Case Number 2404972/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs M Wilson		**Robinson Rice Associates Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Liverpool **ON** 17 January 2018

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For Respondent: **Mr D Tinkler (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 **The claimant was fairly dismissed by the respondent by reason of redundancy: her claim for unfair dismissal is not well-founded and is dismissed.**
2 **The claimant has been paid the correct redundancy payment: no further payment is due.**
3 **The claimant's claim for unpaid wages (by reason of a shortfall against National Minimum Wage) is not well-founded and is dismissed.**
4 **The claimant's claim for unpaid notice pay is not well-founded and is dismissed.**
5 **The claimant's claim for unpaid holiday pay is not well-founded and is dismissed.**

REASONS

Introduction

1 The claimant in this case is Mrs Michelle Wilson who was employed by the respondent, Robinson Rice Associates Limited as a receptionist from 2 May 2007 until 29 August 2017 when she was dismissed. The reason given at the time of the claimant's dismissal was redundancy.

2 By a claim form presented to the tribunal on 9 September 2017, the claimant claims that her dismissal was unfair; that her redundancy payment had been under-calculated; that her salary had been under calculated with the consequence that in fact she had been paid at a rate below the National Minimum Wage; and that due to the same mis-calculation there was outstanding holiday pay due to her. At the time that the claimant presented her claim form, she had not been paid any notice pay: that omission has since been rectified; but again, by reference to the same mis-calculation, it remains the claimant's case that she has been underpaid her notice pay.

3 In its response to the claim, the respondent admits that the claimant was dismissed: but asserts that the reason for the dismissal was redundancy and that the dismissal was fair. The respondent's case is that the claimant's wages have been correctly calculated throughout: and that accordingly, her redundancy payment and holiday pay were also correctly calculated. Subsequent to the filing of the response, the respondent acknowledged that the claimant was entitled to be paid notice pay; and this omission has since been corrected. The respondent's case is that the correct amount of notice pay has been paid having regard to the claimant's hours of work and the wages to which she was entitled in the period prior to her dismissal.

The Evidence

4 The respondent presented its case first: it called a single witness, Mrs Beverly Rice – Director. The claimant gave evidence on her own account and called her husband Mr John Wilson to give evidence in support. In addition to the oral evidence I was provided with an agreed trial bundle running to a little under 200 pages: I have considered those documents from within the bundle to which I was referred by the parties during the hearing.

5 I found Mrs Rice to be a clear; compelling; and honest witness: whose evidence was consistent under cross-examination and consistent with contemporaneous documents. By contrast, the claimant's evidence was at times confused; it varied somewhat under cross-examination; and it was quite inconsistent with contemporaneous documents. Mr Wilson's evidence was not all relevant to the issues I had to decide in one important respect his evidence was inconsistent with what had been stated in his witness statement.

6 Many of the facts in this case are not in dispute: but, where there is a dispute as to fact, I prefer the evidence of Mrs Rice to that given by the claimant or her husband. I have made my findings of fact accordingly.

The Facts

7 The respondent is a firm of Chartered Accountants with offices in Ainsdale; Crosby; and West Kirby. Originally, Ainsdale was the principal office; but, from 2011/2012, Crosby became the principal office; and Ainsdale remained open for meetings with clients and housed a small number of staff engaged in bookkeeping work.

8 In May 2007, the claimant commenced employment with the respondent as a Receptionist/Administrator. In her claim form, the claimant describes her role as that of a Debt Collector: when pressed during cross-examination, she confirmed that, while she had done some debt collection, this had never been her main or even a substantial part of her role. Further, the claimant had obtained a bookkeeping qualification as long ago as 2008; but agreed that she had never worked as a bookkeeper whilst employed by the respondent.

9 The claimant's initial contract of employment is a little ambiguous: it states that her normal working hours will be "*16 hours per week which includes lunch*"; her hours were to be every Wednesday and Friday from 9am until 5pm. The contract was updated in 2009: the later contract made clear that the normal hours were 9am until 5pm during which the employee was entitled to a "*daily one-hour unpaid meal break*". Accordingly, the hours of paid employment would be 7 hours per day.

10 In July 2010, the respondent realised that, due to an error, it had been paying the claimant on the basis of 8 hours per day rather than the 7 hours actually worked. I reject the claimant's evidence that she had ever been expressly told that she would be paid for her one-hour lunch break: I accept Mrs Rice's evidence that this was a genuine error. However, as this had happened due to the respondent's error, Mrs Rice made clear in writing that she did not intend to change the claimant's remuneration. Shortly afterwards, the respondent lost the cleaning contractor who had been responsible for cleaning the Ainsdale office: in return for continuing to receive an additional one hour's remuneration each day, the claimant agreed to take on the cleaning. The agreement was silent as to whether the cleaning would be done in addition to her 7 hours of work; or whether she would actually work an extra hour. In my judgement, this is not relevant to the issues which I have to decide.

11 In May 2015, the claimant went off sick: her sickness absence became prolonged; and it was not until 22 September 2016 that the claimant was able to return to work; an absence of some 15 months. Mrs Rice visited the claimant at home on 12 September 2016 and made clear that the respondent was ready for the claimant to return to working 2 days each week: Mrs Rice left the meeting believing that the claimant would return on that basis; shortly afterwards however, Mrs Rice received an email from the claimant stating the following: -

> "*Unfortunately I am unable to accept your offer of working 2 days per week due to my current medical condition. Not only will this put a strain on my health but it but will also interfere with future hospital appointments.*
>
> *Therefore I propose returning to work one day per week until my condition improves at which point we can discuss increasing my working hours*."

The proposal for the claimant to return one day per week is highly inconvenient to the respondent because they had engaged a temporary employee to cover her for 2 days per week and there was no guarantee that the temporary employee would be willing to continue working on a one-day per week basis. Nevertheless, Mrs Rice accepted the claimant's proposal and asked her to work on a Tuesday: however, the claimant was unable to accept this because her hospital appointments were mainly on Tuesdays - she wished to work on Thursday. Reluctantly, Mrs Rice agreed to this: she was persuaded to agree by a telephone conversation she had with Mr Wilson. Mrs Rice also made clear, and I accept, that it was important to her at this time to restore the claimant to the workplace.

12 The claimant and Mr Wilson have both suggested in evidence that the one-day per week arrangement was specifically agreed as a phased return to work. Mr Wilson's initial evidence was that it was agreed as a six-month arrangement: during cross-examination he agreed that there was no mention of six months; and that inevitably it would take longer than that because the claimant needed further surgery. He described his assertion that the arrangement would last no more than six months as "*flippant*" and "*not intended to be taken seriously*".

13 I find that when the claimant returned to work there was no agreement that one-day per week would be a temporary arrangement. In fact, the claimant was specific in her letter that all she could offer was a potential "*discussion*" about increasing her hours at a later date. Further, when the claimant returned she did not resume her cleaning duties; and there was no expectation that she would do so. I find that there was a clear variation in the claimant's contractual terms at this time: she reduced her working hours from two days per week to one; she did not resume her cleaning duties; and accordingly, she was entitled to be paid for one seven-hour working day each week.

14 On 29 September 2016, the claimant queried her wages: she calculated that by reference to an eight-hour working day she was now being paid £6.63 per hour (the minimum wage at that time was £7.20); however, by reference to a seven-hour working day the claimant was being paid £7.58 per hour; this was explained to the claimant and the calculation sent to her by return of email. The claimant did not query the matter further at that time.

15 In January 2017, the claimant made a request for a three-week holiday from 8 to 28 October 2017: on 28 January 2017, Mrs Rice responded declining the request - pointing out that the staff manual permitted a maximum of two weeks holiday at any time.

16 On 2 February 2017, the claimant commenced a further period of sickness absence returning to work on 23 February 2017. On that day, she suffered an accident at work and went home at 9:45am; in the event, she never returned to work.

17 Shortly afterwards, the claimant submitted a formal letter of grievance: she raised three matters. Firstly, the fact that she had suffered an accident. Secondly, that she still believed that she was being underpaid. And thirdly, she complained that she had been declined the holiday which had been booked (without the respondent's knowledge) for over 12 months. She also asked for certain adjustments to be made when she returned to work.

18 The grievance was acknowledged by letter dated 21 March 2017: and a grievance meeting was held on 12 April 2017. Mrs Rice believes that the grievances were resolved at the meeting: the rate of pay was once again explained; the position with regard to the holiday request was explained; the circumstances of the accident were discussed; and the requested adjustments were agreed. The claimant did not return to work but remained off-sick. The claimant explained that from her point of view the grievances were not resolved at the meeting and she was expecting a formal outcome. On 3 May 2017, whilst still off sick, the claimant sent an email to Mrs Rice chasing the outcome: she did not receive a response. In evidence before me, Mrs Rice accepted that this had not been dealt with in a satisfactory manner.

19 In the meantime, during the claimant's sickness absence, the respondent made some important changes to the Ainsdale office: the majority of space in the office was sub-let to a beauty salon which commenced operations on Monday 10 July 2017. The respondent retained just one room within the building and no longer had a reception area; employees of the beauty salon would direct the respondent's clients to the internal office where two employees engaged in bookkeeping activities were housed; there was also a meeting room available where the respondent could meet clients by appointment. The effect of this change was that the respondent no longer required anyone to cover reception duties at the Ainsdale office.

20 On 6 July 2017, Mrs Rice wrote to the claimant explaining these changes: she explained that Tamsin, who had originally been retained on a temporary basis during the claimant's sickness absence 2016/2017, was now predominantly engaged in bookkeeping and all of her time could now be diverted to that activity; the claimant had no experience of bookkeeping. On this basis, Mrs Rice had

concluded that the claimant was at risk of redundancy; the claimant was offered a meeting to discuss the proposal.

21 The claimant responded expressing surprise at the comment that she had no bookkeeping experience and referring to her bookkeeping training achieved following a college course back in 2009. However, she acknowledged that following the qualification she had not gone on to work as a bookkeeper or gain any experience.

22 A meeting was arranged to discuss the situation at the Ainsdale office on 18 July 2017: the claimant's response that was she was not available for the meeting and indicated that she accept that her position is redundant. However, she did not agree the calculation of her redundancy payment.

23 Mrs Rice made several further attempts to arrange a meeting: at one stage the claimant wish to attend but accompanied by her husband; this was not acceptable to Mrs Rice but the claimant could be accompanied by a colleague. Mr Wilson spoke to Mrs Rice on the telephone he indicated that his wife accepted that her position was redundant - she was only querying the calculation of her redundancy payment. Mrs Rice wrote to the claimant confirming this and offering a final opportunity for a meeting to discuss all options - this was to be held on 22 August 2017. The claimant did not attend.

24 On 29 August 2017, Mrs Rice wrote to the claimant confirming that she had considered all of the options: there was no requirement for receptionist; the claimant had no experience of bookkeeping and could not therefore take over Tamsin's role; and the claimant had indicated that she would accept redundancy. In the circumstances, Mrs Rice explained her decision that the claimant would be dismissed by reason of redundancy effective from 29 August 2017. The claimant's redundancy payment was calculated on the basis of her seven-hours per week contract which had been in place since September 2016. When, eventually, the claimant was paid her notice pay this was calculated on the same basis.

The Law

25 **The Employment Rights Act 1996 (ERA)**

Section 13: Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General fairness

(1) 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 principal reason) for the dismissal, and
(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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) 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 reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 139: Redundancy

(1) 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.

Section 162: Amount of a redundancy payment

(1) The amount of a redundancy payment shall be calculated by—

(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c) half a week's pay for each year of employment not within paragraph (a) or (b).

A Week's Pay

Section 220: Introductory

The amount of a week's pay of an employee shall be calculated for the purposes of this Act in accordance with this Chapter.

Employments with normal working hours

Section 221: General

(1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to Section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week.

26 **Decided cases relating to the creation of a pool for selection**;

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair.

Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

27 **Decided Cases relating to consultation and procedure**;

Williams and Others –v- Compair Maxam Limited **[1982] IRLR 83 (EAT)**
Polkey –v- AE Dayton Services Limited **[1987] IRLR 503 (HL)**
R –v- British Coal Corporation and anr ex parte Price **[1994] IRLR 72**
King and Others –v- Eaton Limited **[1996] IRLR 199 (CS)**
Graham –v- ABF Limited **[1986] IRLR 90 (EAT)**
Rolls-Royce Motor Cars Limited –v- Price **[1993] IRLR 203 (EAT)**

In a case of redundancy in the employer will not normally act reasonably, unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment.
The employment tribunal must be satisfied that it was reasonable to dismiss the individual claimants on grounds of redundancy. It is not enough to show that it was reasonable for the employer to dismiss *an* employee. It is still necessary to consider the means whereby the claimant was selected to be the employee to be dismissed.
Fair consultation means (a) consultation when the proposal is still at a formative stage, (b) adequate information on which to respond, (c) adequate time in which to respond, (d) conscientious consideration by the employer of any response.
If vague and subjective criteria are adopted for the redundancy selection there is a powerful need for the employee to be given an opportunity of personal consultation before he is judged by it.

28 **Decided Cases – General test of fairness**

Iceland Frozen Foods Limited –v- Jones **[1982] IRLR 439 (EAT)**
Sainsbury's Supermarkets Ltd. –v- Hitt **[2003] IRLR 23 (CA)**

In applying the provisions of Section 98 (4) ERA the employment tribunal must consider the reasonableness of the employer's conduct, and not whether the tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to a given situation within which one employer might reasonably take one view, another quite reasonably take another. The function of the employment tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, then the dismissal is fair. If the dismissal falls outside the band it is unfair.
The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee is fairly and reasonably dismissed.

The Claimant's Case

29 There are three elements to the claimant's case: -

(a) Firstly, she contends that she has been unfairly selected for redundancy: she accepts that there was no longer any requirement for a receptionist at the Ainsdale office; but her case is that Tamsin, who had been employed on a temporary basis to cover the claimant during her 2015/2016 sickness absence, should have been dismissed (or her working hours reduced to one day per week instead of two); allowing the claimant to continue working one day per week deployed to bookkeeping duties.
(b) Secondly, she contends that when she returned to work in September 2016 working one day each week she should nevertheless have been paid for 8 hours per day as she had been until she went off sick in May 2015: she has therefore been underpaid by one hour per week since her return on 22 September 2016. There has been a corresponding knock-on effect on her holiday pay and notice pay.
(c) Thirdly, she contends that her agreement to work one day per week was a temporary arrangement by way of a phased return to work: and that the *contract of employment in force* at the time of her redundancy was for two days per week at 8 hours per day. On this basis, it is her case that her redundancy payment has been wrongly calculated.

The Respondent's Case

30 The respondent's case is that the claimant was fairly selected for redundancy: she had no bookkeeping experience; and could not therefore displaced Tamsin who had been working one day each week as a bookkeeper since the claimant's return to work in September 2016; and could easily be employed in that capacity for two days each week.

31 The respondent's case is that, when the claimant returned to work in September 2016, there was a clear variation of her employment contract such that she would now work only one day each week. A phased return would have involved a predictable timescale for the return to two days per week; the claimant would make no such commitment; and offered only *a discussion* about increasing her hours at an unspecified future time. Accordingly, the *contract in force* at the time of the claimant's dismissal was for one day per week.

32 The claimant knew that one day per week involved seven hours of paid work and a one-hour unpaid lunch break. The claimant knew that, prior to May 2015, she had been earning an additional hour's pay by undertaking cleaning duties; but she did not resume those duties when she returned to work in September 2016. Accordingly, she has been correctly paid based on one, seven-

hour, working day per week. Her redundancy payment has also been correctly calculated on the same basis.

Discussion & Conclusions

33 I am satisfied, and it is not in dispute, that the reason for the claimant's dismissal was redundancy which is a potentially fair reason for the purposes of section 98(1) and (2) ERA.

34 When the claimant went off sick in May 2015, Tamsin was retained on a temporary basis to work two days per week covering reception in the claimant's absence. If the claimant had returned to work for two days each week in September 2016, it is likely that Tamsin would not have been retained. The respondent needed Tamsin to remain covering the reception duties for one day each week; and, to encourage her retention, offered her a second day as a trainee bookkeeper. By the time of the redundancy, Tamsin had acquired experience as a bookkeeper which the claimant did not have. I am satisfied that, in the light of the qualifications acquired by the claimant some nine years earlier, Mrs Rice did consider whether it was a viable option to retain the claimant as a bookkeeper and either dispense with Tamsin's services or reduce her hours. Mrs Rice concluded that this was not a viable option having regard to the claimant's lack of experience.

35 The claimant was given every opportunity to fully participate in a process of information and consultation: detailed explanations were provided to her in writing; and she declined to attend meetings on at least two occasions. Ultimately, the message which she conveyed to Mrs Rice was that she accepted that her role was redundant: the only contentious issue was the calculation of her redundancy and other payments.

36 In these circumstances, I find that the claimant was fairly dismissed by reason of redundancy: her claim for unfair dismissal is not well-founded and is dismissed.

37 The remaining issues in this case depend on the terms of the employment contract in force at the time of the claimant's dismissal. I am satisfied that when the claimant returned to work in September 2016 it was agreed that she would do so on the basis of one day per week. This was not agreed as a *phased-return* because no further phases were agreed: at most, the claimant was willing to *discuss* increasing her hours at an unspecified future time. Furthermore, the claimant well understood that the working day was a seven-hour working day with a one-hour unpaid lunch break. She made no offer to resume her cleaning duties (and there was no expectation that she would) there was therefore no reasonable expectation that she would continue to receive an additional one-hour's pay to reflect those duties. From September 2016 onwards, the claimant's

remuneration was correctly calculated on the basis that she was working one seven-hour day per week: her redundancy payment was correctly calculated on this basis. Accordingly, the claimant's claims in respect of the redundancy payment; unpaid wages; unpaid holidays; and unpaid notice pay; are not well-founded and are dismissed.

Employment Judge Gaskell
23 March 2018
Judgment sent to Parties on

3 April 2018