EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104835/2019

Hearing Held at Dundee on 1 and 2 July 2019

Employment Judge: Mr A Kemp

Mr C McGraw	**Claimant** **Represented by:** **Mr A Hutcheson** **Solicitor**
Capita Mortgage Software Solutions Limited	**Respondents** **Represented by:** **Mr R Bradley** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant was not unfairly dismissed by the respondent.

2. There was no breach of contract by the respondent.

3. There was a failure by the respondent to pay sums due for accrued annual leave under Regulation 14 of the Working Time Regulations 1998, which was an unlawful deduction from wages under section 13 of the Employment Rights Act 1996, and the sum of Three Thousand, Nine Hundred and Fourteen Pounds and Eighty Pence (£3,914.80) is awarded to the claimant.

REASONS

Introduction

1. The claimant pursues a claim for unfair dismissal, and in respect of a failure to pay accrued holiday pay. The claims are denied by the respondent, which argues that the reason for dismissal was redundancy, and that it was not unfair. The respondent argues that there is only a claim for breach of contract pled in respect of holiday pay.

2. Following the hearing, I asked the parties for further submissions in relation to three cases which my researches had led me to, two in relation to the issue of reasonable alternatives to a redundancy dismissal, and the third in relation to holiday pay. Both parties thereafter made full written submissions on those authorities, and are referred to below.

Issues

3. The Tribunal identified the following issues:
   (i) What was the reason for the claimant's dismissal?
   (ii) If the reason was potentially fair, was that dismissal unfair under section 98(4) of the Act?
   (iii) If there was an unfair dismissal what was the extent of the Claimant's losses and what remedy should be given to him?
   (iv) Was the respondent in breach of contract or otherwise acting unlawfully in respect of holiday entitlement accrued in 2017, and if so what is the extent of the sum due?

Evidence

4. The Tribunal heard evidence from Mr Keith Green and Mrs Tracey Francis of the respondent, and from the claimant himself. Documents were spoken to from a single bundle the respondent had prepared, and with one document from the bundle the claimant had prepared. Not all documents produced were spoken to in evidence.

Facts

5. The Tribunal found the following facts to have been established:

6. The Claimant is Mr Christopher McGraw.

7. He was employed by the respondent from 21 March 2016 as a Business Development Director. It was a senior role, with gross annual salary latterly of £140,000 per annum, and other benefits. It was based at the Perth office.

8. The claimant's date of birth is 5 December 1958. He has long and wide experience in business development roles, as set out in his CV.

9. The respondent is Capita Mortgage Software Solutions Limited. The respondent provides specialist software to enable mortgage providers to manage applications for mortgages, and the management of the mortgage once granted, and related matters. It is a part of the Capita group of companies.

10. The claimant had a statement of terms and conditions of employment document sent to him on joining the respondent. It stated that he was employed in the position of Business Development Director as part of the Digital & Software Solutions Division. That division operated across a number of companies within the Capita group. Clause 11 provided for holidays and holiday pay, providing that the leave year was the calendar year, and included the following:

"Annual leave must be taken at times agreed by you with your manager. All annual leave entitlement must be taken within the same annual leave year. No payment will be made in lieu of unused holiday entitlement except at the end of your employment."

11. The claimant was also provided with a Job Description. It referred to the key objectives including "to lead the sales operation of the Capita mortgage software business….build and manage a pipeline of opportunities to ensure business resources can be aligned to delivery requirements, whilst working with other parts of Capita on larger BPO opportunities [and] creating key partners within the market to address any weaknesses and shortfalls within our sales solution, this could include other BPO partners and/or partners for other product offerings." BPO referred to business process outsourcing, whereby a provider outsources to a third party a business process such as a telephone advice service for customers. The claimant's duties also included the managing of staff.

12. The Capita group of companies acquired, prior to the respondent employing the claimant, a business called Vertex Financial Solutions. That business had a product called Omega which was a software programme used to manage mortgage applications. It had not been developed in recent years, and was based on out of date software technology. It had been sold to a number of major mortgage providers, and was serviced by the respondent to ensure its continued operation.

13. On 15 May 2017 the claimant commenced a period of absence from work on account of ill health. He was unable to take fifteen days of annual leave that year because of that illness, which continued into 2018.

14. Prior to his absence he had been a material part of a team within the Capita group which won a contract from a major bank worth £9 million. He had been developing relationships with senior managers at other banks and financial institutions who provided mortgages with a view to future business. It takes between one and three years to secure contracts with such clients for the product, primarily Omega, that the claimant was seeking to sell.

15. During his absence, no one took over his role or carried forward the work he had undertaken to that point. He was unable to take 15 days' annual leave in 2017 as a result of his absence through illness.

16. On 13 September 2017 the then managing director of the respondent Jon Peart telephoned him. The conversation was set out in an email of the same date. Mr Peart informed the claimant that the business of which the respondent was a part was being restructured. The respondent was part of CMSS, and another part of the Capita group operated a business called Synaptic. A new senior management team was formed including those from the respondent and Synaptic, which did not include the claimant. Rather than have staff to manage, he would henceforth manage none. He would report to James Davies who was at the time the Sales Director of Synaptic.

17. During the call the claimant asked about commission due for a sale to HSBC which was also referred to, and later paid to the claimant in the sum of £33,000.

18. The division formed between the respondent and Synaptic was called Capita Financial Software Solutions. Its then managing director was giving consideration to a substantial investment in Omega to modernise it as a product.

19. In December 2017 Mr Keith Green who had been Chief Product Officer (CPO) of the respondent was appointed its interim managing director in succession to Mr Peart. Mr Green was also the interim managing director of Capita Software Solutions, of which the respondent and Synaptic were a part.

20. On 19 March 2018 the claimant's GP signed him as fit to return to work but on a phased return basis, and with altered hours. The claimant spoke to Mr Green and informed him of this. Mr Green informed the claimant that he would require to be seen by the respondent's occupational health doctor.

21. An assessment of the claimant took place by Medigold Health on 18 April 2018, and a report issued on 25 April 2018 confirming that the claimant was fit to return but recommending that there be consideration of reduction and limitation of stays away from home and driving significant distances in a rehabilitation phase before a return to normal duties.

22. The claimant met Mr Davies, and Sue Kercher of HR on 8 June 2018. The claimant had prepared notes for discussion in advance, and prepared notes during or shortly after the meeting which are reasonable accurate.

23. On 2 July 2018 Mr Davies wrote to the claimant with regard to his return to work, suggesting a return later that same week, at the office in Cheltenham to begin re-familiarisation with the business. He was told that there would be no sales target for the rest of 2018 “as I recognise you will need time to build up a pipeline of new opportunities.” The claimant returned to work on 4 July 2018 on a full time, not phased, basis.

24. The claimant met Mr Davies on 6 July 2018. He prepared for that in advance, and kept notes of the conversation made then or shortly afterwards, which are reasonably accurate. Mr Davies said that the respondent needed his “book of contacts, knowledge and understanding of the mortgages market, experience and expertise in closing high value sales.” Later that evening the claimant met Mr Green, who also confirmed that the respondent needed the claimant’s expertise.

25. On 19 September 2018 the claimant met Stephen Ferry, who had been appointed as the divisional managing director and was Mr Green’s line manager. Mr Ferry considered that it was not likely to be commercially beneficial to make the investment in Omega required to bring it up to the standard he thought the market required, which involved several million pounds, and wished to focus on existing customers, providing a service to them, rather than new sales in the market. He asked the claimant to produce a sales plan.

26. The discussion held between Mr Ferry and the claimant was confirmed in an email later that day from Mr Ferry which included "Cross sell engagement – advise your views on whether time working on wider opportunities in Pay360 – to drive enterprise opportunities within financial services/Insurance services sector to maximise transferable skills – Chris". The reference to Pay360 was to a software product of the Capita group that managed payments by customers.

27. The claimant sent Mr Green an email on 12 October 2018 with a draft sales plan seeking his views. Mr Green replied late in the day on 15 October 2018 to the effect that there were concerns over it but as time was so short with the meeting itself to take place the next day, that the claimant should just proceed with it. The claimant did so, and discussed it with Mr Ferry and Mr Green at a meeting on 16 October 2018. Mr Ferry said that the Pay360 possibility could not proceed. There was a discussion over the sales plan, and pipeline of potential sales for 2019, and Mr Ferry requested a revised sales plan.

28. On 19 October 2018 the claimant asked Mr Green for a template for the revised sales plan Mr Ferry had asked him for. Mr Green did not reply. The same message was sent on 22 October 2018, without reply.

29. On 31 October 2018 Mr Green met the claimant and informed him that there was a proposal to consider his role as redundant. He wrote on that date to confirm the position. That included giving three factors for the proposal as to redundancy, being (i) no real substantive pipeline [for sales] in 2019 (ii) limited market opportunity and (iii) the sales plan submitted, in respect of which the respondent had little confidence. The letter stated that the proposal was that the business did not require the role of Business Development Director, and that any new sales initiatives were to be dealt with by Mr Green himself. It confirmed that there would be a first consultation meeting on 6 November 2018. The claimant was told that he would be placed on paid leave such that he was not required to attend work for the duration of the

consultation, and asked for a handover document. His access to the company intranet was removed from that date.

30. The first formal consultation meeting took place on 6 November 2018, with the claimant, Mr Green and Mrs Helen Christou of HR in attendance. Mr Green wrote to the claimant on the following day to record what had occurred. The claimant was provided with a redeployment pack, and Question and Answer document which had a link to the Capital job vacancy site. The letter confirmed that the claimant's CV would be sent to other businesses in the division. The claimant at the meeting expressed his disappointment at the position, and disgust at how he had been treated. He challenged the rationale given for the redundancy. Mr Green noted in the letter that he did not agree and that "the rationale for placing your role at risk of redundancy is still valid". The next meeting was scheduled for 21 November 2018, and unless another suitable alternative role was identified "we will confirm that your role will be made redundant on 30 November [2018.]". Details were given of his rights to a statutory redundancy payment, pay in lieu of notice and untaken leave if the redundancy is confirmed.

31. On 12 November 2018 Mrs Christou wrote to the claimant to request his CV, stating that she had a few businesses interested in seeing it. The claimant sent it later that same day. It included working at Sourcing Partners in the period February 2004 to July 2005, in a role that involved BPO.

32. Mrs Christou sent the CV to other businesses in the division. One reply was received from Mr Martin Prescott, Sales Director employed by Capita plc, who was interviewing for two positions as Business Process Directors in the Customer Management (CM) division of the Capita Group in which he worked. There was an arrangement made for the claimant to discuss that opportunity with Mr Prescott on 27 November 2018 by telephone.

33. The CM division was operated separately to the Capita Financial Software Solutions division in which the respondent was located. It had its own line managers, such as Mr Prescott, and its own HR staff. The CM division was

operated by different limited companies to the respondent. The CM division provided different services to those provided by the Financial Software Solutions division.

34. On 21 November 2018 the second consultation meeting took place, with Mr Green, Mrs Christou and the claimant. Mrs Chrstou wrote to the claimant the day after the meeting to record the discussion. Mr Green confirmed that the consultation had been extended to 29 November 2018 and "may be extended further dependent on the outcome of your telephone conversation on 27 November." The letter recorded that the claimant did not have any alternative suggestions to avoid redundancy, and that he had rejected two posts in Manchester as not suitable for him. The letter recorded that if there was no suitable alternative employment by the next meeting the redundancy would be confirmed for 30 November 2018, but "if following your call there is a strong possibility of an alternative role within Capita we will discuss how we will support you in this."

35. After the meeting on 21 November 20189 Mrs Chrstou emailed Ms Claire Kay the head of HR at CM, reiterated that she had already mentioned the proposed redundancy date was 30 November 2018, and asked for details of the salary and compensation plan for the role advertised, and a job description. Ms Kay replied the next day to refer the matter to Rachel Cooper, who was a member of the HR staff working in CM who assisted Mr Prescott, stating that she had spoken to Ms Cooper who said that she had also been involved in exploring the redeployment opportunity for the claimant..

36. The claimant replied to the letter of 22 November 2018 on 23 November 2018. He asked for the copy job description and compensation for the role he was to discuss with Mr Prescott. He asked for contact details of those to whom his CV had been sent so that he could follow that up with them. He stated that he had already proposed two options – one to split his time between the mortgage business and Pay360, and the second to continue working full time for the mortgages business.

37. On 26 November 2018 Ms Cooper wrote to Mrs Christou. She stated that "Martin's initial view is that Chris' CV wasn't strong in the experience he is looking for but he will know more after the call…..Martin will talk Chris through the role requirement on the call tomorrow" and stated that Business Development Director roles pay up to £185,000 plus commission.

38. The claimant had a telephone conversation with Mr Prescott for about 30 minutes on 27 November 2018 to discuss whether the claimant was suitable for the roles that Mr Prescott was seeking to fill. There was a brief discussion about the nature of the role, and a more lengthy discussion with regard to the claimant's ability to perform either business development role. A further call was arranged for 30 November 2018 at 3pm.

39. On 29 November 2018 at 10.30am Mrs Christou emailed Rachel Cooper who provided HR support to the CM division asking about the claimant's application for a role there. At 8.09pm that same day Ms Cooper responded to the email earlier that day to say that she had sent Mr Prescott an email.

40. At 4.30pm on 30 November 2018 the claimant had a third consultation meeting with Mr Green and Mrs Christou undertaken by telephone as had earlier been agreed. It was moved from 2.30pm as the second call with Mr Prescott had been scheduled for 3pm that day, but did not in fact take place then. The claimant was asked if he had any further questions regarding the rationale for placing him at risk, and he said that he did not except for the points mentioned in his email dated 23 November 2018. There was a discussion over the role Mr Prescott was considering the claimant for, and the claimant sought to extend the process to allow that to be completed. Mrs Christou said something to the effect that the business could not extend the process into January, and that they would make a decision. The claimant protested against that. The meeting concluded with an agreement that the claimant would proceed with his call with Mr Prescott, then fixed for 6pm that day, that Mr Green or Mrs Christou would speak to Mr Prescott on 3 December 2018 that date being a Monday, and a decision would then be

made. The claimant was to be leaving to travel abroad on holiday on 1 December 2018 and a letter was to be sent by email to confirm the decision. No decision as to whether the claimant was redundant was made on 30 November 2018.

41. On 30 November 2018 at 4.51pm Mr Green emailed Mr Prescott stating that he had been seeking to reach him, as had Mrs Christou, asking for a call to discuss if there was a role available for the claimant which he wished to take forward. He referred to the redundancy of the claimant's role. There was no immediate reply.

42. The claimant had a further conversation with Mr Prescott at about noon on 1 December 2018. It lasted about 75 minutes. Mr Prescott discussed with the claimant the experience in BPO that the claimant had, and what was required for the roles available. There were two, one as an "instigator" and the other a "closer". The claimant stated that he preferred the latter role but could do either. Mr Prescott told him that final interviews for two other candidates he had interviewed once, who had greater experience in BPO than the claimant, were to take place in the following week or thereby. The claimant stated that he had not had a face to face meeting with Mr Prescott, and Mr Prescott agreed to schedule an interview with the claimant. Following that, Mr Prescott sent an invitation to a meeting with him in London on 7 January 2019 for an interview.

43. At 5.55pm that day Mr Prescott emailed Mr Green in reply to the message from the day before stating "Have had a call with Chris and whilst he is experienced in software sales he doesn't have a BPO pedigree. I have shared this with Chris that there are people better qualified for our opportunities with relevant experience."

44. Also on 1 December 2018 (at a time not given in evidence) Mr Green spoke with Mr Prescott by telephone. Mr Prescott told him that he would not be progressing the claimant's application further for either of the roles, as he did not consider that he had the level of BPO experience he sought.

45. On 3 December 2018 Ms Cooper emailed Mrs Christou at 9.12 am to state "Martin had a call with Chris on Saturday in the end. Sadly, he didn't have the BPO experience that Martin needs so he won't be progressed further."

46. Mr Green decided that the claimant was redundant from his role, and that suitable alternative employment for him could not be found for him after Mr Prescott told him that he would not be progressing the claimant's application for the roles further. Mrs Christou wrote to the claimant to confirm that by letter of 3 December 2018, sent to the claimant's email address. The claimant was informed that he would be paid a statutory redundancy payment, which was later paid to him. He was also told that he would receive three months' pay in lieu of notice, which was also later paid to him. He was also paid for holidays accrued in 2018 up to the date of termination, which was 4 December 2018, but not in respect of unused holidays for the period of his absence in 2017. He was provided with a right of appeal.

47. The claimant replied on 6 December 2018 to state what he considered to be incorrect in the letter of dismissal.

48. On receipt of the email Mr Green emailed Mr Prescott to ask about the second ground of appeal, and Mr Prescott replied on 6 December 2018 stating:

> "I set out for Chris that we did have specific opportunities at this point that we were having the conversation but there were shortlisted candidates who had more relevant skills and with planned meeting dates. These have taken place and we have proceeded to offer and verbal acceptance, which is what I anticipated. Chris raised that he had not been able to meet face to face and so I agreed to put a meeting date in the diary for January. We now do not have the opportunity open for which he was being considered."

49. The claimant wrote on 27 December 2018 to appeal. The grounds of appeal were:

"

1. The rationale provided for selecting me for this process is unreasonable and unfair, given that I only returned to work after a long-term illness on 5 July 2018.
2. The redeployment process has not been fully explored and is still not exhausted or complete. This is evidenced by the fact that I have an interview scheduled with Martin Prescott, Sales Director, Capita Customer Management on Monday 7 January 2019 at 12.00pm at 30 Berners Street, London, which I have accepted."

50. On 3 January 2019 Mrs Chrstou wrote to Mr Prescott asking if he was interviewing the claimant on 7 January 2019, and Mr Prescott replied the same date stating "I have filled the positions for 2019 and new starters joined, the meeting with Chris was provisional last year. I can get Bridget to cancel when she is back to work tomorrow.

51. The meeting on 7 January 2019 was then cancelled by Mr Prescott's assistant at 3.26pm on 4 January 2019.

52. The claimant was invited to an appeal hearing by letter dated 8 January 2019 before Mrs Tracey Francis the managing director of the Healthcare Decisions business of the Capita group. The claimant had asked for an appeal officer outwith the division he had worked in.

53. On the same date Mrs Christou prepared a statement for the purposes of that appeal.

54. The meeting took place on 5 February 2019 attended by the claimant, Mrs Francis and Jo Cresswell of HR. A minute of that appeal is a reasonably accurate record of it. Following the appeal Mrs Francis spoke to Mr Prescott, who confirmed that he had considered the claimant for the roles, but concluded after two discussions with him that he had insufficient BPO experience and that the other candidate had more relevant experience, and was appointed after final interview. Mrs Francis had the understanding that there was only one role.

55. On 8 February 2019 she wrote to the claimant to reject his appeal by letter stating the reasons for that decision.

56. The claimant's net pay with the respondent was £6,907.91 per month, and he had car allowance of £1,166.67 per month and employer pension contributions of £583.33 per month. A benefit was private healthcare which ceased on termination. The claimant then purchased it himself from the same provider at a cost of £128 per month.

57. The claimant has not found new employment, but has attempted to do so and has mitigated his loss. It is likely that he will not secure new employment for at least a further period of six months.

Respondent's submission

58. The following is a summary of Mr Bradley's strongly-argued submission. He accepted that it was for the respondent to show the reason for dismissal, and argued that that was redundancy under the terms of section 139 of the 1996 Act. He referred also to the case of ***TNS UK Limited v Swainston UKEAT/0603/12,*** which had a convenient summary of the legal position, and that the question for the Tribunal was what was the reason for the dismissal, not what was the reason for there being a redundancy, and that the Tribunal will not go behind the rights and wrongs of a declaration of redundancy.

59. He argued that there was no question of the claimant being pooled with Mr Green, noting that that had not been argued until the Further and Better Particulars had been presented.

60. He argued that the rationale given for the redundancy was established in the evidence of Mr Green. The issues of delay in the return to work, or the change to duties whilst off absent, were not relevant to the matters before the Tribunal. The situation was that of a disappearing job, and the dismissal was by reason of redundancy. There had been fair consultation under section 98(4) with proper consideration of alternative work. The decision had been postponed for that to be clarified. Rference was made to the case of ***Morgan v Welsh Rugby Union*** referred to in more detail below. Mr Prescott

had been entitled to appoint those best qualified for the role, and there was no suggestion that the claimant had not been genuinely considered.

61. On holiday pay, he referred to the contractual term with regard to use of accrued annual leave in the leave year.

62. He argued that the sum sought for loss of statutory rights was excessive.

63. He invited me to dismiss the Claim.

64. The following is a summary of his supplementary submission. He argued that the cases of ***Euroguard*** and ***Parfums*** did not establish any general principle of law, and had not been referred to in subsequent cases or in any textbook. The former was confined to its facts, and the latter did not go beyond the principle derived from ***Vokes*** (referred to below). He also argued that the claim for holiday pay had only been put as one of breach of contract, and that there had been no application to amend to include one for holiday pay under the Working Time Regulations 1998 or as an unlawful deduction from earnings claim.

Claimant's submission

65. In an equally strong submission, Mr Hutcheson referred to holiday pay and that the Working Time Regulations 1998 allow carry forward of unused holidays. He restricted the claim by five days, as the claimant did state that he could take five days.

66. He approached the issue of the reason by looking at the genuineness of the redundancy, as he described it. There was a need for the claimant. The future of the respondent depended on new business. The onus fell on the employer to select the pool, and that should have included Mr Green. There was a possible split role with Pay360.

67. The claimant was a suitable candidate for the alternative role. His prospects were fundamentally compromised by the respondent's failures. Mr Prescott was not present to explain matters. The claimant had not been interviewed whereas others had, he had been promised an interview which did not take place, and he had not received the job description he had asked for. The job title was not clear. The lack of BPO pedigree was a disadvantage not a disqualification. There had been no discussion with the claimant after 30 November 2018. There had been a failure to follow up in relation to his CV with others in the business. Mrs Christou had commented about making a decision on 30 November 2018 without knowing the outcome of the discussion with Mr Prescott. It was part of a thread of conduct, which included the variation of the contract without consent when off ill, and a delay in return to work. He argued that the respondent did not wish to employ the claimant. The appeal could not have changed the outcome as by then the jobs had been filled. He referred to ***Software 2000 Ltd v Andrews [2007] IRLR 588*** and ***King v Eaton Ltd [19998] IRLR*** and their conclusion that if the process was unfair it could not be possible to construct the outcome of what may otherwise have happened.

68. On remedy he accepted that there was no basic award as the statutory redundancy payment had been paid, he sought the maximum compensatory award arguing that the losses in future would continue above that maximum, and that the claimant had mitigated his loss. He had argued at the start of the submission that the sum sought for loss of statutory rights was appropriate.

69. The following is a summary of his supplementary submission. He argued that the cases of ***Euroguard*** and ***Parfums*** did establish general principles of law, and that the respondent required to exhibit reasonable care, and in implement of this duty, take reasonable steps, investigate fairly, and investigate objectively. He set out a series of matters which the respondent was said to have failed in and that was argued as establishing a pattern of conduct by them, referred to further below. It was alleged that Mr Prescott

had not given reasonable consideration to the claimant's application. It was said that there was no evidence that Mr Prescott had been aware of the redundancy. The respondent's failure to call Mr Prescott was founded on, and it was said that no evidence had been submitted that the companies operated autonomously.

70. In relation to holiday pay he made reference to the Claim Form, and the effect of ***Larner***.

The law

(i) *The reason*

71. It is for the Respondents to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

72. ***In Abernethy v Mott Hay and Anderson [1974] ICR 323,*** the following guidance was given by Lord Justice Cairns:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

73. Those words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748***, Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

74. Redundancy is defined in section 139 of the Act, and includes where a dismissal is wholly or mainly attributable to the fact that the requirements of

the business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish, whether permanently or temporarily and for whatever reason.

Fairness

75. If the reason proved by the employer is one that is potentially fair under section 98(2) of the Act, such as redundancy, whether the dismissal is unfair in law is determined by section 98(4) of the Act which provides that it:

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

76. The principle is therefore one of reasonableness. In the context of redundancy, the House of Lords in the seminal case of ***Polkey v AE Dayton Services [1987] ICR 142*** made the following summary of the relevant procedures required in a redundancy dismissal in the following terms:

> "… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation".

77. There was a review of authority by the EAT in ***Mugford v Midland Bank [1997] IRLR 208***, which summarised the state of the law and stated that it will be a question of fact and degree for the tribunal to consider whether consultation was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

78. ***Rowell v Hubbard Group Services Ltd [1995] IRLR 195*** had also emphasised the importance of consultation, and whilst it accepted that there were no invariable rules as to what consultation involved, the tribunal endorsed the guidance in the case of ***R v British Coal Corporation and Secretary of State for Trade and Industry, ex p Price [1994] IRLR 72***, as follows:

"24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:

'Fair consultation means:

(a) consultation when the proposals are still at a formative stage;

(b) adequate information on which to respond;

(c) adequate time in which to respond;

(d) conscientious consideration by an authority of the response to consultation.''

79. That wording was approved by the Inner House of the Court of Session in ***King v Eaton Ltd [1996] IRLR 199***, albeit in the context of collective consultation with a trade union.

80. If that consultation leads to the conclusion that the role is redundant, a second consideration is whether there may be an alternative role for the employee in the same company, or elsewhere in the same group of companies. This was discussed in ***Vokes Ltd v Bear [1973] IRLR 363***, in which a works manager, was made redundant without warning or attempt

made to see he could be employed somewhere else within the group. The NIRC made the following statement of the position in rejecting the appeal against a finding of unfair dismissal in light of the lack of adequate steps to consider alternative employment:

"It would have been the simplest of matters to have circulated an inquiry through the group to see if any assistance could be given to the employee in the very difficult circumstances in which he would shortly find himself."

81. The duty on the employer is to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment, see ***Quinton Hazell Ltd v Earl [1976] IRLR 296***. The EAT there upheld an appeal against a finding that the dismissal was unfair because the employer, it was held by the tribunal, had not been sufficiently energetic in seeking alternative employment.

82. In ***British United Shoe Machinery Co Ltd v Clarke [1977] IRLR 297***, the EAT stated that tribunals should not impose an 'unreal or Elysian standard'.

83. The case of ***Morgan v Welsh Rugby Union [2011] IRLR 376*** was founded on by the respondent. It is not in precisely the same context as the present case. There two employees were employed by the respondent in different positions in relation to coaching, and the respondent created one new, and higher, role for which both were interviewed. The claimant was not selected, and was then made redundant. That therefore is a somewhat different situation to the present where the claimant is redundant and the respondent, the employer, has no alternative role but an associated company of the respondent, within the same group, has a vacancy. Nevertheless, the comments in ***Morgan*** are of assistance, and as they were founded on by the respondent the relevant paragraphs are worth quoting in full, as follows:

"30
We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. Where an employer has to decide which employees from a pool of existing employees are to be made

redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams-type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion……

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To our mind a tribunal considering this question must apply s.98(4) of the 1996 Act. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4)…….

38
If the appointment of a new manager had been external, an employer would not have been bound by its job description or person specification. If a candidate had emerged, perhaps from a recruitment process, who was outstanding but who did not meet some aspect of the person specification, the employer would still have been entitled to appoint that candidate. In one sense, this may have seemed unfair to other candidates who did meet the person specification; but it would not follow that the decision by the employer was unreasonable. Indeed where the appointment is at a high level, it is in our experience not unusual for the interview process to be two-way; a good candidate may suggest changes to the job description and may demonstrate that some aspect of the person specification is unnecessary.

39
When making an internal appointment, we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind the employer was entitled to interview internal candidates even if they did not precisely meet the job description; and it was entitled to appoint a candidate who did not precisely meet the person specification. It was, in other words, entitled at the end of the process, including the interview, to appoint a candidate which it considered able to fulfil the role. We do not, therefore, see any error of law in the approach of the tribunal to this matter; and we do not consider the approach of the majority to be perverse."

84. There are two further cases on the issue of alternative employment in another group company, being those on which I asked for further submissions, which may be relevant. They are referred to in the IDS Handbook on Redundancy at paragraph 8.183.

85. In ***Eurogard Ltd v Rycroft EAT842/92*** an HR manager was made redundant by one group company, but applied for a vacancy at another group company. The employee had been interviewed for the post but not treated in the same way as other applicants, and not appointed. The same individuals had roles at each of the employer and other group company. The tribunal held the dismissal unfair, and the EAT dismissed an appeal. The EAT held that there might be circumstances in which it would be appropriate to look beyond the immediate employer to other companies in the same group, and that on the particular facts of the case the Tribunal had been entitled to find as they had done.

86. In ***Parfums Givenchy Ltd v Finch EAT 0517/09*** a sales person in a franchise for a perfume was made redundant, and claimed that she had not been employed by another group company with a different branding when she applied because of the actions of HR managers at her former employer. The EAT held that the tribunal had not been entitled to find that the employer had had a power to allocate a role in the other group company, and that the companies operated autonomously with their own HR staff and line managers. The duty the employer had was explained as follows:

> "The highest it can be put is that it was under a duty to assist the claimant and to consider alternative work. In the same way, it should not unfairly influence the appointing officers of the subsidiary companies in the decisions which they made."

Holiday pay

87. The right to holiday pay is provided for in the Working Time Regulations 1998. They are made under the European Communities Act 1972. They give effect to EC Directive 93/104/EC. Regulation 13 states the entitlement to annual leave, which totals 5.6 weeks and is capped at 28 days per annum. Regulation 13(9) states that the leave "may only be taken in the leave year in respect of which it is due". Regulation 14 provides for payment for annual leave accrued during the leave year in which the employment is terminated. They require to be construed purposively in accordance with the purpose of the Directive and case law of the Court of Justice of the European Union (CJEU) which explains it. That case law is to the effect that the right to annual leave is an important social right, and must be carried forward if it cannot be used because of illness in one year. The issue is discussed in ***NHS Leeds v Larner [2011] IRLR 894***, a Court of Appeal authority, which held that the Regulations require to be held amended in order to give effect to the Directive and case law such that annual leave unused because of illness must be carried forward to the time when the employee returns to work and is able to exercise it.

88. Holiday pay falls within the definition of wages under section 27 of the Employment Rights Act 1996. There is a right not to suffer unauthorised deductions from wages under section 13, and a right to claim to a tribunal under section 23.

Discussion

Reason

89. I have considerable sympathy for the claimant. When he was off work ill, there was no-one put in post to carry forward his duties. When he returned to work, which was after a delay longer than would be anticipated, he did so against the background of a form of standing start, afresh. During his absence, many of his responsibilities had been taken from him with no real

prior consultation. But he did not raise any grievance about that at the time, still less did he resign and claim constructive dismissal.

90. The divisional director originally in post was supportive of investment in the respondent and its product, but the new divisional director Mr Ferry was not. The claimant alleged that the respondent did not wish him to come back after his illness. That however stands in contrast to the attempts made to have him back to work, the comments as to his value to the company, the request for a sales plan, and the two meetings he had with Mr Ferry to discuss the position. Whilst Mr Ferry did not give evidence, one can infer from the role that he held that he had a busy schedule, and is not likely to have used a part of that for the discussions with the claimant if there was no interest in his return.

91. Mr Ferry concluded that the benefit of investing many millions of pounds in supporting the Omega software was not worth the cost. The claimant in effect argued the contrary. He argued that his own role was not redundant but essential for the future health of the company, and that there was a market for the product even without investment. But these are decisions that are for an employer to make. They are not ones that an employment tribunal can legitimately question. What is relevant is the reason for dismissal, not the reason for redundancy as explained in ***TNS.*** If there is a false reason put forward, such that redundancy is used to mask an underlying reason, that is a different matter. I was however impressed with the candour of Mr Green's evidence. He required to apply the investment strategy decided upon by Mr Ferrry. I do not consider that there was any hidden motive, and that the reason for dismissal was anything other than a genuine belief that the role the claimant performed was redundant as a result of the strategy that had been decided upon. That had been formed from a combination of factors that emerged from the discussions held with Mr Ferry and the claimant, in which Mr Green had been involved as well. They were listed in the letter of 31 October 2018. That led to the conclusion that the role held by the claimant

was not required, and that met the test of redundancy in section 139 of the Act.

92. I consider therefore that the respondent has proved that the reason for the dismissal was redundancy. That is a potentially fair reason. Whether or not it is fair is then determined under section 98(4) of the Act.

Fairness

93. The claimant argued for a series of matters in this context. Some of the issues were historic, in that they pre-dated the consultation on potential redundancy as referred to above. It is true that there was some delay in the return of the claimant to work. His own GP certified him as fit to return, the respondent sought its own medical advice, and that advice was received by letter dated 25 April 2018. The return to work discussion was then held on 8 June 2018, and there was no explanation for that delay. When the claimant did return to work, he did not do so on a phased basis as the report had recommended. The reason given for that by Mr Green in his evidence was that the HR adviser Mrs Christou thought that time had passed such that it was not required. She did not give evidence. That was certainly far from good practice, but the claimant did not protest it at the time, did not raise a grievance, still less resign, and I did not detect any relationship between these events and the redundancy. I consider that they may, understandably, have coloured the claimant's perception of matters, but did not have relevance for the issue of whether the dismissal fell within section 98(4) or not.

94. What are I consider relevant for that purpose are the claimant's arguments that his proposals were not properly considered. He gave two options for not proceeding with the redundancy of his role. One was to share a role related to a product called Pay360 with another member of the group. On that however Mr Ferrry had had a discussion with him before the redundancy

process started and informed him that it was not a realistic option. The second was essentially to reverse the decision on redundancy, on the basis that the respondent needed the sales to be achieved to survive. That was however a management decision and has been dealt with above, but in any event Mr Green did not consider that either argument was a valid one. I have concluded that he did genuinely consider them, and consulted over them appropriately.

95. The next issue is that of the alternative employment that could be considered. The respondent sought and obtained the claimant's CV, which was then distributed among others in the group. One response was received, from Mr Martin Prescott who was employed by another entity within the group, not within the respondent or the same division. He was responsible for customer management. He was seeking to recruit for two roles as Business Development Directors as instigator and closer, with the claimant having indicated a preference for the latter but saying that he could do both of them.

96. The claimant asked Mrs Christou for the job description and salary details. He did receive the latter, in discussion with Mr Prescott. A reply was also sent to Mrs Christou on the salary which was that it was up to £185,000 per annum, higher than his own salary by about £40,000. It was a senior position. It would at least have preserved salary, if not led to an increase.

97. The claimant did not receive the job description. It does not appear that he asked for it a second time. Mrs Christou had asked her HR colleague in CM for it, nevertheless. The claimant did also have two discussions with Mr Prescott, each one for a material length of time. These were therefore discussions with the decision maker for that role. The claimant's CV had been sent to Mr Prescott. He was from that CV, and the discussions held thereafter, given information as to the claimant and whether he could be further considered for the roles. His conclusion was that the claimant would

not be, and he put that in an email dated 3 December 2018 which stated that the claimant did not have a "BP pedigree". By that he must have meant a pedigree in business process outsourcing matters. The claimant claimed in evidence that he did. He referred in particular to his work at Sourcing Partners. But that was in the period 2004-5, and was a small part of the claimant's overall experience. As Mr Prescott put it in an email, the claimant's experience was in software sales. It appears to me from the evidence that there was that Mr Prescott did have a basis for stating the lack of pedigree in business process outsourcing, and whilst the claimant may dispute that it cannot be said that there was not an evidence base for such a view. The earlier email from Ms Cooper had said that Mr Prescott was seeking strong experience in BPO in effect, and his CV and evidence to the Tribunal did not disclose that.

98. Mr Prescott was not a witness. That however has to be set against the fact that Mr Prescott was not the dismissing officer, nor was he employed by the respondent. The focus is on what the respondent did, and whether it was acting within the band of reasonable responses in the context of considering whether there might be alternative employment. I consider that the case of ***Morgan,*** and others, makes it clear that the band of reasonable responses applies to how the respondent manages such a process where alternative employment is being considered, and that was a case where the alternative was within the respondent organization itself. Matters are one step removed from that where the vacancy is within another company, albeit in the same group of companies. Mr Prescott had two conversations with the claimant, and there is nothing to suggest that he did not give genuine consideration to the matter. There was no basis to consider that his view that the claimant's application would not be taken forward was capricious, or out of favouritism, or on personal grounds. The view stated was the claimant's lack of a BPO pedigree, particularly in comparison with two candidates who had been interviewed already, would then have a final interview, and be offered and accept the roles.

99. Mr Prescott's emails have been produced and are reasonably clear, as are those from HR which include a comment that he had read the CV but would discuss matters further in a call, but also Mr Green spoke to his conversation with him, and Mrs Francis spoke to her own conversation with Mr Prescott for the purposes of the appeal, and he confirmed matters to her on the same basis. The appeal was a further part of the process. By then the interviews had taken place and two persons appointed.

100. There are further issues to consider. The first is that Mrs Christou said at the meeting on 30 November 2018 that the process was taking too long and she initially intended that the redundancy decision be made on that date. She was wrong to do so. Had the decision been made on that date, before the discussions later with Mr Prescott, I consider that the dismissal would have been unfair. But the decision was not made on that date. That delay to the decision was likely made because the claimant protested matters, but the fact is that the decision was delayed. The delay allowed Mr Green to speak with Mr Prescott. Mr Prescott told him that the claimant was not being considered for any vacancy. At that stage, Mr Green concluded there was no alternative vacancy that might be available for the respondent.

101. It was further argued that the claimant had not been treated fairly as he had not been given the job description, and had he been he would have said more to Mr Prescott, and secondly that he had been promised an interview but that was cancelled such that the other candidates were treated differently, and more positively, than him. There is something in that matter to an extent, but that requires to be set in the context that the process of hiring was one addressed not by the respondent but Mr Prescott, and it was for Mr Prescott to consider whether the claimant was someone he wished to consider for appointment. It is not as if Mr Prescott did not engage with the claimant, instead there were two conversations, which were held to seek to establish if the claimant might be capable of being appointed. The conversations were held against the background of an email from the HR manager stating that Mr

Prescott was, to paraphrase, concerned as to whether the claimant had the appropriate level of experience for the role, and a second one in which it was said that the role requirements were to be discussed. The claimant's own CV does refer to some experience in relation to BPO, but that was relatively historic, and relatively limited as referred to above. I considered that there was a basis for the reported initial concern of Mr Prescott, and it is relevant that despite that concern he did arrange to speak to the claimant at length on a second occasion. That indicates a genuine interest on the part of Mr Prescott, who did not dismiss the application of the claimant out of hand, and that he was acting in good faith. Once he had decided that the claimant was not a person he considered had the experience he sought, the application effectively failed. Whilst an interview had been arranged following the second call, which the claimant had asked for, it was followed by second interviews of the other two candidates, who were then offered the posts, which they accepted and there was then no point to it taking place. It was cancelled in that context.

102. The evidence was that there were separate line managers and HR staff in CM. There were two roles with a requirement for BPO experience and the view was taken that the claimant did not have that sufficiently, against two other candidates, such that CM did not progress his application further. Clearly Mr Prescott might have deferred a decision until holding an interview with him, but he did not. Importantly however the issue was considered by Mr Prescott who is not an employee of the respondent. It was suggested that he, Mr Prescott, was not informed of the prospective redundancy, but that is not I consider the case. His HR colleague Ms Cooper was informed of that by email, the claimant had two conversations with him in the context of his prospective redundancy, Mr Green referred specifically to the claimant's role being redundant in his email on 30 November 2018 and after Mr Green emailed further on 6 December 2018 following the dismissal Mr Prescott did not reply to state that he had been unaware of it. I consider that Mr Prescott was informed of the prospective redundancy. It was further suggested that the respondent made no attempt to enter into dialogue or influence Mr

Prescott. I do not consider that that was put to Mr Green. In any event that is not I consider a matter that can required of the respondent, for the reasons set out further below.

103. It was alleged that Mrs Christou had not done as much as she should as she did not follow up on the sending of the CV, and had not passed on contact details to the claimant when he requested them. She might have done so, but I do not consider that it can be said that not doing that was outwith the band of reasonable responses. She had sent the CV out initially, and it was reasonable to infer from the fact that there was only one response that that indicated that those who did not do so did not have a vacancy for which the claimant could be considered. The claimant had also been informed of two roles in Manchester, which he decided not to pursue but were alternatives for his consideration.

104. It was suggested that the claimant ought to have been in a pool of employees with Mr Green. There is I consider nothing in that argument. Mr Green was performing a very different role as CPO and then as interim managing director. There was no realistic possibility of the claimant undertaking Mr Green's role. It was no part of the claimant's case at the consultation process or appeal that such pooling ought to have taken place, and whilst that is not conclusive it is a factor. In any event, whether or not two employees should be considered in the same pool is an issue determined against the band of reasonable responses (see **Capita *Hartshead Ltd v Byard [2012] IRLR 814***) and I cannot hold that the respondent was not entitled to proceed on the basis that the claimant was a sole job holder.

105. It was also suggested that removing the claimant from the intranet after the meeting on 31 October 2018 hindered his prospects of securing alternative employment. I do not consider that it can be said that doing so was outside the band of reasonable responses for the respondent. There was no evidence

of the claimant protesting that matter at the time, or in the subsequent formal meetings. Whilst that is not determinative, it tends to support that conclusion.

106. In the supplementary submission the claimant put forward arguments as to failures by the respondent. They included, with my conclusions on them so far as not addressed above:

1. It did not engage in, but actively disengaged from, the process of seeking to secure alternative deployment for the Claimant.

I do not consider that that criticism is justified. It was not what the evidence established. The respondent did not disengage from the process of seeking to secure alternative deployment, but engaged with it by both emails to and a discussion with Mr Prescott about it.

2. It neither knew, nor sought to establish, the prospective role. It did not establish the requirements of the role. In the case of Ms Edwards, it did not establish the number of roles.

There was a lack of clarity in precisely what the role involved, and whether there were one or two such roles, in the evidence of Mrs Francis, but I do not consider this to be material. Mr Prescott was the person who had the decision to make, and he will have been aware of the position as he was in control of it. Whether there was one, or were two, roles was not the key issue, which was Mr Prescott's assessment of the BPO experience level of the claimant against that of two other candidates he had interviewed.

3. Critically, the Respondent did not procure a job description for the Claimant, though asked to do so by the Claimant. It thus rendered the Claimant ill-equipped to communicate in any informed way with Mr Prescott about the requirements of the position. It was thus left to the

Claimant to establish that Mr Prescott would be able to meet the Claimant's existing salary with the Respondent.

The respondent did ask for the job description, by email from Mrs Chrisout, but its absence was not I consider as significant as is submitted. Ms Cooper in her email of 26 November 2018 suggested that Mr Prescott would discuss the role requirement on the call that he would have with the claimant. The claimant had two lengthy conversations with Mr Prescott. The claimant has very substantial business experience. The critical issue for Mr Prescott was what the BPO experience of the claimant was, and that was an issue which the claimant knew himself, and was able to comment on and explain.

4. Critically, the Respondent failed to communicate with either the Claimant or Mr Prescott regarding their informal discussion regarding the position which took place on Saturday, 1 December 2018.

The discussion the claimant had with Mr Prescott led him to inform the respondent that he was not being considered for the vacancies, and in turn that led the respondent to conclude, reasonably in my assessment, that there was no alternative employment for the claimant. They were entitled at that stage in my opinion to inform the claimant of the termination of his employment.

5. In consequence of its disengagement, the Respondent failed to establish that the Claimant was to be interviewed for the position on Monday, 7 January 2019.

As indicated above, I do not accept that the respondent disengaged from the process as claimed. Mr Prescott's email after the second call indicated that the claimant had raised the issue of a face to face interview, and he had arranged one in light of that, but that he had explained that there were two other candidates with greater BPO experience who were to be

interviewed for a final time in the week after that call. Those interviews took place, the individuals were offered the roles, and accepted them, as the email explained. I did not consider that the interview having been arranged was a material issue in light of that. The individuals referred to had been interviewed and accepted offers such that there were then no vacancies available. Had the interviews not resulted in offers, the position would have been different.

107. This is not to say that the respondent, or CM, acted perfectly, or followed at all times which might be said to be best practice. But that is not the test. It is necessary to apply the statutory test, with the guidance from authority.

108. I consider that the issue of whether or not the issue of a reasonable alternative to redundancy was considered within the band of reasonable responses is a matter of fact and degree. If the alternative role is within the same employer, as was the case in ***Morgan,*** the degree of control over the process, including any interview, is higher than it is, or may be, where the alternative role is at an associated company. In ***Euroguard*** the EAT held that Tribunal entitled to find that the two companies in the group were closely integrated at least in relation to appointment of staff, with the same individuals involved. In such a situation the level of control is similar to that in ***Morgan.*** That was a finding made on the basis of "the particular facts of the case". ***Parfums*** was a different set of facts. The companies operated autonomously. Different individuals were involved as managers and HR staff. The EAT held that it was not open to the Tribunal to find that the respondent could allocate the claimant to a position in an associated company. It set out the test as one of assisting the employee, to consider alternative employment, and not seeking unfairly to influence application made to the associated company.

109. It appears to me that the claimant's submissions go beyond that test, going beyond the band of reasonable responses and not therefore in accordance with the statutory test under section 98(4). I consider that what the respondent

as employer requires to do is to act within the band of reasonableness in how it handles the question of whether there might be alternative employment found for the claimant elsewhere in the same group of companies, and not unfairly influence that process. I consider that the respondent did act reasonably in all the circumstances in this regard. It consulted with the claimant fairly. It passed out the claimant's CV. It followed up with Mr Prescott when he expressed an interest. Whilst it did not forward on the job description for the role Mr Precott had, it did ask for that and there was no evidence it was sent to it. Mr Prescott had two conversations which included the nature of the role. The respondent delayed the final consultation meeting initially by two hours to seek to accommodate the second discussion with Mr Prescott. It then delayed the decision until the conversation did take place, and Mr Green thereafter asked Mr Prescott about the claimant's application for the role both by email and telephone. The decision to dismiss was not taken until after Mr Prescott said that the claimant was not to be appointed to either vacancy At that stage, Mr Green considered there was no reasonable alternative role available for the claimant. I consider that he was acting within the band of reasonable responses when he did so, and decided to dismiss.

110. Whilst the sense of unfairness from the claimant's perspective is fully understandable, I require to consider matters not on the basis of how I would have acted, but whether or not the respondent's actings fell within the band of reasonable responses. I have concluded that it did. In so far as there was any unfairness at the stage of the decision by Mr Green, particularly in relation to the timing of that when there was an interview arranged with Mr Prescott for 7 January 2019 is concerned, which was later cancelled after the final interviews of other candidates led to offers being made and accepted, I consider that the appeal addressed matters adequately, with Mrs Francis speaking directly to Mr Prescott to check matters with him. I consider that the appeal cured such if any defect that there was, under reference to ***Taylor v OCS Group Ltd [2006] ICR 1602.***

Holiday pay

111. The Claim Form on page 7 stated that the claimant was "owed…holiday pay". On page 8 he alleged "The respondent illegally has refused to carry forward annual lave, and thus has repudiated its obligation to pay unused annual leave." It did not specify the basis of that illegality. It could have been any one of breach of contract, breach of the 1998 Regulations or an unlawful deduction from wages in respect of that holiday pay.

112. The claimant was off work ill in 2017. He could not complete fifteen days of accrued annual leave. He returned to work in June 2018, and the employment terminated in December 2018 which is during the same holiday year.

113. The contractual provision is clear in that annual leave cannot be carried forward. There can be no claim for breach of contract.

114. Mr Hutcheson argued that there was a right to carry forward under the Working Time Regulations 1998. There is not, at least under the words of those Regulations as they state that leave must be taken in the leave year under Regulation 13(9). The issue however is one of European law, as discussed in ***NHS Leeds v Larner [2011] IRLR 894***, , and Mr Bradley did not challenge that, rather his challenge was that the basis of that authority had not been pled.

115. Whilst the issue was certainly not pled clearly in the Claim Form in that there was only reference to the failure to carry forward the leave "illegally", it did refer to that in the context of holiday pay, and I consider that there is just sufficient to allow it to be argued. It was clear that the claim made was for holiday pay, and that is apt to include both claims under the Regulations and as an unlawful deduction from wages under Part II of the 1996 Act. They did not require I consider amendment.

116. There was no dispute that the claimant had been off ill, that fifteen days were not taken in 2017, that he remained off until July 2018, and that the termination of employment was during the same leave year which was the calendar year of 2018. The issue was what the legal basis for his claim was, when the contract of employment did not provide for it. In light of the leave accruing from 2017 unused because of illness being carried forward to when the employee returned to work in 2018, in accordance with the principles established in the ***Larner*** case, I consider that the claimant has a right to payment for those holidays under Regulation 14 of the Working Time Regulations 1998, and that that right to holiday pay falls within the definition of wages under section 27 of the Employment Rights Act 1996.

117. Given that the claimant accepted that five days could have been taken in 2018 before dismissal, I make an award for the balance of ten days holiday pay. The net monthly pay was £6,097.91, and included car allowance, pension and private healthcare as benefits. The total per month is £8,785.91 and that converts to a daily sum of £390.48. I award the sum of £3,904.80.

Conclusion

118. Despite therefore the considerable sympathy I have for the claimant, I require to dismiss his Claim for unfair dismissal. I make the award for holiday pay as above.

Employment Judge: Mr A Kemp
Date of Judgment: 24 July 2019
Date sent to Parties: 25 July 2019