



EMPLOYMENT TRIBUNALS

Claimant:

Mr T Thavathurai

v

Respondent:

Ultra Electronics Ltd

Heard at:

Reading

On: 8 and 9 January 2018

Before:

Employment Judge Milner-Moore

Members: Mrs AE Brown and Ms J Nicholas

Appearances

For the Claimant: In person

For the Respondent: Ms A Esmail (Solicitor)

JUDGMENT

1. The claim for unfair dismissal fails and is dismissed.
2. The claim for direct race discrimination fails and is dismissed.

REASONS

1. This case was listed for a hearing (liability and remedy) to consider claims of unfair dismissal and direct race discrimination.

Preliminary issue

2. A list of claims and issues had been formulated at an earlier case management hearing. When we reviewed the list with the parties at the start of the hearing, the claimant indicated that there were two additional complaints of race discrimination that he wished to pursue. First, that he had been less favourably treated by reason of the delay in granting him a “test stamp”. Second, that he had been less favourably treated in that, in February 2016, a position on promotion had been created and Mr McHugh had been moved into it without the claimant being considered for the post. We reviewed the ET1. We considered that the “test stamp” complaint was identified in the ET1, such that no application to amend was necessary. This complaint had been dealt with in the respondent’s evidence such that there would be no prejudice in allowing this complaint to proceed even though it had not been specifically identified as an issue at the case management hearing. However, the complaint regarding Mr McHugh’s

promotion did not feature in the ET1. The claimant sought leave to amend to add this complaint on the basis that he had believed that the Employment Judge who conducted the case management hearing had asked him to clarify his complaints in writing after the hearing and he had done this by producing his witness statement. There was no indication in the order that this had been the Judge's intention and the respondent disputed the claimant's account. The respondent maintained that it would be prejudiced by any amendment because it had not prepared evidence to address this complaint. Having considered the Selkent guidance we refused the application to amend. There was no basis for concluding that the list of issues identified at the case management hearing was in any way provisional and subject to further clarification by the claimant. The complaint was out of time, there was no good reason for the claimant's delay in adding this complaint and it would not be in the interests of justice to allow the amendment, given the prejudice to the respondent that would result.

3. Accordingly, the following issues arose for determination.

Issues

Unfair dismissal

4. What was the reason for dismissal?
 - 2.1 The respondent says the reason for dismissal was redundancy.
 - 2.2 The claimant says the reason for dismissal was race.
5. Did the respondent act reasonably in all the circumstances in treating that reason as sufficient ground for dismissal?
 - 3.1 The claimant's grounds for challenging the fairness of the dismissal are: that the dismissal was tainted by race discrimination, that the pool for selection was not within the range of reasonable responses, that the process had been manipulated to ensure that the claimant was selected for redundancy; and that there had been inadequate consideration of alternative employment such that the dismissal was unfair.
6. In the event of a finding that the dismissal was unfair, should any compensation awarded be reduced to reflect the likelihood of a fair dismissal occurring (Polkey)?
7. Should compensation be reduced on grounds of the claimant's failure to comply with the ACAS Code of Practice?

Race discrimination

8. The issues arising for determination were:-

- 5.1 Was the claimant, by being dismissed, less favourably treated than a hypothetical comparator would have been treated?
- 5.2 Was the claimant less favourably treated in not receiving a “test stamp” within the usual period and would a hypothetical comparator have been differently treated?

Evidence

9. We heard evidence from the claimant and from Stephen Holder, the Head of Materials and Manufacturing in the Command and Sonar part of the respondent’s business. Mr Holder was the individual who took the decision to make the claimant redundant. We received a large trial bundle, a small supplementary bundle with some additional documents and some chronologies and cast lists which were amended by the claimant. In light of all the evidence, we made the following factual findings.

Findings of fact

10. The claimant began his employment with Varisys as a test engineer. He has an MSc in Electronics Engineering. Varisys was acquired by Ultra Electronics in around June 2013. At the time of the acquisition, the claimant was working in a team with three other individuals: Neil McHugh and two others and had the job title of Senior Production Engineer.
11. There was a dispute as to the precise nature of the claimant’s role at this time and as to whether it was a managerial role. The claimant’s evidence was that he was simply a more experienced colleague without any particular seniority or management responsibility as such. However, having considered all the evidence, we find that the claimant did have a senior and managerial role as Senior Production Engineer for Varisys. The organisation charts show him as the more senior (he is represented above the other engineers who are in a reporting chain below him). He is described in those charts as a “senior” production engineer. The claimant accepted that he was more knowledgeable and was relied on to share his experience. He also accepted that he had been acting up following the departure of a colleague. In the claimant’s CV (p338) he describes himself as solely responsible for test and production engineering and as leading, coaching and developing a small team and allocating work.
12. The claimant’s work for Varisys involved testing a range of products with which he was familiar through his long service with that company. The products in question were digital products, which operated at low electrical voltages. The respondent made different products. It manufactured products for the defence industry and those products operated on high voltages.
13. It was a part of the business planning process operated by the respondent that it regularly assessed its “forward load”, i.e. it assessed the upcoming

workload and, in particular, the manpower demanded to service that workload to check that it was not over or under-manned.

14. By February 2016, the work of Varisys had begun to drop off and over the following year it halved. The number of engineers engaged on Varisys work reduced over time, so that by 2017, only Neil McHugh was still working on Varisys products.
15. At the same time, it was envisaged that the respondent's "Ultra CCS work" would grow because several contracts had been obtained which were predicted to generate work over the course of 2016 into 2017. In particular, the respondent was expecting work resulting from a contract with the Ministry of Defence for a product called PDM and from another contract involving a product called VML. Because the Ultra CCS work was growing and the Varisys work was declining, the respondent proposed a change of role to the claimant and proposed that he should be employed as the Test Team Lead in the Ultra CCS team managing a team of five. Whilst not formally a promotion, it was presented as a development opportunity for the claimant. The claimant accepted this change of role. The claimant's salary at the relevant time was £32,960.00 and although he did not receive an increase in salary on taking up the new role, he was told that an increase would be possible if he performed well.
16. There was a dispute between the parties as to whether, in doing so, the respondent had created a senior Varisys role to which Neil McHugh had been promoted or whether Neil McHugh had simply stepped in to fill the vacuum created by the claimant's departure. We find that the respondent did not create any new senior Varisys role; it was simply that when the claimant moved on to his new Test Team Leader role in the Ultra CCS test team, Neil McHugh was by default as the next most experienced member of staff. However, Neil McHugh was not offered a promotion and no new role was created for him. Subsequently as the Varisys work declined, the remaining staff moved away from work on the Varisys products and were redeployed elsewhere. Any managerial element of Neil McHugh's role therefore diminished considerably over time.
17. The claimant now argues that the Test Team Lead position was not in reality a development opportunity as it had little management content and he spent most of time in that role conducting testing. He considers that the respondent intended to move him into a unique role so that he could be easily selected for redundancy.
18. The respondent's position was that the Test Team Lead was a genuine management role and that the move was intended to benefit the claimant. It was expected to provide a real opportunity for the claimant to develop his career within the respondent, to gain experience of a broader range of the respondent's products and to safeguard him from the potential consequences of the fall in Varisys work. The respondent disputes that the claimant spent most of his time on testing.

19. We find that the role of Test Team Lead was a real management role and that the respondent genuinely intended this to be a career development opportunity for him. The role involved managing a team of five engineers, scheduling their work, prioritising their work, carrying out some testing in respect of new products, and also involved a small element of supporting Neil McHugh in his role for Varisys. The team of engineers had all been working in that area for some time. They were experienced and expert in testing the products in question. They had greater knowledge and expertise than the claimant, whose experience at Varisys was in testing digital, low voltage products rather than high voltage products such as those produced in the Ultra CCS part of the business. However, the respondent did not consider this to be a difficulty given that the claimant's role was primarily a management one. Furthermore, the expectation was that, over time, the claimant would increase in experience and expertise and be able to work competently with these high voltage products.
20. We consider that the claimant's email at page 123 of the bundle evidences that this was a genuine opportunity for career development which the claimant embraced. He said: "*Following discussion, I have been given additional responsibility to manage the CCS team and Varisys team*" and he invited his colleagues out for a drink to celebrate this new role. The narrative in the claimant's appraisal report also supports the idea this was a challenging development opportunity for him.
21. Whilst the claimant did continue to do some testing, we accept the evidence of Stephen Holder that that he spent between 30 and 50% of his time engaged in the management aspects of the role, attending meetings to discuss workload, allocating work, prioritising, and so on. Had it been the case that the claimant's role had involved very little management, then one would have expected to see the claimant complaining about this at the time but he did not do so and we think this bears out that his role did involve a significant management aspect.
22. A health and safety "near miss" occurred in April 2016. The claimant had been testing some equipment and two cables which were connected up to a high voltage power source were left lying on a test bench. The cables shorted out. There was a dispute between the parties as to whether or not the claimant was at fault in this incident. The claimant maintains that he was not at fault because he considers that he was doing testing under the supervision of Nick Stonnard (his subordinate) and that there had been a failure to communicate works instructions to him and to arrange for rubber matting to be present on the test bench. The respondent, whilst accepting that there were a number of things that ought to have been done differently, considered that the claimant was primarily at fault because he had been using the equipment and failed to disconnect the leads from the high voltage source before leaving it unattended. We find that the claimant must bear some responsibility for the health and safety incident, he had been using the equipment and should have ensured that the cables had been disconnected before leaving them unattended. We do not consider that somebody with qualifications and experience in electrical engineering

ought to have required supervision and direction to know that the cables attached to a high voltage source should have been disconnected when not being used.

23. There was also a dispute between the parties as to the extent to which the claimant was interchangeable with the team of engineers that he supervised on the Ultra CCS work. The claimant considered that he could have done all of the work that was carried out by his subordinates. The claimant's position is inconsistent with his refusal to accept responsibility for the health and safety near miss in April 2016. Mr Holder's evidence was that although the claimant had some relevant experience, he did not, at the time of the redundancy exercise, have sufficient expertise and experience of the range of Ultra CCS products to operate interchangeably with the engineers whom he supervised. He considered that the claimant would have required around a year in post to get fully up to speed.
24. We find that the claimant was less experienced and had less technical expertise in the CCS product range than his subordinates and that he was not therefore capable of operating interchangeably with them at the time that he was made redundant. The claimant was still relatively new in his role at that time and the health and safety incident indicated a significant lack of experience which needed to be addressed and we accepted Mr Holders evidence that the claimant would have needed further time in post to become competent to carry out the full range of work conducted by the engineers
25. The claimant also complains that the respondent did not confer a "test stamp" on him within a reasonable period of his taking up the Test Team Lead role. Holding the "test stamp" indicated someone was assessed to be sufficiently competent and experienced in the range of products in question to conduct and evaluate testing without any external supervision or countersignature. The claimant took on his new role in around February 2016. At that time, the Quality Assurance manager sent an email to the claimant confirming what he would need to do to obtain a test stamp. He would need to work for at least three months in the new role. He would then need read work instruction W12187 and complete a form, which needed to be countersigned by his manager, to certify his competence in the various areas of work identified on that form. Mr Holder maintained that the claimant needed additional time to attain the "test stamp" because he had no experience of the CCS products or of systems testing of high voltage products. He believed that it would have taken about nine months for the claimant to achieve the test stamp.
26. The claimant did not pursue obtaining the test stamp in May/June 2016 (which is when he might otherwise have expected to have received it having, by then, had three months in role). He did not complete the relevant form or get it signed off by his line managers. This may have been because by then, the health and safety incident had occurred. This led to some concerns as to the claimant's competence and ability to be signed off to hold a test stamp at that time.

27. Subsequently, the claimant took no steps to complete the form necessary for him to obtain a test stamp. However, he began to sign off some work as though he held a test stamp. This came to light around 27 September 2016 shortly before the claimant was made redundant. The respondent's management said that he should not sign work off but that it would take steps to resolve the issue of the test stamp as quickly as possible. However, subsequent events intervened and the matter was never resolved.
28. In July 2016, CCS merged with Sonar and an organisational announcement was issued to all staff advising of the merger. One of the FAQs that accompanied the announcement indicated that there might be job cuts but that it was hoped that most of these could be achieved through natural wastage. However, a further development then occurred, triggering the redundancy situation which resulted in the claimant's dismissal. When the claimant had been appointed to the Test Team Lead role, it had been assumed that the MOD contracts would be generating work by autumn 2016. However, it subsequently became apparent that the MOD work was going to be delayed at least by nine months and that there were no guarantees as to when the work would materialise. (In fact, the MOD work was delayed for even longer than the nine months initially anticipated). The respondent therefore reviewed its "forward load" and decided that the engineering department was overmanned. It concluded that the claimant's Test Team Lead role was no longer necessary because the management functions performed by the claimant could be absorbed by others in the business. The Sonar business operated without the kind of supervisory role performed by the claimant and this reinforced the respondent's view that did not need to retain the Test Team lead function in the CCS business.
29. On 5 October 2016, the respondent made another announcement to staff in the following terms.

"As part of the ongoing consolidation process, a further review of headcount has been undertaken. As you would expect, we have some duplicated roles and also a review of Project Forward Load indicates that we have too many people in engineering, operations and programmes. Regretfully, this means we have some redundant roles, the majority of which can be accommodated through scheduled leavers' retirements and terminating of contract labour. This means that formal redundancy only affects 15 roles across the three sites, Loudwater, Greenford and Weymouth."
30. The respondent thereafter operated individual and collective consultation processes.
31. There is a dispute between the parties as to whether or not the respondent adopted an appropriate pool for redundancy. We find that the respondent did direct its mind to the question of the appropriate pool. It had concluded that the claimant's role was unique and not interchangeable with the other test engineers that he supervised because of his role's management

content and because he did not have the same experience and expertise of the Ultra CCS products. The respondent also considered that the claimant's role was not interchangeable with that of Mr McHugh given that Mr McHugh's role had little management responsibility.

32. On 5 October 2016, the respondent wrote to the claimant to tell him he was at risk of redundancy. That letter appears at page 147 of the bundle. It explained the reasons for the redundancy situation, advised that he had been provisionally assessed as at risk. He was invited to a consultation meeting to consider ways of avoiding redundancy amongst other things. He was directed to the company website for details of alternative roles. He was given an indication of likely redundancy compensation and told that he could be accompanied at any future consultation meetings.
33. A consultation meeting took place between the claimant and Mr Holder on 17 October 2016. Mr Holder rehearsed the reasons why the claimant was at risk of redundancy and the claimant raised a number of points with him. He suggested that he had been unfairly treated in transitioning to the Ultra CCS role and that what had been promised to him had not materialised. He enquired about why steps had been taken to recruit somebody to a mechanical engineering role (Mr Crawford). He said that he felt that he did a great deal of hands on work so why could he not be retained. Each of these points was addressed by Mr Holder during the consultation meeting. It is notable that the claimant did not suggest at any point during that meeting that his redundancy was motivated by race discrimination. Mr Holder discussed alternatives to redundancy for the claimant and asked him whether he had any ideas as to potential alternative positions. The only alternative to redundancy that the claimant mentioned was a vacancy at Greenford. In particular he did not suggest that he wanted to return to the Varisys role occupied by Mr McHugh. The claimant indicated that he was willing to consider different or lower paid work provided that it was within a reasonable commute of Aylesbury.
34. A second consultation meeting was offered but declined and then, on 18 October, the respondent wrote to the claimant advising of a final consultation meeting on 21 October.
35. That meeting took place and the claimant had a further opportunity to make any representations that he wished to make before the respondent took a decision as to whether or not to make him redundant. Throughout Mr Holder made efforts to support the claimant. He reviewed the claimant's CV and helped him redraft it. He directed him to agencies or employers who might be able to provide him with employment and he gave him a reference. He also offered to conduct dummy interviews in order to support the claimant in getting other work.
36. The claimant applied for a vacancy in Greenford and was interviewed but was unfortunately unsuccessful, as he was assessed not to have the required skills and experience for the post.

37. On 25 October, the respondent wrote to the claimant confirming that he was being made redundant and the claimant's employment terminated on 31 October 2016. Happily, the claimant was able to obtain new employment with Abacor and he began work there on 16 November 2016.
38. The claimant did not pursue any appeal at the time of his dismissal. He wrote to the respondent several weeks later asking about an appeal process but he did not attempt to pursue a late appeal.
39. The claimant has identified certain other roles which were filled at or around the time that he was made redundant. He considers that this evidences that there was no real redundancy situation or that these might have been suitable alternative employment for him. One role was the mechanical engineer post occupied by Mr Crawford. This was a junior appointment, which was made before the redundancy situation arose, of an individual with different skills (mechanical engineering), and at a much lower salary (£24,000 as opposed to the claimant's £33,000). The claimant also referred to a test role that was advertised in September 2016 but this role was never, in fact, filled by the respondent and was withdrawn in light of the redundancy situation. The claimant has also made reference to a role occupied by Graham Tyler. Graham Tyler was also a mechanical engineer and was appointed on a fixed term basis, though he subsequently became permanent. We did not consider that these roles would have been suitable alternative employment for the claimant or that the fact of these appointments having been made suggested that there was no genuine redundancy situation.

Law

40. The burden is on the respondent under section 98(1) of the Employment Rights Act 1996 ("ERA") to show a potentially fair reason for dismissal. Redundancy, if shown, is a potentially fair reason. A redundancy situation arises where, amongst other things, an employer has a diminished requirement for employees to carry out work of a particular kind (section 139 ERA). Under section 98(4) ERA, the respondent then has to go on to show that the dismissal was reasonable in all the circumstances including by reference to the size and administrative resources of the respondent. The case of Williams v Compair Maxim sets out the basic requirements as to fair process in the case of redundancy. There should be fair and objective selection processes, i.e. use of an appropriate selection pool and, where necessary, selection criteria; there should be warning and consultation of the individual in relation to risk of redundancy, warning and consultation with any recognised trade union, and consideration of alternative employment. In relation to the pool for redundancy, the issue for the Tribunal is whether the employer has directed its mind to the question of what would be an appropriate pool and reached a reasonable decision. If the employer has done so and if the pool decided upon is a reasonable one, it is not for the Tribunal to interfere with that assessment. Factors going to the reasonableness of a pool for selection would include

whether the pool includes other employees doing the same work or other employees with whom the redundant individual is interchangeable.

41. The claim for race discrimination being brought here is a claim of direct race discrimination under section 13 of the Equality Act 2010. Section 13 provides that direct discrimination occurs if “*a person A discriminates against another, B, if because of a protected characteristic A treats B less favourably than A treats or would treat others*”. Section 136 of the Equality Act 2010 provides that the burden of proof lies with the claimant and states: “*If there are facts from which the court could decide in the absence of any other explanation that a person contravenes the provision concerned, the court must hold that the contravention occurred but subsection 2 does not apply if A shows that A did not contravene the provision.*” In essence, this means that the burden is on the claimant to show facts from which a tribunal could, in the absence of any explanation from the respondent, infer discrimination. If the claimant succeeds in doing so, then the burden passes to the respondent to show a non-discriminatory reason for the treatment complained of (Barton v Investec Henderson Crossthwaite Securities Ltd 2003 IRLR 332).

Conclusions

Unfair dismissal

42. The respondent has shown a fair reason for dismissal. The reason for dismissal was redundancy. As a result of the Sonar merger and the delay to the MOD contracts, the respondent had concluded that it was overmanned. The claimant’s particular position was assessed to be redundant. The respondent could meet its requirements without a dedicated employee performing the supervisory function of Test Team Lead. In those circumstances, the respondent has plainly demonstrated that it had a diminished requirement for employees to carry out work of the particular kind carried out by the claimant.

Reasonableness of dismissal

43. We consider that the respondent has shown that it acted reasonably in all the circumstances in dismissing the claimant on grounds of redundancy. It is plain that there was warning and consultation with the claimant as an individual regarding the redundancy situation. He received a letter explaining to him why he was at risk. He had two consultation meetings with Stephen Holder at which he was advised why the risk of redundancy had arisen. He was given an opportunity to raise concerns and those concerns were addressed. Consideration was given to alternative employment; he was directed to the list of vacancies on the website and when he expressed an interest in the vacancy at Greenford, he was interviewed for that vacancy, albeit that he was unsuccessful.
44. The claimant challenges the respondent’s decision to apply a selection pool of one. We consider that the pool was within the range of reasonable

responses for an employer given the facts that we have found. The claimant occupied a distinct management position which the respondent had decided could be dispensed with in light of the down turn in work. The respondent did direct its mind to the relevant pool. It was reasonable to conclude that the claimant was not interchangeable with his subordinates in CCS or with Mr McHugh, given the facts that we have found.

45. We had limited evidence from the respondent about collective consultation but it is clear from the documents in the bundle that there was some collective consultation with staff members. We have also found that there was consideration of alternative employment through the process of individual consultation with the claimant. In the circumstances, the process adopted by the respondent prior to the claimant's dismissal was reasonable.

Race discrimination

46. Turning now to the claim of race discrimination, the claim is one of direct discrimination, i.e. that the claimant was less favourably treated than the respondent treated, or would have treated, a hypothetical white comparator when the respondent dismissed the claimant on grounds of redundancy and/or when it delayed granting him a test stamp.
47. Dealing first with dismissal, we did not consider that the claimant had shown facts from which, in the absence of explanation from the respondent, the employment tribunal could properly infer that any difference in treatment was because of race.
 - 47.1. It is clear that there was a redundancy situation which affected not just the claimant but also a number of other members of staff. The claimant was one of a number of individuals who was made redundant at that time.
 - 47.2. The claimant suggests that the decision to move him to the Test Team Leader role was a ploy to place him in to a unique role from which he could be selected for redundancy. However, this allegation is not borne out by the facts that we have found. The CCS Test Team leader role was a genuine career development opportunity for the claimant. Everyone expected this to be a good opportunity for him and it was simply unfortunate that that turned out not to be the case due to the events that triggered the redundancy situation.
48. In any event, we consider that the respondent has shown a non-discriminatory reason for the claimant's dismissal. The respondent had identified a beneficial opportunity for the claimant in the Test Team leader role. However, subsequent events, in particular the delay in the MOD contracts, meant that the respondent was overmanned. It identified the Test Team lead role as one that it could dispense with and the claimant was dismissed for that reason and not for any reason connected with his race. As to the appointments of Mr Crawford and Mr Tyler, we did not

accept that these appointments showed that there was no genuine redundancy situation or that there was a failure to find suitable alternative employment for the claimant. These roles involved a different skill set and would not have been suitable for the claimant.

49. Dealing with the test stamp issue: again, we did not consider that the claimant had shown facts from which, in the absence of explanation from the respondent, the employment tribunal could properly infer that the treatment accorded to him was because of race. It did take longer than initially expected for the claimant to obtain a test stamp but this, in itself, does not warrant an inference that the claimant's race was a factor in the delay.

50. In any event, we consider that the respondent has shown a non-discriminatory reason for the claimant's treatment. It is clear that there was a delay in the claimant getting the test stamp but we accept the respondent's evidence that they had concerns about whether the claimant was fully competent to get a test stamp within the usual three-month period given his background working with low voltage products and his lack of experience with the CCS product range. Those concerns were reinforced by the health and safety near miss, for which we have found that the claimant must share some responsibility. It is also clear that the claimant was not proactive in taking the necessary steps to secure the test stamp after the three-month period had elapsed. We find that these factors explain the delay and that it was not attributable to the claimant's race

Employment Judge Milner-Moore

Date: 19 February 2018

Judgment and Reasons

Sent to the parties on: 22 February 2018

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For the Tribunal Office