



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Cornwell

**Respondent:** Beyond Reflections

**Heard remotely by CVP on:** 14 June 2023

**Before:** EJ Rogerson

**Representation**

Claimant: in person

Respondent: Mr. A Williams (solicitor)

## RESERVED JUDGMENT

The claimant was unfairly dismissed. The claimant is awarded compensation in the sum of £640.

## REASONS

1. The claimant claims that he was unfairly dismissed by the respondent. He was informed of his summary dismissal with a payment in lieu of notice by a letter dated 25 October 2023. He was informed he was being dismissed because his role as “Social Media and Marketing Officer” was redundant.
2. The claimant’s complaints are that the redundancy was not genuine. The respondents failed to follow a fair process by not warning and consulting with him prior to dismissing him and that he had already decided to resign before he was dismissed intending to bring a claim of constructive unfair dismissal
3. I explained that in deciding the unfair dismissal complaint, I was deciding it on the basis that he had been dismissed not resigned. There was no constructive unfair dismissal complaint for me to decide.

### Applicable Law

4. I thought it would be helpful to explain the applicable law to the claimant as a litigant in person so that he could understand the issues I would be considering when deciding the facts after hearing evidence from both parties.

5. As a dismissal is admitted it is for the respondent to show the reason (or if there is more than one reason relied upon, the principal reason) justifying the dismissal was a potentially fair reason.
6. The respondent must prove on the balance of probabilities the reason(s) for dismissal falls within the potentially fair reasons identified under sections 98(1) and (2) Employment Rights Act 1996 (“ERA 1996”).
7. A ‘reason for dismissal’ has been described as ‘a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee’ (**Abernethy-v-Mott Hay and Anderson 1974 ICR 323 CA**).
8. The burden of proof on the employer at this stage is not a heavy one. The employer does not have to prove that the reason did justify the dismissal because that is a matter for the tribunal to assess when considering the question of reasonableness.
9. The respondent relies upon 2 potentially fair reasons: that the claimant was redundant under 98(2)(c) and in the alternative it was some other substantial reason of a kind justifying the dismissal of a “Social Media and Marketing Officer” under 98(1)(b). The substantial reasons (SOSR) are business reorganisation and/or a breakdown in working relationships.
10. If a potentially fair reason for dismissal is shown, then the tribunal will decide on a neutral burden of proof, whether the dismissal is fair or unfair in accordance with the requirements of section 98(4). This subsection provides that:
  - “The determination of the question whether the dismissal is fair or unfair (having regard to the reason 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.*
  - b) Shall be determined in accordance with equity and the substantial merits.*
11. Redundancy is defined if any of the circumstances set out in section 139 ERA 1996 exist. An employee 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.
12. The respondent says that the work of a particular kind that had ceased/diminished was the work of “Social Media and Marketing Officer” and the claimant’s dismissal was wholly or mainly attributable to those circumstances.
13. Procedural fairness is an integral part of the reasonableness test. In a redundancy dismissal *‘the employer will not normally 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 deployment within his own organisation’* (**Polkey-v- AE Dayton Services Ltd 1988 ICR 142 HL**). If following a fair procedure would have delayed the dismissal (‘procedural unfairness’), it is just and equitable to reduce compensation to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed (Polkey reduction).
14. Where there has been a business reorganisation, the employer does not have to show that a reorganisation, was essential, a sound business reason is sufficient. The reason is not one that the tribunal considers sound but one ‘which management thinks on reasonable grounds is sound’ (**Scott and Co -v- Richardson EAT 0074/04**).
15. For SOSR so long as an employer can show a genuinely held belief that it had a fair reason for dismissal, that reason may be a substantial reason provided it is not whimsical or

capricious (**Harper-v- National Coal Board 1980 IRLR 260 EAT**).

16. I heard evidence for the respondent from one of its Trustees Mr. Scott Andrew Johnson and from the claimant. I found that both witnesses gave honest and credible evidence at the hearing making concessions where necessary and corroborating answers by reference to the documents in the joint electronic bundle running to 166 pages.

### **Findings of Fact**

From the evidence I saw and heard I made the following findings of fact:

17. The claimant was employed by the respondent in the role of “Social Media and Marketing Officer” for just over 2 years from the 1.6.2020 until the 25.10.22.
18. The respondent is a mental well-being charity supporting transgender and non-binary service users. It is a small charity funded by grants which had allowed it to employ 6 members of staff: a Chief Executive Officer, Operations Manager, Member Support Co-ordinator, Volunteer Co-ordinator, Social Media and Marketing Officer and a Book keeper.
19. The charity was run by the board of 3 trustees comprising the Chair of Trustees S Whitehorn, Mr Johnson and Melissa Tilling.
20. On 6.6.2022, the claimant raised an informal complaint about a member of staff (A). The CEO (B) carried out an initial investigation with A after which it was left to the claimant to decide whether he wanted to pursue a formal grievance.
21. The claimant did not pursue a formal grievance. The reasons he gave were that he perceived that this might be viewed negatively, and B may use the grievance against him. He perceived that B and A were friends and that if he raised a formal grievance, he thought he was unlikely to get a fair outcome.
22. The respondent considered that the informal grievance had been resolved and therefore no further action was taken in relation to it.
23. On 21.6.2022, B conducted a formal conduct review with the claimant to discuss concerns that had been raised regarding his professionalism and behaviour in the workplace. The claimant was provided with an action plan for improvement.
24. In July 2022, the claimant was absent on sick leave for back pain until the 15th of September 2022. During this absence, the claimant had delegated parts of his role and responsibilities to others to cover his absence which was expected to be lengthy.
25. During a “Keep in Touch” discussion on 16.9.2022, B reported that feedback provided to the claimant was responded to “defensively and aggressively”. B had report that the claimant had behaved in an inappropriate angry way as a result of which B ended the meeting.
26. On the 21.9.2022, B decided to suspend the claimant for his alleged misconduct making 2 allegations of misconduct: relating to the claimant’s conduct and communications with others falling short of the standard expected in a professional workplace and his alleged failure to follow management instructions.
27. Mr Johnson and Ms Tilling were not involved in the suspension decision and were tasked with deciding the alleged misconduct under the respondent’s disciplinary procedures.
28. On 19.10.22 they communicated their outcome to the claimant (page 129). They concluded the claimant’s behaviour did not amount to misconduct but found that his conduct at work and communication with others had on occasions fallen short of the standard expected in a professional workplace. The found evidence showed there was a pattern to the communications backed up by accounts from witnesses

suggesting a lack of professional courtesy by the claimant. They concluded that while that behaviour was unacceptable it was not misconduct.

29. Mr Johnson confirmed in his evidence that the concerns identified were in retrospect better categorised as performance issues rather than misconduct issues and the trustees decided the suspension should end and that lessons should be learnt to improve relationships in the future.
30. The claimant viewed that outcome as supportive. He felt it showed that he should never have been suspended by B or subjected to any kind of disciplinary process.
31. Mr. Johnson agreed that the claimant should not have been suspended. He gave his view recognising that it might appear that he was “throwing B under a bus”. He felt that it was unfortunate and could have been avoided if roles had been better understood, tasks more clearly defined and team dynamics better managed.
32. The claimant says following his suspension he had lost trust and confidence in the respondent and had intended to resign before he was dismissed.
33. In October 2022, Mr. Johnson was made aware the financial position was very precarious. Existing grant funding had not been renewed and applications for other potential funding sources had not been successful and all the eggs were in one basket leaving them with no wriggle room in terms of funding. The board of trustees decided the only viable option was to reduce the charity's cost base by reducing staff costs which was the major operating cost.
34. Mr Johnson confirmed that the board of trustees gave very careful consideration to each paid role the skill sets they held and their criticality for the functioning of the charity. The board considered the claimants role and decided that whilst the role added some values, the functions could easily and quickly be picked up and delivered by others. During the claimant's sickness absence others had absorbed parts of his role into their existing roles. Mr Johnson accepts there had been some complacency on the part of the board in not focussing on the funding recognising it should have flagged and addressed much earlier because of the changing economic circumstances.
35. At the October meeting the trustees recognised that it was imperative that cost savings were made. In fact, after the claimant was made redundant, 3 other employees voluntarily resigned leaving only 2 members of staff. After the claimant's dismissal there has only been 1 new appointment, a replacement CEO. The replacement was recruited on a substantially lower salary and only works one day per week. Those salary cost savings have enabled the charity to avoid closure after losing their main source of funding.
36. The claimant is not able to challenge any of that evidence which I have accepted is true. He suggests that the timing of the redundancy decision is suspicious. He relies upon the minutes of the meeting of trustees of 24.10.22 which show that B had expressed some dissatisfaction with the decision on the misconduct investigation suggesting there was other evidence that should have been considered. She expressed her views before redundancies were discussed.
37. The claimant refers to a reference made in the minutes to “meeting paused, then Board and CEO reconvened to discuss possible redundancy”. After which the minutes record:

*“We will look at redundancy which we could enact straightaway. The charity is having financial issues, we need to cut costs and we have been doing without SM post for a while, so we've made the decision to cut this role.*

*We could go down a dismissal route for some other substantial reason. Big organisations use breakdown in relationships but its more difficult with only 6 employees to redeploy staff. We could bring him back and he will be managed but that will be tough. The other route is a collective grievance taken out by the other*

*members of staff saying they can't work with him. However, redundancy feels like it's the cleanest route'*

38. That decision was unanimously made by the three trustees. The letter of dismissal was sent to the claimant by email on 25.10.22 by the Chair of Trustees. It was not well received by the claimant who responded the same day stating:  
*"I am saddened to see that after B's attempts to remove me via false conduct allegations that Beyond Reflections have stooped to the level of "redundancy" to kick me out. Either myself my legal representative or ACAS will be in touch ahead of employment tribunal for unfair dismissal. Sorry your CEO doesn't have a backbone"*
39. The relevant parts of the letter of dismissal state:  
*"The management board has reviewed the current financial state of the charity which is very challenging as you know. We are therefore having to make difficult decisions about expenditure and staffing roles. It is in that context that we have unfortunately determined that we can no longer sustain the role of 'Social media and Marketing Officer' and have therefore made the role redundant. Unfortunately, due to ongoing challenges we have not been able to identify any suitable alternative work for you"*
40. The letter informs the claimant of his right to appeal about pay in lieu of notice and pay for untaken annual leave which the claimant confirms were correctly made.
41. Having reread the letters at this hearing the claimant accepts he was notified of his right of appeal but had decided not to exercise that right consistent with his intimation that a claim for unfair dismissal would be made.
42. I asked the claimant his views as to the dismissal procedure that should have been followed. He said he would have expected 2 consultation meetings before a letter of dismissal extending his employment by a further 2 weeks.
43. He has also repeatedly said he would have resigned if he had not been dismissed which does not suggest he wanted to engage in consultation with a view to keeping his job.
44. The claimant had found a job during his notice period. He extended his part time hours of work in his second job at café where he now works full time. The difference in hourly pay between his job with the respondents and his second job is 0.19p an hour. In his schedule of loss, he has claimed dog walking expenses, parking, and travel expenses because of the requirements of his new job which he cannot do from home.
45. He claims loss of statutory rights of £500. His net weekly pay for the respondent was £160.

### **Submissions**

46. The respondent's submissions were very brief. Mr Williams relies on the evidence which he submits supports a finding that the dismissal was fair, and no compensation should be awarded.
47. The claimant's submissions focussed on the grievance he raised and a lack of any evidence around that grievance investigation. He says his grievance was never resolved. The respondent did not want to deal with the breakdown in working relationships. It was easier for them to get rid of him, sliding in a redundancy to make it seem legitimate. What they have done is wrong and unfair.

### **Conclusions**

48. The first issue to decide was the reason for dismissal the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. Mr. Johnsons unchallenged credible and clear evidence was there was a

loss of funding preceding the board's decision to select the role of "Social media and Marketing" for redundancy was clear credible and corroborated by the subsequent events in particular the reduction from 6 to 2 employees.

49. The charity's largest operating cost was the salaries. A unanimous decision was made by the trustees on 24 October 2022 to make reductions in the operating costs by making the claimant's role redundant. The claimant's sickness absence had provided an opportunity for the charity to assess the impact his absence would have. The trustees' made a genuine assessment based on how the charity had functioned without that role. They decided that whilst the role added some values the functions could easily and quickly be picked up and delivered by others. The minutes record *"The charity is having financial issues, we need to cut costs and we have been doing without SM post for a while, so we've made the decision to cut this role"*.
50. The claimant had been directly involved in distributing parts of his role to others and was aware that the respondent had managed without the post for a while. The circumstances were that the respondent's requirements for employees to do work of a particular kind (social media and marketing) has ceased/diminished and that role was redundant.
51. The claimant performed that role and he has accepted there was no requirement for any type of scoring exercise for selection when the role is unique. Was the claimant's dismissal wholly or mainly attributable to the fact that the requirements of the business for employees to carry out that work had ceased or diminished? On 24 October 2022, when the decision was made to make the role redundant the claimant's dismissal was wholly or mainly attributable to that state of affairs: the role was no longer required and the claimant as the individual in that role was selected for redundancy.
52. What the respondent has failed to do is warn and consult the claimant before his employment was terminated on 25 October 2022. The respondent has not offered any explanation for its failure to warn/consult. Consultation is an essential part of a fair redundancy process even if it does not alter the outcome. The fact that the claimant might not have engaged or might have resigned during the consultation process was not known at the time and does not excuse the failure. It is not suggested that on 24 October 2022 when the decision was made the trustees had decided they would not consult because consultation was futile.
53. Although the trustees considered alternative reasons for dismissal they decided on redundancy after considering that any breakdown in working relationships would likely have resulted in more management time being spent on managing the claimant or the prospect of dealing with a collective grievance.
54. Those views were expressed but do not in my view change my finding that the principal reason for the dismissal was his role was made redundant and he was selected for redundancy. The social media and marketing function was considered surplus to requirements at a time when costs savings needed to be made and the respondent decided more critical functions needed to be retained. The precarious financial position the respondent had found itself in was made known to the staff resulting in 3 voluntary resignations after the claimant's dismissal. There was a substantial reduction in the workforce after the claimant's redundancy inferring that this was a genuine redundancy situation and not a sham as the claimant has suggested.
55. Having decided the respondent has shown the principal reason was the potentially fair reason of redundancy not some other substantial reason the next question is whether the respondent acted fairly or unfairly in dismissing the claimant for redundancy. It is not in dispute that the respondent did not warn or consult about the redundancy or explore any alternatives to redundancy before the claimant was dismissed.
56. Procedural fairness is an integral part of the reasonableness test. In a redundancy

dismissal *'the employer will not normally 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 deployment within his own organisation'* (**Polkey-v- AE Dayton Services Ltd 1988 ICR 142 HL**).

57. If following a fair procedure would have delayed the dismissal ('procedural unfairness'), it is just and equitable to reduce compensation to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed (Polkey reduction).
58. The claimant was an affected employee who was denied any fair procedure by his summary dismissal. The respondent does not advance any reason explaining its failure to warn or consult. A reasonable employer would have given an employee the opportunity to respond in any meaningful way to a proposal to dismiss before the termination of employment. Even as a small employer a fair process was possible. The respondent has demonstrated its ability to do that in the disciplinary conduct investigation when dismissal was a possible outcome. It was unreasonable to completely fail to follow any process at all when the respondent was deciding to dismiss the claimant for redundancy.
59. Although the claimant was informed of his right of appeal, it was by then too late for him to engage in consultation because the dismissal decision had already been made.
60. It was clear from subsequent events that other employees' resignations avoided the need for further redundancies. It was also clear that the claimant had no intention of continuing in his employment with the respondent. In my view his employment would have been extended by a further 2 weeks (the time it would have taken for the respondent to follow a fair procedure).
61. For those reasons I find the complaint of unfair dismissal succeeds. The dismissal was procedurally unfair.
62. In terms of compensation the claimant has been paid a redundancy payment (£304) equivalent to a basic award. No further amount is awarded in relation to the basic award.
63. In relation to the compensatory award the claimant is awarded 2 week's pay to compensate him for the failure to follow fair procedure (£320). I find the outcome of dismissal would have been the same even if a fair procedure had been followed it would only have delayed the dismissal by 2 weeks. The claimant is not entitled to any compensation for future loss of earnings based on my findings of fact and because it is not just and equitable to award compensation beyond 2 weeks.
64. The claimant claims £500 for loss of statutory rights. I award the sum of £320 (2 weeks' pay) which is in my view a more appropriate amount to compensate for the loss of statutory rights. The total compensatory award is £640 (the recoupment provisions do not apply to the award)
65. Although I had explored with the parties' their positions on any potential reductions in compensation under section 207A TULRA 1992, it was only relevant if I had found the principal reason was not redundancy. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) does not apply to dismissals due to redundancies and no reduction is therefore made in relation to the claimant's failure to appeal his dismissal.

Employment Judge Rogerson

15 June 2023