGMENT SENT TO THE PARTIES ON

23/1/2020

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FOR THE TRIBUNAL OFFICE