Case Number: 3200714/2016

mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Rodliffe**

Respondent: **SOS Parking Ltd**

Heard at: **East London Hearing Centre** **On: 22-24 February 2017**

Before: **Employment Judge Brown**

Members: Mrs M Fuller-Smyth
Mrs B K Saund

Representation

Claimant: Mr M Singh (Counsel)

Respondent: Mr O McKenna (Owner)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Respondent unfairly dismissed the Claimant on the grounds of redundancy.

(2) If the Respondent had conducted a fair procedure, it would not have dismissed the Claimant.

(3) The Respondent wrongfully dismissed the Claimant when it failed to pay him notice pay.

(4) The Respondent did not pay the Claimant holiday pay during his employment, or at the termination of his employment in relation to accrued holiday pay.

(5) The Respondent did not pay the Claimant a redundancy payment and the Claimant was entitled to be paid a redundancy payment.

(6) The Respondent did not subject the Claimant to a detriment in

relation to the Working Time Regulations under *s45A Employment Rights Act 1996*.

(7) The Respondent did not make unlawful deductions from the Claimant's wages.

(8) The Respondent did not subject the Claimant to age discrimination.

REASONS

Preliminary

1 The Claimant brought complaints of ordinary unfair dismissal, automatic unfair dismissal, wrongful dismissal, a failure holiday pay, a failure to pay redundancy payment, detriment under *s45A Employment Rights Act 1996*, direct age discrimination and unlawful deductions from wages, against the Respondent, his former employer.

2 The issues for determination were agreed at a Preliminary Hearing, held in front of Employment Judge Brown, on 3 October 2016, as follows:-

Unfair dismissal

2.1 The Claimant claims unfair dismissal pursuant to Part X of the Employment Rights Act 1996 (the "ERA").

The Claimant claims that:

2.1.1 his dismissal was unfair applying the test in Section 98 of the ERA; and/or

2.1.2 the reason for the dismissal or, if more than one reason, the principal reason, was that he had asserted a statutory right, namely annual leave, Section 104 of the ERA.

Qualification for the right and dismissal

2.2 The Claimant has sufficient continuity of service to advance his claim of unfair dismissal and that he was dismissed within the meaning of that expression in Section 95(1) of the ERA.

Section 98(4) fairness

2.3 Whether the reason for dismissal was a potentially fair reason under Section 98 of the ERA?

2.4 If so, whether it fair in all the circumstances of the case (including the size and administrative resources of the employer's undertaking) for the Respondent to dismiss the Claimant?

Section 104

2.5 To determine whether the reason, or principal reason, for the dismissal fell within Section 104 of the ERA, the Tribunal will need to determine:

2.5.1 Whether or not the Claimant made it reasonably clear to the Respondent that his statutory right, namely to paid annual leave, was being infringed;

2.5.2 If so, whether the reason or principal reason for the Claimant's dismissal was the fact that the Claimant had asserted such a statutory right.

Detriment

2.6 To determine whether the Claimant was subjected to a detriment under Section 45A of the ERA, on the grounds that he had alleged infringement of such a right, namely 45A(1)(a)(b) & (f) the Tribunal will need to decide:

2.6.1 Whether or not the Claimant made it reasonably clear to the Respondent that his right to statutory rights pursuant to annual leave under the Working Time Regulations 1998 ("WTR") was being infringed.

2.6.2 If so, whether by doing so, the Respondent failed to provide/cut dramatically the Claimant with work as set out in the Claimant's Grounds.

2.6.3 The Claimant contends that the Respondent's reduction in the hours of work provided to him and its failure to provide him work were detriments on the grounds the he alleged infringement of his right to paid holiday pay.

2.6.4 Whether the Claimant was subjected to those detriments on the ground that he had asserted infringement of such a right.

Holiday pay

2.7 The Claimant advances claims that he was not afforded paid statutory holiday contrary to Regulation 13 of the WTR and with the Respondent instead operating an unlawful rolled up holiday arrangement. The Tribunal will need to determine:

2.7.1 Whether the Respondent operated an unlawful rolled up holiday pay arrangement;

2.7.2 Whether the Claimant was permitted to take paid annual leave during his employment;

2.7.3 Whether the Claimant is entitled to compensation pursuant to Regulation 30 of the WTR or as an unlawful deduction from wages pursuant to Section 23 ERA for failure to allow the Claimant to take paid annual leave;

2.7.4 If so, at what level having regard to:

2.7.4.1 the Respondent's default in refusing to permit the worker to exercise his right, and

2.7.4.2 any loss sustained which is attributable to the matters complained of.

2.8 Whether the Claimant should be entitled to a payment for the amount of statutory leave untaken during the period of the Claimant's employment up to the date of dismissal pursuant to Regulation 14 WTR. In default of agreement then the Tribunal will have to determine the number of days of leave accrued but untaken.

Payments of wages

2.9 The Claimant advances a claim that he is due payment of wages for the period up to dismissal. The Tribunal will need to determine:

2.9.1 What the contractual arrangements and obligations were between the parties and in particular from December 2015.

2.9.2 Whether the Claimant was willing able and available to carry out his shifts/work up to dismissal.

2.9.3 Whether the Claimant was provided with shifts/work and whether there was any obligation to do the same.

2.9.4 If so, whether the Claimant has entitlement to be paid wages, for what period and at what level.

Age discrimination

2.10 The Claimant advances a claim of less favourable treatment on account of his age pursuant to Section 13 of the Equality Act 2010. To determine this the Tribunal will need to consider:

2.10.1 Whether driving work was allocated to an employee of a different age group to that of the Claimant;

2.10.2 If so, to whom that driving work was allocated to instead of the Claimant;

2.10.3 If so, what were the relevant age groups;

2.10.4 Whether the Claimant was not allocated shifts/driving work from December 2015 because of the Claimant's age; and/or

2.10.5 Whether the Claimant was dismissed because of the Claimant's age;

2.10.6 If so, whether the Respondent can show the treatment as a proportionate means of achieving a legitimate aim;

2.10.7 If any acts took place more than three months (plus the extension due to Early ACAS Conciliation) whether the acts set out amounted to a conduct extending over a period within the meaning of Section 123(3)(a) of the Equality Act 2010;

2.10.8 If not, whether is just and equitable in the circumstances for the Tribunal to extend time in this respect.

Wrongful dismissal

2.11 The Claimant claims that he was not paid for any period of notice upon dismissal. The Tribunal will need to determine:

2.11.1 Whether the Claimant was paid in lieu or provided with notice pursuant to his contract of employment;

2.11.2 If not, whether the Claimant is entitled to a notice payment.

Redundancy payment

2.12 If it is contended by the Respondent that there was a redundancy situation, the Tribunal will need to determine:

2.12.1 Whether there was a redundancy situation within the meaning of Section 139 ERA;

2.12.2 If so, whether the Claimant's dismissal was on account of that redundancy situation;

2.12.3 If so, whether the Claimant is entitled to a redundancy payment pursuant to Section 135 ERA.

B. Remedy

Remedy generally

2.13 What loss the Claimant suffered as a consequence of his dismissal?

2.14 Whether the Claimant taken reasonable steps to mitigate any loss?

2.15 Whether the Respondent show that the Claimant has failed to take reasonable steps to mitigate his loss?

3 At this Final Hearing the Employment Tribunal allowed the Claimant to amend his claim of direct age discrimination, to include an allegation that the Respondent had treated him less favourably than the Claimant's comparator, Charlotte McKenna, by paying him rolled up holiday pay, when his comparator was paid a salary. The Tribunal gave the Claimant permission to make this amendment because it considered that the Claimant could not have known that Charlotte McKenna had been paid a salary, and not rolled up holiday pay, until he had had sight of Ms McKenna's pay slips. He saw the pay slips on the first day of this Final Hearing. We considered that the proposed amendment constituted a further factual allegation, additional to an existing claim of age discrimination. We considered that, even if the amendment was presented out of time, there was a good reason for this, because the Claimant had been unaware of the facts until the day he made his application. We considered that there would be little hardship or injustice to the Respondent in allowing the amendment application, because it knew that the Claimant had been comparing his treatment, in general, with that of Ms McKenna; and the Respondent was able to address the further allegation in in evidence, in cross-examination and in submissions in the Employment Tribunal. The Respondent would be able to give evidence about reason for the difference in treatment between the Claimant and Ms McKenna before the Employment Tribunal made its decision.

4 The Tribunal heard evidence from the Claimant. It heard evidence from Owen McKenna, Director of the Respondent. There was a bundle of documents, to which some documents were added at the start of the Final Hearing. Both parties made submissions. The Tribunal heard evidence on liability first.

Findings of Fact

5 The Claimant was born on 21 July 1961. He commenced employment with the Respondent on 26 May 2012, as a driver. He held a Hackney Carriage licence for this purpose.

6 At the time, the Respondent Company operated a private airport car park, close to Stansted Airport. It hired out car parking spaces to holiday makers and business people.

7 The Claimant was employed to park customers' vehicles, drive customers to and from Stansted Airport in the Respondent's minibus, and drive customers' cars on a "park and ride" basis. He also undertook "meet and greet" services until about 2014. The Claimant was employed to work on a shift basis.

8 At the start of the Claimant's employment, the Respondent did not give him a written contract. Mr Owen McKenna, Director of the Respondent, told the Claimant, at the start of his employment, that the Claimant would be paid £7 an hour.

9 There was a dispute of fact between the parties about whether Mr McKenna told the Claimant that the £7 an hour included an element of holiday pay. It was agreed, however, that, on the Claimant's pay slips throughout 2012, it was recorded simply that

the Claimant was paid at the rate of £7 per hour, with no separate element of holiday pay specified.

10 On 14 January 2013 (p.67), the Claimant wrote to Mr McKenna, quoting extracts from the ACAS website about employees' entitlement to 5.6 weeks' annual leave and saying that the Claimant had calculated that he had accrued 14 days holiday since the start of his employment and that he wished to take that holiday, and be paid in advance, at the rate of £70 per day.

11 He also sent a letter to the Respondent on 15 January 2013 (p.69), saying that he had not been given a written contract of employment, or written statement of employment particulars, and that when he had applied for his job, the job had been advertised as four days working 10 hours morning shifts, four days off, and four days working 10 hours afternoon shifts, at £7 per hour. He said his shift pattern had later changed to a three day shift pattern, also working at £7 per hour. He said that the Respondent had started to cut his hours in November 2012, without consultation, and that he wished to have a written contract of employment.

12 In February 2013, following these letters, the Respondent gave the Claimant a written contract of employment. At clause 4 the contract provided: "Your basic rate of pay is £6.25 per hour". At clause 7 it provided:

> "**Hours of Work**
>
> There is no obligation on the company to provide work as this is entirely dependent upon work being available. The availability of work will vary throughout the year but you agree to be available for work within the following alternate shifts:
>
> - 3 Days On Early/3 Days on Late/3 Days Off
> - Shift of 10 hours, excluding half an hour unpaid break.
> - Start and finish times to be agreed in advance with management…
>
> In order to provide the highest service standards to clients of the company, it is imperative that all employees adhere to their working hours. Punctuality and timekeeping are, therefore, considered as being important by the company and employees are required to abide by the contractual hours of work."

The contract also provided at clause 8:

> "**Annual Leave**
>
> All full time employees are entitled to paid annual leave of 28 days per calendar year (January 1st to December 31st), including the eight permanent UK public holidays.
>
> As your actual days and hours to be worked is dependent upon the availability of work, it is not possible to accurately calculate your pro-rated entitlement to annual leave. The company shall therefore pay you an additional £0.75 per

> hour, a loading of 12.07%, in order to ensure that you receive paid annual leave that has been fully pro-rated to the hours that you actually work…"

A schedule was appended to the contract of employment relating to holiday pay (pgs.107 & 111).

13 The Claimant continued working for the Respondent after receiving the contract. After the Respondent had issued the Claimant with the contract, the Claimant's pay slips started to record the hourly rate as £6.25, separately from a holiday pay rate of 75p per hour. The Claimant told the Tribunal that he objected to the holiday pay provisions in the contract and printed off extracts from the government website. which he gave to the Respondent. He also told the Tribunal that Mr McKenna paid him for holiday he had taken that year, by cheque. The Claimant did not produce the cheque, or any paying in record from 2013. Mr McKenna told the Tribunal that he had no record of having written such a cheque.

14 On the evidence, the Tribunal accepted the Claimant's evidence that Mr McKenna had told him, at the start of his employment, that he would be paid £7 per hour and that the Claimant was not told that part of the £7 would be for holiday. It is clear that holiday was not separately set out in the 2012 pay slips and it is clear from the Claimant's letters, at the time, that he believed that he had been told he would be paid £7 per hour.

15 With regard to the Claimant having been paid a cheque for holiday pay in 2013, we accepted the Claimant's evidence that Mr McKenna paid him by cheque for the holiday he took at that time. The Tribunal found the Claimant to be honest, forthright and credible in his evidence. He had a clear recall of events.

16 By contrast, the Tribunal did not accept Mr McKenna's evidence that he had separated out a holiday pay element in the Claimant's pay from the start of the contract. We did not accept his denial that he had paid a cheque to the Claimant for holiday he had accrued when the Claimant challenged him in writing about this in 2013.

17 The Tribunal found that the Claimant objected to being paid rolled up holiday pay in 2016. It was on 3 February 2016 that he wrote to the Respondent saying that rolled up holiday pay was now no longer legal. He referred, then, to an extract from the relevant government website.

18 The Claimant continued to work for the Respondent. Generally, he worked 10 hour shifts, on a rolling three day shift basis. There was, however, variation in the hours that the Claimant worked, depending on the availability of work. The Respondent had prepared a comparison of the hours worked by the Claimant between 2014 and 2016. It was clear that, throughout the period, the hours the Claimant worked did change from month to month.

19 The Claimant told the Tribunal that, when he was not transporting clients during his working hours, he performed other tasks, like inspecting vehicles and completing paperwork. The Tribunal accepted that evidence, which was not significantly disputed.

20 The Respondent's Mr McKenna agreed in evidence that, under the Claimant's

contract of employment, when there was work available, the Respondent was obliged to provide the work to the Claimant. Mr McKenna also agreed that the Claimant was expected, under his contract of employment, to be available for work during the specified shift times.

21 In summer 2015 the Respondent changed the amount paid on the Claimant's pay slips per hour to £6.75 per hour; the holiday pay element remained at 75p. While it is correct that 75p was about 12% of the £6.25 hourly rate, 75p was not 12% of the £6.75 hourly rate; it was less than that.

22 The Claimant did not receive any separate additional payment after 2013 for holiday pay, other than the amount said, on the pay slips, to be referable to holiday pay. The Respondent did not keep records of the Claimant's holiday as and when he took it. The Claimant wrote dates of holidays on a message book, but the Respondent did not produce this at the Employment Tribunal and told the Tribunal that it had been mislaid. The Respondent produced some handwritten requests for holiday which the Respondent said were not a complete record of the holidays the Claimant had taken (pgs.513-516).

23 During the Claimant's employment the number of drivers employed by the Respondent fluctuated. The maximum number employed was about 6. During 2015 other drivers called Rick, Chris and Costell all left the Respondent's employment. Rick left in June 2015, Chris at the end of 2015 and Costell in about October 2015, on the Respondent's evidence.

24 In early 2016, therefore, only the Claimant and one other driver, David Hewitt, remained.

25 In May 2015 the Respondent company employed Mr McKenna's daughter, Charlotte McKenna. The Respondent company brought a franchise called Practical Van Hire, which hired vans to passengers at Stansted Airport. Charlotte McKenna was employed on a salary of £690 gross per month; she was not given rolled up holiday pay. Ms McKenna was aged 23.

26 Mr McKenna told the Tribunal that Charlotte McKenna ran the van hire side of the business. The Respondent did not produce her job description, her contract of employment, or any analysis of the work Ms Charlotte McKenna did. On 21 September 2015 Ms McKenna was added to the Respondent company's insurance schedule and thereafter was insured to drive the same minibus as the Claimant.

27 In October 2015, Mr Owen McKenna met with the Claimant and David Hewitt. Mr McKenna told them that their shift hours of work would be changing to 6am to 6pm. He said that they would each work four days on and four days off. He said that the new hours would be more sociable.

28 The Claimant told the Tribunal that Mr McKenna commented that it would be handy to have Charlotte McKenna licensed and insured for the minibus, to help out with busy periods. The Tribunal accepted his evidence.

29 Mr McKenna and his wife both drove vehicles as part of the Respondent's

business. Mr McKenna told the Tribunal that his wife and he continued to drive for the few remaining car park customers when its car parking business declined.

30 The Respondent lost a contract with Ryanair in about May 2014. Mr McKenna told the Tribunal that 90% of his bookings for private parking were made a few days or weeks before the relevant booking and only 10% of the customers made bookings 6 months or more before the parking space was required. Mr McKenna told the Tribunal that the Respondent's work were seasonal; busier in the summer, but generally quieter in the winter.

31 He produced evidence of occupancy rates of the car park. These did show a significant drop in the number of cars parked in the car park between 2015 and 2016. For example, the occupancy rate of the car park in January 2015 was, at lowest, 59 cars and highest 150 (p.144). In January 2016, by contrast, the occupancy rate, at its lowest, was 16, and, at its highest, was 43. The Tribunal notes that the highest occupancy rate in January 2016 was lower than the lowest occupancy rate in January 2015 (p.158). In December 2015, the occupancy rate of the car park, at its lowest, was 9; its highest was 29 (p.156). The year before, in December 2014, the occupancy rate, at its lowest, was 28, and highest 159 (p.142). By way of further comparison, in February 2015, the lowest occupancy rate was 42, but the highest was 113 (p.146). In February 2016, the lowest occupancy rate was 11 and the highest was 71 (p.145).

32 On that evidence there was clearly a very significant drop off in the Respondent's car parking business between 2015 and early 2016. The reason for that has not been explained by the Respondent. Clearly the Ryanair business had been lost a long time before that period.

33 The Respondent has not produced any evidence to the Tribunal about the volume of business for the van hire business which it operated at the same time.

34 After October 2015 the Respondent dramatically reduced the number of hours work it gave to the Claimant. By way of illustration, in September 2015 the Claimant was given 113.5 hours work - which was similar to the number of hours he had been given in September 2014 - but in October 2015 he was given 77 hours; in November 71 hours; in December 10.5 hours; and January 7.5 hours. In December 2014 and January 2015 the Claimant had been given a total of 305½ hours; but in December 2015 to January 2016 he was given a total of 18 hours' work. The Respondent's total revenue from car parking in January 2016 was £459.66 (p. 328); its total revenue from car parking in February 2016 was £1,479 (p. 335).

35 Up to about December 2015, Mr McKenna would text the Claimant before his shift started, telling him about the time the first customer for the next morning was due to arrive. Mr McKenna agreed, in evidence to the Employment Tribunal, that, from December 2015, he forgot to text the Claimant about work.

36 The Claimant emailed the Respondent on 3 February 2016 (p.71). He said that, since the new shift pattern had been introduced, the Claimant's hours had been reduced to almost nothing, although he knew that there was work to be done on the days that he was working, because the Claimant had been checking the Respondent's electronic Inkara system, which showed bookings. The Claimant said that Mr

McKenna was choosing to do the work himself, or getting Charlotte to do it. He said the Respondent had a duty to provide the Claimant with a variation in contract because his hours and shifts had changed. He also said that rolled up holiday pay was no longer legal.

37 Mr McKenna replied on 4 February 2016. He said that he had called the Claimant on 23 January, 26 January and 3 February 2016. Mr McKenna said the Claimant's contract of employment was a zero hours contract, meaning that he was not obliged to offer minimum working hours and that the Claimant was not obliged to accept the work offered. He said that he should have told the Claimant that there was no work available. Mr McKenna said that the current situation did not warrant any additional drivers and that this would remain the same for the foreseeable future (p.72).

38 On 8 February the Claimant replied, saying that he was well aware of the basis on which the Claimant worked for the Respondent. On 10 February 2016 the Claimant emailed, again, saying that the Respondent had not texted him about work and that the Respondent had removed the Claimant from its Inkara system, so that the Claimant could no longer see what work was being booked in (p.73).

39 On 14 February Mr McKenna emailed once more, saying that there was no work for additional drivers. He asked the Claimant to arrange a time to come in to see him in the office (p. 73).

40 The Claimant did not arrange to meet Mr McKenna. Around this time, the other driver, David Hewitt, left the Respondent's employment, to take up driving work at Stansted Airport.

41 On 11 March 2016, Mr McKenna wrote to the Claimant saying:

> "…
>
> To clarify the situation the company is moving in a different direction with very little parking involved so we no longer need your services…"

42 The Respondent did not offer the Claimant a redundancy payment, or notice pay. It did not offer the Claimant an appeal. The Respondent did not make any payment to the Claimant for accrued, but untaken, holiday.

43 There was no dispute that the Claimant had been a reliable and contentious worker. In submissions to the Tribunal, Mr McKenna told the Tribunal that he and his daughter had attended a training course in relation to the van hire business and that drivers like the Claimant could have undertaken that course in the future.

44 The Claimant produced photographs, taken in May 2016, showing that there were cars parked in the Respondent's car park. He also produced photographs of Charlotte McKenna dropping customers at the airport and collecting them in the Respondent's minibus; those photos were taken in about summer 2016. The Respondent told the Tribunal that Ms McKenna was driving the minibus in order to collect and deliver van hire customers.

Relevant Law

Equality Act 2010
45 By *s39(2)(c) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him.

46 Direct discrimination is defined in *s13 EqA 2010*. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

Direct Age Discrimination.
47 Direct discrimination is defined in *s13 EqA 2010:*

"(1) 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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

48 By *s5 EqA 2010*, age is a protected characteristic. A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

49 In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Elements of Direct Discrimination
50 Accordingly, for a Claimant to succeed in a direct age discrimination complaint , it must be found that:

(a) A Respondent has treated the Claimant **less favourably** than a comparator in the same relevant circumstances;
(b) The less favourable treatment was because of age as defined in s5 EqA - **causation**;
(c) that the treatment in question constitutes an unlawful act such as dismissal.
"Because"- Causation
51 The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, Para [77].

52 If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

Burden of Proof and Inferences

53 In approaching the evidence in a discrimination case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and the Annex to the judgment.

54 In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58.

Unfair Dismissal

55 By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

56 *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Redundancy is a potentially fair reason for dismissal.

57 It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of proper information.

Redundancy

58 Redundancy is defined in *s139 Employment Rights Act 1996.* It provides so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

…

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

(i) for employees to carry out work of a particular kind…

have ceased or diminished or are expected to cease or diminish."

59 *Safeway Stores plc v Burrell* [1997] ICR 523, 567 IRLB 8 and *Murray v Foyle Meats Ltd* [2000] 1 AC 51, [1999] IRLR 562 indicated that there is a three stage process in determining whether an employee has been dismissed for redundancy. The Employment Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

60 If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

61 *Williams v Compair Maxam Ltd* [1982] IRLR 83 sets out the standards which guide tribunals In determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

62 In *Langston v Cranfield University* [1998] IRLR 172 the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

Consultation

63 "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

Pool

64 There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding* [1980] IRLR 255. In that case, an unskilled worker in a factory could easily have been fitted into work she had already done at the expense of someone who had been recently recruited. Equally, however, there is no principle that the employer is never justified in limiting redundancy selection to workers holding similar positions to the claimant (see *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55 *EAT.*

65 In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

Alternative Employment

66 In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v* Earl [1976] IRLR 296, [1976] ICR 296; British United Shoe Machinery Co Ltd v Clarke [1977] IRLR 297, [1978] ICR 70.

67 In all these matters, the employer must only act reasonably and there is a broad band of reasonable responses open to a reasonable employer.

Polkey

68 If an employer has dismissed an employee unfairly, the ET may consider what was the likelihood that the employer would have dismissed the employee fairly following a fair procedure, *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974

Rolled Up Holiday Pay

69 Under *Regs 13 & 13A Working Times Regulations 1998* workers are entitled to

take holidays each year and to be paid holiday pay. The right under *Reg 13* is to 4 weeks annual holiday; the right under Reg 13A is 1.6 weeks, meaning that a worker has a right to 5.6 weeks' paid holiday each year.

70 Under *Regulation 14 WTR 1998*, an employee is to be entitled to be paid, at termination of employment, the proportion of holiday that he is entitled to in proportion to the holiday year expired, but which has not been taken by the employee during that time.

71 The ECJ considered whether "rolled up" holiday pay was compatible with the Working Time Directive in *Robinson-Steele v R D Retail Services Ltd*: C-131/04, [2006] IRLR 386, [2006] ICR 932.

72 Under a 'rolled-up holiday pay' system, typically, there is an hourly rate of pay, and an hourly supplement designated as holiday pay. The worker receives payment of both the basic and supplementary payments at the same time, in respect of any given period of work.

73 The ECJ decided that "The purpose of the requirement for payment for [annual] leave is to put the worker, during such leave, in a position which is, as regards remuneration, comparable to periods of work.' (para 58) and 'Furthermore, account must be taken of the fact that, under Article 7(2) of the Directive, the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated. That prohibition is intended to ensure that a worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety … A regime such as that referred to by the questions at issue [ie rolled up holiday pay] may lead to situations in which, without the conditions laid down in Article 7(2) of the Directive being met, the minimum period of annual leave is, in effect, replaced by an allowance in lieu.' (paras 60–61).' Hence, the ECJ decided, rolled-up holiday pay arrangements were precluded by the WTD.

74 However, the ECJ held that the WTD does not preclude the setting off of sums actually paid under transparent and comprehensible arrangements for rolled-up pay, against any liability to pay in respect of any specific period of leave taken by the worker.

75 WTR SI 1998/1833 Reg 16(5) provides that contractual remuneration paid to the worker 'in respect of a period of leave' goes to discharge liability under the Regulations to pay in respect of that period, and vice versa. There is no time restriction in the provision, so that if a payment falling within it has been made by the time a complaint to the tribunal comes to be determined, Reg 16(5) can be relied on.

76 *Lyddon v Englefield Brickwork Ltd* [2008] IRLR 198, EAT, concerned whether payments to a Claimant on account of holiday pay could be set off against his entitlement. The EAT (Elias P presiding) applied the test set by the CJEU in *Robinson-Steele*, that payments must be additional to remuneration for work done, and must be paid transparently and comprehensibly as holiday pay (*Robinson-Steele*, para 63).

Unlawful Deductions from Wages and Contractual Terms

77 *s13 Employment Rights Act 1996* a worker has the right not to suffer

unauthorized deductions from wages. By *s27 ERA 1996* "wages" is defined. By *s27(1),* "In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including: a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise. …" .

78 *Adams v British Airways plc* [1996] IRLR 574 concerned the construction of a collective agreement. The Court of Appeal said that, in construing the contract, the Court was not concerned to investigate the subjective intentions of the parties to an agreement which may not have coincided anyway. The Court's task is to elicit the parties' objective intentions from the language which they used. The starting pint is that the parties meant what they said and said what they meant. But an agreement is not made in a vacuum, a modern contract is to be construed in its factual setting as known to the parties at the time. Where the meaning of the document is clar beyond argument, the factual setting will have little or no bearing on construction; but to construe an agreement in its factual setting is a proper approach to construction and it is not necessary to find an agreement ambiguous before following it."

79 In *Johnson v Unisys Limited* [2001] ICR 480, the House of Lords held that implied terms can supplement the express terms of a contract, but cannot contradict them.

80 A contract can be varied by express or other implied agreement. Implied agreement to a change in terms and conditions may be found where the change in terms has immediate practical effect and the employee continues to perform the contract, *Jones v Associated Tunnelling Co Limited* [1981] IRLR 477, *Lee v GEC Plessey Telecommunications [1993] IRLR 383*.

Notice Pay

81 By *s86 Employment Rights Act 1996,* the notice required to be given by an employer to terminate the contract of employment of a person who is continuously employed for one month or more is not less than one week's notice if his period of continuous employment is less than two years, is not less than one week's notice for each year of continuous employment if this period of continuous employment is two years or more but less than 12 years, and not less than 12 weeks notice if his period of continuous employment is 12 years or more.

82 By Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994 the Employment Tribunal has jurisdiction with regard to contractual claims arising or outstanding at the termination of the employment of an employee.

Working Time Detriment

83 By *s45A(1)(a)(b)&(f) ERA 1996* an employee has the right not to be subjected to a detriment by his employer done on the ground that the worker has refused to comply with a requirement his employer has imposed in contravention of the WTRegs 1998, has refused to forego a right under the WTRs, or has alleged that his employer has infringed his rights under the WTRs.

84 On a complaint to the Employment Tribunal, it is for the employer to show the ground on which the employer acted, *s48(2) ERA 1996.*

Discussion and Decision

85 There was no issue in this case that the Claimant was an employee of the Respondent. The Respondent agreed that it was under an obligation to provide work to the Claimant when work was available and that the Claimant was obliged to be available for work during shift hours.

Age Discrimination

86 The Claimant compared himself with Charlotte McKenna, aged 23, who was of a different age group to the Claimant. He said that he had been treated less favourably than her in a number of respects and relied on the following factual allegations:-

86.1 That driving work was allocated to Charlotte McKenna when it was not allocated to the Claimant.

86.2 That the Claimant was not allocated shifts, or work, from December 2015 when Ms McKenna was.

86.3 That the Claimant was dismissed, when she was not.

86.4 That the Claimant was paid rolled up holiday pay, when Ms McKenna was not.

87 The Employment Tribunal finds that the Respondent's driving and parking work substantially reduced from about October 2015. Members of the McKenna family (Mr McKenna and his wife) may well have undertaken some driving work in relation to the parking business, but the Tribunal finds that, in reality, there was very little parking work for anyone to do. There was no evidence that Charlotte McKenna, herself, did any driving in relating to the parking business in late 2015 or early 2016.

88 The Respondent company had acquired a franchise for a van hire business in May 2015. Charlotte McKenna was employed by the Respondent at that time. She was employed on a fixed monthly salary and not on a zero hours contract. She was ot paid "rolled up" holiday pay. The Claimant was dismissed when Charlotte McKenna was not.

89 The Respondent did treat the Claimant less favourably than it treated Charlotte McKenna when it gave him rolled up holiday pay and when it dismissed him.

90 The Tribunal does not find that it treated him less favourably regarding the allocation of work, because the Tribunal finds there was no work to be done, or very little work to be done and there is no evidence that Charlotte McKenna did that parking work.

91 With regard to holiday pay and dismissal, the Tribunal finds that the Respondent

did not consider retaining the Claimant to do the van hire work which was still being done at the date of his dismissal. We find that there was a difference in treatment between the Claimant and Ms McKenna with regard to holiday pay and dismissal and there was a difference in their protected characteristics; there was a difference in their age groups.

92 However, on the facts, we found that the Claimant and Ms McKenna were not in the same material circumstances for an appropriate comparison to be made. The Claimant had been employed as a driver and Charlotte McKenna had been trained in relation to the van hire business which had been newly acquired. They were, therefore, allocated to different parts of the Respondent business. When the car parking work fell away, it was the Claimant who was primarily affected.

93 Further, the Tribunal found that Mr McKenna and his wife continued to drive cars in relation to the parking business. They were not aged 23 or of that age group – they were a similar age to the Claimant.

94 Charlotte McKenna was a member of the McKenna family. Members of the McKenna family continued to do work for the Respondent company, regardless of their age.

95 The Tribunal decided that those facts were not facts from which the Tribunal could conclude that the difference in treatment between the Claimant and Charlotte McKenna was due to age when the Claimant was dismissed, or that the Claimant was treated less favourably than a comparator who was in similar material circumstances. Ms McKenna was allocated to work which had not declined and she was a member of the McKenna family, all of whom continued to do work for the Respondent.

96 When Charlotte McKenna was employed on a salary she was allocated to a different part of the business. The Tribunal finds that all drivers were given zero hours contracts, with rolled up holiday pay. It concludes that drivers, whatever their age, were given rolled up holiday pay. That was the reason that the Claimant was given rolled up holiday pay: he was a driver. Ms McKenna was not an appropriate comparator, as she was not employed as a driver. There were not facts from which the Tribunal could conclude that the Respondent had subjected the Claimant to age discrimination, or that the Claimant had been treated less favourably than a comparator in the same material circumstances.

97 Accordingly, the Claimant's age discrimination claims fail.

Unfair Dismissal

98 The Tribunal found that the Respondent had shown that the reason for dismissal in this case was redundancy. There was a reduction in the work required for drivers: that was quite plain from the occupancy rates of the car parks in late 2015 and early 2016 and from the amount of money generated from parking in that period. There was, therefore, a reduction in need for employees to carry out work of a particular kind: driving cars in relation to the car parking business. That was the reason in the Respondent's mind for dismissing the Claimant in March 2016.

99 We found that the Claimant was not dismissed for asserting a statutory right. The Claimant had asserted statutory rights in 2013 and had not been dismissed in 2013. It was clear, however, that in 2016 that there was a very substantial drop in parking related work. That was what led to dismissal at that time, even though the Claimant had again asserted his statutory rights.

100 Therefore the Respondent had a potentially fair reason for dismissal when it dismissed the Claimant for redundancy. The Tribunal went to consider whether the Respondent acted fairly in dismissing the Claimant for that reason under *s98(4) Employment Rights Act,* applying a neutral burden of proof. *Williams v Compair Maxam* requires the Tribunal considers whether there was fair selection of a pool, fair selection criteria, fair application of the criteria, fair consultation with the Claimant on all those matters, and whether the Respondent looked for alternative work, before the dismissal decision was made. The Tribunal reminded itself that it must apply a broad band of reasonable responses to the Respondent's actions.

101 With regard to the pool, at the time the Claimant was made redundant, he was employed by the Respondent company and so was Charlotte McKenna. The Respondent dismissed the Claimant and not Charlotte McKenna. It did not consider re-training the Claimant to do work in relation to the van hire business. In fact, the Respondent did not consider a pool at all. There was no consideration of re-training the Claimant instead of Ms McKenna, even though the Claimant had been employed since 2012 and Ms McKenna only since the summer of 2015.

102 At the Employment Tribunal, the Respondent did not provide a job description for Charlotte McKenna. It did not provide any evidence to show the work Ms McKenna was doing was substantially different to that of the Claimant, or required skills that the Claimant did not have, or could not have easily acquired.

103 The Tribunal considered that the Respondent acted unreasonably in not considering the pool for selection at all. It acted outside the band of reasonable responses in giving no consideration to criteria, or to the application of criteria.

104 It also acted outside the band of reasonable responses in undertaking no consultation whatsoever with the Claimant. The Claimant was dismissed without notice. He was not invited to a meeting where redundancy was to be discussed, or where he could have proposed alternatives to redundancy; he was not warned that redundancy was being considered; he was offered no appeal. He was not offered alternative work which was available in relation to the van hire business.

105 In submissions to the Tribunal, Mr McKenna said the Claimant could have been trained to undertake the van hire business. There was nothing in the evidence before the Tribunal to suggest that the van hire business work was complex or difficult. It certainly involved driving clients to and from the airport, as evidenced by the Claimant's photos in summer 2016. We accepted the Claimant's evidence that he completed paperwork in relation to the parking business. He was clearly an intelligent and literate man, judging by the correspondence he sent to the Respondent. The Tribunal found that it was unreasonable and outside the band of reasonable responses for the Respondent not to have considered the Claimant for the work which still existed. He

had been employed since 2012 and was a good reliable employee, whereas Ms McKenna had only been employed since 2015 and, necessarily, had little experience of any work, including the van hire work. She had no statutory rights, when the Claimant did. On the evidence, Ms McKenna was not engaged in work which was significantly different to the Claimant's work. Accordingly, the Tribunal found that the Claimant was unfairly dismissed by the Respondent by reason of redundancy.

106 We went on to consider, under *Polkey,* what was the likelihood that the Respondent would have dismissed the Claimant if the Respondent had acted fairly. We found there was no likelihood that it would have dismissed the Claimant. It would not have been fair to dismiss a competent, reliable employee, who could have been trained in a basic job and who had been employed for nearly four years, rather than someone who was simply a family member.

Alleged Unlawful Deductions from Wages

107 The Claimant worked for the Respondent under a contract which said that the Respondent was not required to provide a particular level of work. While there was some mutuality of obligation, and the Respondent was required to provide work where it was available, there was no specific requirement for a number of hours to be provided at any time. The Claimant knew that, as evidenced by his letter of 8 February 2016.

108 The work provided by the Respondent to the Claimant did fluctuate throughout the period of the Claimant's employment.

109 We found that, accordingly, there was no obligation under the contract of employment for the Respondent to provide a particular level of work to the Claimant. We therefore found that the Respondent did not make deductions from wages when it did not offer work to the Claimant and the Claimant did not do the work. There was very little work to do. Mr McKenna and his wife undertook what little work there was and did not require any additional drivers, given the very low level of income in the business.

Notice Pay

110 The Respondent did not give the Claimant any notice of his dismissal. The Claimant was entitled, under *s86 Employment Rights Act,* to a minimum of three weeks notice, because he had completed three whole years of employment.

Holiday Pay

111 The European Court of Justice has said, in *Robinson-Steele,* that rolled up holiday pay is incompatible with the *Working Time Directive,* but that payments additional to remuneration for work done, transparently and comprehensibly paid as holiday pay, can be set off against an employee's entitlement to holiday pay.

112 The Tribunal has found that the Respondent employed the Claimant in July 2012 to work for £7 per hour. About six months later, when the Claimant asked to be paid holiday pay, the Respondent purported to pay 75p of that £7 per hour as holiday

pay. It gave him a contract setting this out. The Tribunal found that, in doing so, the Respondent did not give the Claimant any extra payment for holiday; it simply took a portion of the hourly rate already agreed and said that it was for holiday pay. Even when the rate of pay was increased to a total of £7.50, the Respondent said that hourly rate had only increased to £6.75. This hourly rate was still less than the £7 agreed at the start of the contract. Part of the normal hourly pay was still purportedly allocated to holiday pay. Furthermore, after that increase in the hourly rate, the holiday pay element remained the same, at 75p, and, therefore, was not the 12.07 % required to be paid as holiday pay under the terms of the Claimant's written contract.

113 The Tribunal found, applying the test in *Robinson-Steele,* that the holiday pay element was not transparent. It was not additional to the rate of pay agreed. It was not comprehensible, whether in February 2013, or the summer of 2015, when the overall rate of pay went up, but the amount of holiday pay allocated remained the same.

114 We found therefore that the Respondent was not entitled to set off, against the Claimant's claim for holiday pay, amounts which it purported to pay separately for holiday. Such a set off is excluded because there was no transparency or comprehensibility.

115 The Tribunal concluded that the Respondent failed to pay the Claimant for holiday pay during his employment. It also did not pay the Claimant at the end of his employment for accrued, but untaken, holiday pay, during that holiday year.

Detriment

116 The Respondent did not subject the Claimant to detriment for asserting a statutory right. The Tribunal found that the reduction in hours offered to the Claimant was due to the reduction in parking work available. We concluded that the Respondent had discharged the burden of proof to show that the reduction in parking work was the reason that the Claimant was not offered the hours that he had been previously offered.

.....
Employment Judge Brown

13 March 2017