



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr Andrew Day

Compton Fundraising Consultants Limited

HELD AT Birmingham **ON** 26th, 27th and 28th September 2017

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: Mr S O'Brien - Counsel

For the respondent: Mr J Meichen - Counsel

RESERVED JUDGMENT

The claimant's claim for unfair dismissal succeeds.

REASONS

Background

1. The claimant brought a claim for unfair dismissal following the termination of his contract of employment by the Respondent on 23rd November 2016 by reason of redundancy.

2. The respondent is the UK's leading fundraising consultancy and manages annual, capital and legacy campaigns for charities and not-for-profit organisations.

Evidence and documents

3. I heard evidence from the claimant and for the respondent from Mrs Sue Linfield (Finance Director). In addition, on the first day of the hearing I was presented with an agreed bundle of some 275 pages. By consent, on the second day of the hearing a further 5 pages were added to the bundle. In addition, I was presented with three witness statements from former colleagues of the claimant – Ms Caroline Hutt, Mrs Amy Stevens and Ms Nicole Conchar. As Mr Meichen had no questions for any of these witnesses due to the historical nature of their evidence, they did not attend the hearing.
4. I also had an agreed list of issues and written submissions from both parties.

Issues

5. The agreed issues were as follows:

Unfair dismissal

- 5.1 Can the Respondent show, per section 98 of the Employment Rights Act 1996 (“ERA”), that the claimant was dismissed for a potentially fair reason?
- 5.2 In particular, was the claimant dismissed in circumstances which amounted to a genuine redundancy situation?
- 5.3 If so, did the respondent, in all the circumstances, act reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissing the employee?
- 5.4 Was the dismissal fair or unfair having regard to equity and the substantive merits of the case?
- 5.5 In particular, did the respondent:
 - 5.5.1 Consult fairly with the claimant over redundancy?
 - 5.5.2 Select the claimant fairly for redundancy?
 - 5.5.3 Give adequate consideration to any alternatives to redundancy?
 - 5.5.4 Adopt a fair procedure in implementing the claimant's redundancy?
- 5.6 If the tribunal determines that the dismissal was procedurally unfair, what difference, if any would a fair procedure have made ?

6. The claimant disputed that there was a genuine redundancy situation.

Facts

7. I make the following findings of fact:
- 7.1 The claimant commenced employment with the Respondent on 1st January 1990, originally based in Australia but undertaking work for the UK business.
- 7.2 On first of April 2005 the claimant was appointed group chief executive officer based in the United Kingdom pursuant to a service agreement of the same date.
- 7.3 Clause 9.2.2 of the service agreement required the claimant to :*“devote the whole of his time and attention and all his abilities and skills to such duties and not engage in any activities outside his employment which may detract from the proper performance of such duties;”*
- 7.4 Clause 9.2.3 of the service agreement required the claimant to :
“not (except as a shareholder or investor or representative of the Group all with the prior consent in writing of the board, such consent not to be unreasonably withheld) be directly or indirectly engaged or concerned or interested in any capacity in any trade, business or occupation whatsoever other than the business of the group, whether or not competing in any material respect with the business”.
- 7.5 The claimant’s job description held him accountable to the board for the implementation and the achievement of all group objectives, strategies, budgets and targets both financial and otherwise as set and approved by the board.
- 7.6 The claimant had reporting to him a Regional Managing Director who was accountable for the implementation and achievement of all regional objectives, strategies, budget and targets - financial and otherwise as set and approved by the Board. The role of Regional Managing Director was undertaken by Mr Paul Molloy.
- 7.7 Both the claimant and Mr Molloy were also shareholders in the respondent. The claimant, through his wife and Mr Molloy, through his own and his wife’s shareholding each held 38.15% of the shareholding in the respondent. Other significant shareholders were Mr Don Leir, the Chairman of the respondent who held 12.41% of the shareholding and Mrs Sue Linfield, the Finance Director, who held 3.76% of the shareholding.
- 7.8 The claimant, Messrs Leir and Molloy and Mrs Linfield were the only directors of the respondent.
- 7.9 Although on paper Mr Molloy reported into the claimant in reality they were both peers undertaking work for different

clients. The claimant focused on capital campaigns which were traditionally of shorter duration as they often required resourcing studies. Mr Molloy worked predominately on fundraising campaigns which were of a longer duration and more labour intensive.

- 7.10 By 2015 there were some tensions between the claimant and Mr Molloy in relation to the future direction of the business. Mr Molloy preferred to grow the business to a sufficient size so that it would be an attractive acquisition target. The claimant, however, preferred to grow the business organically with a gradual exit through a vendor financed sell-down to the current team who had helped grow the business. Despite these tensions both the claimant and Mr Molloy continued to work together in relative harmony until May 2015 when matters came to a head.
- 7.11 In or around May 2015 the claimant was appointed a Councillor of Warwick District Council. The claimant stood for election in order to promote the interests of the village in which he lived.
- 7.12 On 14 May 2015 the respondent had a strategy planning session for the board. Item 5 on the agenda for the day was to review the strengths and weaknesses of the respondent's business (in the same way as the respondent would approach its client) as regards structure, people, operations and delivery and finances.
- 7.13 Prior to the commencement of the strategy planning session the claimant picked up Mr Leir to take him to the respondents offices. Mr Leir had travelled from Canada for the purposes of the strategy planning session and a finance operations meeting which was due to take place the following day, on 15 May 2015.
- 7.14 Whilst they were travelling the claimant advised Mr Leir of his new appointment as a councillor. Mr Leir expressed some concerns as to the impact this appointment would have on the claimant's ability to fulfil his contractual obligations towards the respondent.
- 7.15 In the event the claimant's appointment as a councillor became the first topic of discussion at the strategy day. Mr Leir asked the claimant why he had not raised his decision to stand for the council and his subsequent election with his colleagues previously, even if only as a matter of courtesy. The claimant was of the view that his election was a personal matter as he would be undertaking this work in his own time. If he needed to attend any meetings during the working day he would take leave to attend them. The board, however, felt that the claimant was distracted by non-work related matters and referred to the description of duties on the council website which indicated that the role was "*a lot of hard work*". The claimant indicated that this was what the council said but did not reflect the reality of the situation. In

- evidence, the claimant indicated that given his vast experience in business and through other voluntary roles he did not find the role “hard work”. I accept the claimant’s evidence in this regard.
- 7.16 I accept that the claimant and other members of the board had undertaken a variety of other voluntary roles in the past.
- 7.17 The Board also raised with the claimant the general perception that he was, regularly, distracted by personal issues. In addition, the claimant’s alleged lack of transparency was raised through the removal of personal appointments from his diary after the event. The claimant indicated that the appointments were only deleted retrospectively if they did not go ahead for some reason. Concerns were also raised regarding the claimant’s sales vis-à-vis Mr Molloy’s even though he had achieved the sales which he had indicated that he would. It was also suggested that the claimant may wish to consider working part time to enable him to pursue his outside interests. This was not palatable to the claimant.
- 7.18 In any event the conversation became heated and resulted in the claimant advising the board that if they didn’t like his appointment they should buy him out. The respondent’s position is that the claimant asked to be bought out or “fired”. I do not find it material as to whether or not the claimant asked to be fired given the reason for dismissal. It is agreed that the claimant asked to be bought out.
- 7.19 The claimant was asked to leave the meeting so that the board could discuss the situation.
- 7.20 Whilst the claimant was out of the board meeting the remainder of the board discussed a possible management structure whereby there would be only one senior executive. The minutes of this meeting record that it was clear that not only could the respondent operate using such a structure, but that it would be more effective way to operate the company and that implementing such a structure would be in the best interests of the respondent. In evidence, Mrs Linfield indicated that the respondent would supplement the work of the one senior executive with the appointment of two additional campaign managers who would undertake the work of the other senior executive.
- 7.21 After discussing the various options the Board decided to have a “protective conversation” with the claimant and make him an offer. The claimant returned to the meeting and a protected conversation took place.
- 7.22 The following day a finance operations meeting took place which was attended by the same individuals. The operational reports showed that the respondent had had a good start to the year with £209,550 pounds in revenue and £25,925 net profit before tax in April. The dividend

recommendation prepared before the board meeting was for a dividend of £1.50 a share. However, it was decided that in light of the discussions which had taken place with the claimant the previous day that it would be prudent not to pay a dividend immediately and possibly to wait until July as there should be some caution about the size and timing of the dividend until more was known about the likely calls on cash. Discussions also took place about the sale of the Day family shares. Once again the claimant left the board meeting to enable the remaining board members to discuss a plan for the Day shares. The minutes of this meeting record that the remaining directors had a discussion about a possible timetable around buyback of the Day shares. In addition, a further discussion took place about a possible management structure of the business going forward with only one senior operational executive.

- 7.23 A valuation report for the sale of the Day of shares was prepared and there were some discussions between the claimant and Mr Molloy as to what clients should be told in the interim although the claimant continued to work throughout this time. However, by 29 June 2015 it was clear that a deal was not going to come to fruition. Accordingly, the claimant wrote to Mr Molloy setting out some of the matters which would need to be implemented in order to enable him to discharge his responsibilities as CEO. The claimant also requested regular meetings with Mr Molloy in order to “mend the fences”.
- 7.24 On 7th July 2015 Mrs Linfield emailed the claimant requesting a short meeting. The meeting took place on 9th July 2015 as during which the claimant was informed that the respondent was considering redundancies as a part of a reorganisation programme and that his role and that of Mr Molloy was at risk of redundancy. He was invited to attend a further consultation meeting on 13th July 2015.
- 7.25 In the event the meeting did not take place as on 15th July 2015 the claimant raised a grievance arguing that a “sham” redundancy process was being launched by the Company. The claimant indicated that no reasons had been provided of the need for the reorganisation programme nor had it been discussed at a board meeting or at a shareholders’ meeting.
- 7.26 Mrs Linfield acknowledged the grievance on 17th July 2015 and put the redundancy process on hold pending an investigation into the grievance.
- 7.27 The claimant’s grievance was investigated by Wright Hassell’s, the respondent’s solicitors who acted for them in relation to the protected conversations. The claimant raised concerns about this. In the event his grievance was not upheld. The claimant duly appealed and the appeal was heard by Rachel Oliver, an external HR consultant but a

- number of the claimant's queries in relation to this appointment were not fully answered by Mrs Linfield.
- 7.28 In the background discussions continued in relation to the buy back of the Day family shares until mid-September 2015.
- 7.29 On 4th November 2015 a board meeting took place. Mr Leir attended by telephone. During the course of the board meeting discussions took place about the jobs descriptions for the claimant and Mr Molloy. It was accepted by all that these were out-dated. Mr Leir indicated that on the face of it both the claimant and Mr Molloy undertook the same functions and the board should consider whether two senior executives were required or whether one would be sufficient. The claimant expressed the view that these discussions were only taking place as a result of the breakdown in relationship which had occurred in May. In the event, it was put to vote that a formal notification and consultation process should be implemented to determine whether or not the claimant and Mr Molloy "*should become the subject of redundancy*". The resolution was passed with the claimant abstaining.
- 7.30 On 16th November 2016, Ms Oliver emailed the claimant to advise him that save in respect of one minor point his grievance was not upheld. On the same day Mrs Linfield invited the claimant for a redundancy consultation meeting also to take place on the same day. During this meeting the claimant was shown the proposed selection criteria. The claimant put forward additional criteria to be considered, namely "diversity of work"; "qualifications, education and training" and "Professional Standing within the sector". Mrs Linfield agreed to consider these. The claimant indicated that he had not seen any business plan for the respondent and was informed by Mrs Linfield that one had not yet been finalised. A similar consultation meeting took place with Mr Molloy on 17th November who confirmed he was happy with the proposed criteria.
- 7.31 The claimant met with Mrs Linfield again on 24th November 2015 when the claimant was presented with his completed scores. The claimant raised a number of concerns about the selection criteria and, in particular, that they had been construed in a way that favoured Mr Molloy. In particular, that 3 of the 7 criteria related to the generation of revenue rather than profitability which favoured Mr Molloy as he generated more revenue rather than the claimant whose work was more profitably. I am satisfied on the evidence presented to me that the claimant's work was more profitable than Mr Molloy's. The claimant was not given an opportunity to appeal his scores and he was informed that he had been selected for redundancy. The claimant was advised of his right of appeal.

7.32 The claimant did not appeal. I accept the evidence of the claimant that he did not appeal as he had already raised his concerns with Mrs Linfield to no avail.

Applicable law

8. Section 98 (1) Employment Rights Act 1996 provides that in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) *The reason (or if more than one the principle reason for the dismissal).*

(b) *That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

A reason falls within the subsection if it –

(c) *is that the employee was redundant,*

9. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), 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 employers 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.*

10. Redundancy is defined in s139 as

For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) *the fact that his employer has ceased or intends to cease—*

(i) *to carry on the business for the purposes of which the employee was employed by him, or*

(ii) *to carry on that business in the place where the employee was so employed, or*

(b) *the fact that the requirements of that business—*

(i) *for employees to carry out work of a particular kind, or*

(ii) *for employees to carry out work of a particular kind in the*

*place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.*

11. In determining whether an employee has been dismissed by reason of redundancy one should have regard to the case of **Safeway Stores plc –v- Burrell [1997] IRLR 200 (EAT)**. In **Safeway**, the EAT formulated a three-stage test for applying section 139 ERA 1996 as follows :
 - 11.1 Was the employee dismissed? If so,
 - 11.2 Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in section 139(1) exist)? If so,
 - 11.3 Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2 above.
12. In considering the question of fairness of a redundancy dismissal consideration should be had to warning and consultation, adoption of fair selection criteria and consideration of alternative employment as per **Williams –v-Compare Maxam Ltd [1982] IRLR 83**. The question at each stage is whether the decision taken by the employer was within the bands of reasonable responses as per **Whitbread plc v Hall [2001] IRLR 275**.
13. Furthermore, a tribunal must not investigate the commercial merits of an employer's decision that redundancies are required (**James W Cook & Co (Wivenhoe) Ltd –v- Tipper [1990] ICR 716**) nor should the tribunal's substitute its own view about how an employee should be scored for that of an employer (**Russell –v- College of North West London UK/0314/13/MC**).

Conclusions

14. In reaching my conclusions I have considered all the evidence I have heard and considered the pages of the bundle to which I have been referred. I also considered the very helpful oral and written submissions made by the parties' representatives.
15. The first issue I need to consider is whether the respondent had a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996, namely redundancy.
16. Mr O'Brien argues that the statutory definition of redundancy is not satisfied and/or redundancy was a sham and/or predetermined. Mr Meichen refers to the strategy meeting on 14th May 2015 and item 5 on the agenda for that meeting which was to review the strengths and weaknesses of the business which included reviewing the structure, people, operations and delivery and finances as evidence of a potential redundancy situation. This was then followed up at the board meeting on 15th May 2015.

17. I do not accept Mr Meichen's submission and am satisfied that those discussions, which took place in the claimant's absence, took place in the context of a potential buy out of the claimant's family shares and whether the business could continue with one executive if the claimant left the business.
18. Mr Meichen also points to the fact that the claimant has not been replaced by a senior executive as evidence of a redundancy situation. However, the clear evidence of Mrs Linfield was that the claimant's work would not cease but would continue to be done. Some of it would be absorbed by Mr Molloy and, in addition, two further senior consultants would be recruited to undertake the corporate campaign work.
19. In the circumstances, I am not satisfied that the respondent had a genuine redundancy situation as defined in section 139 of the ERA 1996. There was no closure of a business nor a workplace closure. Furthermore, there was no diminished requirements for the respondent's business to undertake the type of work undertaken by the claimant. I note that the respondent has not pleaded some other substantial reason as a potential reason for dismissal.
20. As such I am not satisfied that the respondent had a potentially fair reason to dismiss the claimant.
21. However, if I am wrong in this conclusion I have also considered whether the redundancy was a sham and/or predetermined.
22. Mr Meichen argues that the claimant is wrong to suggest that the restructure had not been discussed at board level or that it was only discussed after discussions about the claimant's exit package broke down. Mr Meichen also submits that a full rationale behind the restructure was discussed at a board meeting on 4th November 2015 and approved by the board. However, I do not think that the board meeting on 4th November 2015 assists the respondent in this regard as the redundancy consultation process had already commenced in July 2015, when the discussions about an exit plan broke down. As this point the proposed restructure had been discussed only on 14th and 15th May in the claimant's absence but in the presence of Mr Molloy who was also allegedly at risk of redundancy. I also note that when the claimant requested a copy of the business plan he was advised by Mrs Linfield that one had not yet been put in place which seemed incredulous if there was a genuine redundancy situation.
23. Turning to the process I am also satisfied on the evidence, that the selection criteria was put together to ensure that Mr Molloy scored the higher scores given the significant weighting given to revenue over profit. I note that the claimant was not given the opportunity to appeal his scores although he was given the opportunity to appeal his ultimate dismissal. Mr Meichen criticises the claimant for not appealing his

dismissal but I am satisfied by the claimant's explanation and that it was reasonable for him not to do so.

24. It is clear that the relationship between the claimant and the respondent had broken down and the sensible course in the circumstances was to consider an exit package. However, I am satisfied that when those negotiations broke down the respondent engineered a redundancy situation in order to procure the removal of the claimant and that redundancy process was predetermined. I note that the redundancy consultation process was resumed on the very date that the claimant was notified of his grievance appeal outcome.
25. I am not satisfied that a fair process was adopted for the reasons set out above and, as such, the claimant's claim for unfair dismissal succeeds.

Signed by

Employment Judge Choudry

on 30th October 2017