Case Number: 2206683/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J. Fay	**V**	**Michael Conn Goldsobel**

Heard at: London Central (by video) **On**: 3 and 4 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms K. Balmer (of Counsel)

For the Respondent: Mr M. Cole (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

Reserved Judgment

1. The claimant's claim for unfair dismissal fails and is dismissed.
2. The claimant's claim for breach of contract in relation to commission pay fails and is dismissed.
3. The claimant's claim for unlawful deduction from wages and for breach of contract in relation to her accrued but untaken holiday is dismissed on withdrawal.

REASONS

Claim

1. By a claim form presented on 13 October 2020, the claimant brings claims for unfair dismissal and for unlawful deduction from wages and for breach of contract in respect to accrued but untaken holiday and commission pay. The claimant claims that she was dismissed unfairly, and that the respondent failed to pay her outstanding holiday pay and commission payments in breach of her statutory right under section 13 of the Employment Rights Act 1996 ("ERA") and in breach of contract.
2. The claimant does not accept that there was a redundancy situation, or if it were, that she was dismissed by reason of redundancy. She says that the real reason for her dismissal was a planned merger (or materially similar joining arrangement) with another law firm, which is not a fair reason under section 98 of ERA 1996. In any event, she claims, her dismissal was procedurally unfair because there were: (i) no genuine pooling of all staff, (ii) no fair and objective selection criteria applied, (iii) no fair scoring process, (iv) insufficient warning given, (v) failure to provide clear and sufficient information, (vi) lack of transparency, (vii) no proper and meaningful consultation, (viii) no proper consideration of suitable alternatives to dismissal, and (ix) conflict of interest in relation to the involvement of Ms Emma Gross (an employee of the Respondent) in the redundancy process.
3. The respondent accepts that the claimant was dismissed but denies dismissing her unfairly. It avers that there was a genuine redundancy situation, and that the claimant was dismissed by reason of redundancy and it was a fair dismissal within the meaning of section 98(1) of ERA. It further avers that if the dismissal were found to be procedurally unfair, the claimant would have been dismissed in any event and therefore any compensation award must be reduced accordingly.
4. The respondent avers that it paid the claimant all monies due and she is not entitled to any further holiday pay or commission.

5. The claimant was represented by Ms K. Balmer (of Counsel) and the respondent by Mr M. Cole (of Counsel). I am grateful to both counsels for their submissions and assistance to the tribunal.
6. I heard evidence from five witnesses, for the respondent: Mr Sivan Gelb (a partner in the property department), Mr David Ross (a partner in the litigation department) and Mrs Karen Truckell (the respondent's office manager); and for the claimant: Mr Aaron Canlas (an immigration advisor at Visalogic) and the claimant herself. All witnesses gave sworn evidence and were cross-examined.
7. I was referred to a bundle of documents of 259 pages the parties introduced in evidence. Two additional documents (a LinkedIn screenshot) and a client invoice were introduced by the parties on day two of the hearing, and with the parties' agreement I accepted those two additional documents in evidence.
8. At the start of the hearing, I discussed with the parties the issues I needed to determine.

Breach of Contract – Commission Pay

9. The sole issue in that claim is one of interpretation of the claimant's contract to determine whether her entitlement to commission payments continued after her dismissal (as contended by the claimant) or has ceased upon the termination of her employment (the respondent's interpretation). The value of the commission payment, which would have been payable to her if I were to find in favour of the claimant's interpretation was agreed on the second day of the hearing as 20% of the respondent's invoice dated 23/09/2020 to Mr S. Ong for £705 (excluding VAT and disbursements).

Holiday Pay

10. The issue in dispute was whether the respondent had calculated the claimant's accrued holiday correctly. The claimant claims that the respondent has deducted certain days from her entitlement when in fact she did not take those as holidays. On the second day of the hearing the parties were able to agree on the outstanding pay owed to the claimant.

The respondent has made the payment. The claimant has confirmed receipt of the money and withdrawal of her holiday pay claim.

Unfair dismissal

11. To resolve the complaint of unfair dismissal, I need to answer the following questions:

    11.1 Was there a redundancy situation?

    11.2 If the answer is yes, was the claimant dismissed for that reason?

    11.3 If I find that she was not dismissed for redundancy, the claimant's dismissal would be unfair. The respondent did not plead in the alterative any other reason for the dismissal.

    11.4 If I find that the claimant was dismissed for redundancy, the next question is whether in the circumstances the respondent acted reasonably in treating that reason as a sufficient reason for dismissing the claimant. I must determine this question in accordance with equity and the substantial merits of the case.

    11.5 If I determine that the claimant's dismissal was procedurally unfair, I then need to decide whether, if a fair procedure had been followed, the claimant would have been dismissed in any event and/or to what extent and when ("Polkey issue").

    11.6 Finally, if I find that the dismissal was unfair, in deciding what compensation should be awarded to the claimant, in addition to the Polkey issue, I need to assess the claimant's financial losses arising from the dismissal and whether she took reasonable steps to mitigate them.

12. The claimant initially advanced her case on the basis that the dismissal was "*prima facie by reason of a TUPE transfer and therefore automatically unfair*". However, at the start of the hearing the claimant accepted that the Transfer of Undertakings (Protection of Employment) Regulations did not apply to the respondent's joining arrangement with MCG law firm and therefore pursued her claim as an "ordinary" unfair dismissal under section 98 of ERA.

Findings of Fact

13. The respondent is a small law firm organised as a partnership. The respondent ceased operating as a practicing law firm on 30 September 2020 but remained a partnership. At all material times there were five partners: three in the property department, one in the litigation and one in the corporate, and three secretarial and support staff. The claimant and Ms Emma Gross, who joined the respondent in June 2019, were the only two other fee earners in the firm. They were not partners in the partnership.
14. The claimant is a New Zealand national. She lived in the UK since August 2011. She requires a visa to stay and work or study in the UK. The respondent arranged her sponsored Tier 2 work visa, which allowed her to work for the respondent only. After her dismissal, to be able to remain in the UK, she needed to either find another employer, which would be able to obtain for her another Tier 2 sponsored work visa, or to change her immigration status to a full-time student to obtain a Tier 4 student visa. She needed to do that within six months of her dismissal, otherwise she would have had to leave the UK and would not have been able to return to work in the UK for 12 months. If she had not been dismissed by the respondent, in October/November 2021 she would have attained the requisite length of time as a Tier 2 migrant and would have been able to apply for an indefinite leave to remain in the UK.
15. The claimant joined the respondent in May 2016 as a paralegal on a fixed term contract until September 2016. After a short break, due to her needing to return to New Zealand to arrange her visa, she was re-employed by the respondent as a trainee solicitor in October 2016. Upon her solicitor qualification she was promoted to an associate solicitor in the litigation department where she worked until her dismissal.

16. For the purposes of the claimant's commission claim the relevant terms of her contract of employment are as follows (my underlying):

1. INTERPRETATION

Appointment: the employment of the Employee by the Employer on the terms of this Agreement.

2.1 The Appointment shall commence on the Commencement Date and shall continue, subject to the remaining terms of this Agreement, until terminated by either party giving the other not less than two months' prior notice in writing.

7. SALARY

7.1 The Employee shall be paid an initial salary of £45,000 per annum.

9. COMMISSION

9.1 The Employee is further entitled to receive a payment calculated at 15% of any fees paid (and not repaid) ("Commission Payment") on work undertaken by the Employer for clients who are introduced to the Employer by the Employee. Payment will be made monthly.

9.2 The Commission Payment will be made monthly. The Employee will produce to Karen Truckell her calculation of the Commission Payment for the previous month and then when agreed the Commission Payment will be paid in the next salary run. The Commission Payment is subject to deduction of all taxes.

13.PAYMENT IN LIEU OF NOTICE

13.1 Notwithstanding clause 2, the Employer may, in its sole and absolute discretion, terminate the Appointment at any time and with immediate effect by notifying the Employee that the Employer is exercising its right under this clause 13 and that it will make within 28 days a payment in lieu of notice (Payment in Lieu), or the first instalment of any Payment in Lieu, to the Employee. This Payment in Lieu will be equal to the basic salary (as at the date of termination) which the Employee would have been entitled to receive under this Agreement during the notice period referred to at clause 2 (or, if notice has already been given, during the remainder of the notice period) less income tax and National Insurance contributions. For the avoidance of doubt, the Payment in Lieu shall not include any element in relation to:
(a) any bonus or commission payments that might otherwise have been due during the period for which the Payment in Lieu is made;

17.POST TERMINATION RESTRICTIONS

17.1 In addition to the matters set out above, the following restrictions will apply after termination of your employment for whatever reason:-
(a) You will not, whether directly or indirectly, whether on your own behalf or on behalf of another person or other body, for a period of 6 months after termination of your employment act for, solicit or endeavour to entice away

> from the Employer any client for whom you have acted in the last 12 months preceding termination of your employment or discouraged from becoming a client of the Employer any potential client of whom you have had dealings in the last 12 months proceeding termination of your employment.
> (b) You will not, whether directly or indirectly, whether on your own behalf or on behalf of another person or other body, for a period of 12 months after the termination of your employment, employ, solicit or endeavour to entice away from the Employer any employee employed by the firm at the time of your termination of your employment who holds a position of Solicitor or Partner with whom you have worked during the 12 months preceding the termination
> your employment.

17. In 2018 and 2019 the respondent's revenue and profits were significantly down against the 2017 figures. As a result, the respondent started to look at various options to increase revenue and profitability, including merging with another law firm, acquiring another department to generate a new revenue stream, and increasing marketing.
18. In June 2019, the respondent employed Ms Gross, who is an employment and data protection specialist with the view of setting up and running the respondent's employment law practice, the area in which until then the respondent had done very little work due to the lack of specialist knowledge.
19. Around the same time, the respondent appointed Ms Emma Sosner as a marketing consultant to help the respondent to better market its services to clients, including by increasing the respondent's social media presence.
20. At the beginning of 2020, the respondent was in discussions with another law firm, Gunnercooke LLP, about the possibility of the partners dissolving the partnership and joining Gunnercooke as consultants under individual services agreements. The discussions did not result in an agreement and in or around April 2020 were put on hold.
21. The respondent's financial position was further exacerbated due to the onset of the Covid pandemic. The work was decreasing, and on 15 April 2020, the claimant was put on furlough leave and remained on furlough until her dismissal.

22. In or around April/early May 2020 the respondent's partners decided that the financial situation required them to consider redundancies.
23. On 11 May 2020, Mr Gelb held an all-staff video meeting, at which he announced that the financial situation of the firm was very serious, that costs cutting measures would be necessary for the firm to survive and that redundancies were being considered. He advised that all staff members would be invited to individual video meetings.
24. On the same day, the claimant was invited on and had a call with Mr Gelb and Mr Ross. On the call Mr Gelb and Mr Ross explained to the claimant that the litigation department was not doing well financially, and that the continued workload was not enough to justify having an associated in the department. The claimant was asked to consider whether there were any other roles she felt she could do. The claimant said that she would be willing to move to the corporate department. Mr Gelb told the claimant that there would be a follow up call in the next couple of weeks to discuss any proposal she had. He also invited her to call him at any time if she wanted to discuss anything before the next meeting.
25. Following the meeting, Mr Gelb spoke with the corporate partner, Mr Howard Goldsobel, to check whether there was a role for the claimant in his department. Mr Goldsobel told Mr Gelb that he did not have sufficient work in the department to justify having an associate, and the type of work he did was at the level the claimant would not be able to assist with due to her lack of expertise in corporate law.
26. On 21 May 2020, Mr Gelb and Mr Ross had the second video call with the claimant. The claimant recorded that call without telling that to Mr Gelb and Mr Ross. Mr Gelb told the claimant that there was no role available in the corporate department and asked the claimant if she had any further proposals. The claimant again said that she would be willing to move to the corporate department, but otherwise did not make any other proposals. She expressed her concern that if she were made redundant and did not find another job, she would lose her immigration status and would have to leave the UK. Mr Gelb said that the respondent would be willing to extend her notice period if that could

help her with finding an alternative job while remaining employed by the respondent.

27. The respondent held similar consultation meetings with other staff members, which ultimately resulted in a receptionist and one of the secretaries being made redundant and the remaining two secretaries sharing work of the property and the litigation departments.
28. The respondent considered making Ms Gross redundant but decided against that because she had started a new practice area (employment law and data protection), which started to generate additional revenue for the firm. The respondent considered that the demand for employment law advice would continue to increase due to the pandemic and the government furlough scheme. Therefore, the respondent decided that making Ms Gross redundant would deprive the firm from such additional revenue, which it expected would cover the cost of Ms Gross's salary.
29. On 5 June 2020, Mr Gelb and Mr Ross telephoned the claimant and told her that they had decided to terminate her employment for reason of redundancy and that this would be confirmed to her in a letter, which would also provide details of how she could appeal the decision.
30. After the call ended, the claimant telephoned Mr Gelb again to discuss her redundancy. The claimant says that during that conversation Mr Gelb said the following phrase: "*the possibility of the merger led to this redundancy process*". Mr Gelb denies saying that. The claimant places strong emphasis on this evidence in support of her case that the real reason for her dismissal was not redundancy but a planned merger with Gunnercooke or some other law firm. I do not consider resolving the conflict in evidence on what exactly was said by Mr Gelb about the possibility of the merger is critical to my decision on the issue of reason for the claimant's dismissal. I will explain why later in my judgment.
31. In the same conversation Mr Gelb told the claimant that she should be looking for another job because he did not see things improving, but if the business picked up, he would be prepared to consider reversing the decision.

32. On 7 June 2020, the respondent sent the claimant a notice of termination with the effective date of 10 August 2020. The letter stated that the claimant could appeal the decision by 19 June 2020. It also set out her termination payments. The letter was sent by Mr Gelb by email, in his email he stated that the respondent would be prepared to consider extending the claimant's notice if she required. He also invited the claimant to call him or other partners if she wished to discuss anything.
33. In early June 2020, the claimant made applications to various universities to secure a place on LLM Mater in Law courses. On 14 June 2020, she received an offer from the University of Law and on 16 June 2020 – from UCL.
34. On 17 June 2020, the claimant replied to Mr Gelb's letter with comments on her employment start date and saying that an extended notice period would "*likely be necessary*" and asking for further information on "*the mechanics*". She said that she wished to reserve her right in respect of the appeal until after she had received further details on her redundancy figures and the timing. She did not appeal her dismissal.
35. On 30 July 2020, the claimant again wrote to Mr Gelb seeking information about how it was decided to make her role redundant.
36. On 31 July 2020, the respondent was introduced to a partner at Spenser West ("SW") law firm, which led to talks and ultimately services agreements signed on 1 September 2020 by the five partners and Ms Gross with SW, under which they agreed to provide legal services as "partners" of SW.
37. The relevant terms of the agreements are: (my underlining):

3.DUTIES AND OBLIGATIONS

3.1 The LLP and MCG may at their discretion, offer to the other such business or work opportunities as each party considers appropriate from time to time, subject to any obligations of confidentiality that either party or the Individual owe to any third party. Neither party is under any obligation to accept any such opportunity or work that the other may offer.

3.4 The Individual shall be held out to actual and prospective clients as a 'partner'' of the LLP. Notwithstanding this unless it or the Individual has been specifically authorised to do so by the LLP in writing:

> 3.4.1 neither MCG nor the Individual shall have any authority to incur any expenditure in the name of or for the account of the LLP; and
> 3.4.2 MCG and the individual shall not hold itself I themselves out as having authority to bind the LLP.
> 3.5 The LLP agrees to use reasonable endeavours to make clear via all relevant documents that the Individual's title of "partner" does not describe the Individual's legal status.

38. On 3 August 2020, Mr Gelb replied to the claimant's 31 July email providing further explanations why the decision was taken and why it was not possible to find an alternative employment for the claimant.
39. On 6 August 2020, the claimant wrote to Mr Gelb stating that she felt that the process was unfair and that she was handing over the matter to her solicitor. Mr Gelb replied on the same day reiterating his view that the process and the decision were carried out in a fair manner and pointing out that the claimant did not appeal her dismissal.
40. On 6 August 2020, the claimant's solicitor wrote to the respondent challenging the fairness of her dismissal, which led to further correspondence between the parties ultimately resulting in these proceedings.
41. On 10 August 2020, the claimant's notice of termination has expired, and she was dismissed.

The Law

42. Section 139 (1) of ERA defines redundancy as follows:

> "an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
> 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"

43. The law relating to unfair dismissal is set out in section 98 of ERA.

> "(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 –
> …….
> (c) is that the employee was redundant;"

44. In determining whether an employee was dismissed for reason of redundancy the tribunal must decide:

    (i) was the employee dismissed?

    (ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

    (iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution? (**Safeway Stores plc v Burrell 1997 ICR 523, EAT**).

45. It is for the employer to prove the asserted reason for dismissal. If it fails to do so, the dismissal will be unfair. A reason for dismissal is "*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*." (**Abernethy v Mott, Hay & Anderson [1974] ICR 323**).

46. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

> "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)—
> 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
> shall be determined in accordance with equity and the substantial merits of the case."

47. Procedural fairness is an integral part of the reasonableness test is section 98(4) of ERA. In redundancy dismissal "*the employer will not*

normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation" (**Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**).

48. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (**Williams v Compair Maxam Ltd [1982] ICR 156**).
49. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the tribunal should be slow to interfere with the employer's choice of the pool. However, the tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances. (**Capita Hartshead v Byard [2012] IRLR 814**)
50. A fair consultation would normally require the employer to give the employee "*a fair and proper opportunity to understand fully the matters about which [he] is being consulted, and to express [his] views on those subjects, with the consultor thereafter considering those views properly and genuinely*." (per Glidwell LJ in **R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72**) cited with approval and as applicable to individual consultation by EAT in **Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT** "*when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests*". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (**John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT**)

51. If the tribunal decides that the dismissal is procedurally unfair, as part of considering the issue of remedy it ought to consider the question whether the employee would have been fairly dismissed in any event, and/or to what extent and/or when. This inevitably involves an element of speculation. However, the tribunal may reasonably take the view that based on the evidence available it might be too speculative and uncertain to try and predict what might have happened if a fair procedure had been followed (**Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT**).

Discussions and conclusions

Credibility of respondent's witnesses

52. The claimant's case is that I must prefer her evidence to those of Mr Gelb and Mr Ross. She challenges the credibility of their evidence. Ms Balmer for the claimant submits that Mr Gelb was more arguing the respondent's case than giving evidence, his evidence were inconsistent in relation to ongoing talks with Gunnercooke, profitability of the respondent's employment department, LinkedIn post announcing the "merger" with SW.
53. On the contrary, she says, the claimant was credible and honest in giving her evidence. She made a number of concessions, agreed on some points put to her in cross-examination, her evidence were supported by her contemporaneous notes. There were no evidence to show that she was lying.
54. Mr Cole for the respondent does not argue that the claimant was not honest in her evidence. He submits that she was not straight on some points but generally honest and tried to assist the tribunal. However, he says, so were Mr Gelb and Mr Ross. He says that because of the prima facie weakness of the claimant's unfair dismissal case, to make it out, she is forced to run it on the lines of a dishonest conspiracy on the part of the respondent.
55. I find that all witnesses I heard from were honest and their evidence reliable. They disagreed on certain facts, and their interpretation of

some of those facts were different, however, that does not mean they were not telling the truth. I accept that on occasions when answering question Mr Gelb was trying to put the respondent's case to Ms Balmer. However, in my judgment, this does not mean that he was not truthful with his answers. Given his role in the redundancy process and the subsequent litigation, it is understandable that he wished to put his side of the story forcefully and clearly.

56. I do not accept that Mr Gelb was not telling the truth when he was saying that the "merger" talks with Gunnercooked were not ongoing at the time the respondent initiated the redundancy process. Ms Balmer refers me to paragraph 11 of Mr Gelb's witness statement as showing that the talks were ongoing. It does not say that. She also refers me to Mr Ross oral evidence. However, his evidence were that while a possibility of moving to join another partner was still something on the respondent's partners' mind by May they had realised that it "*was not going to work*" with Gunnercooke. When it was put to him that the respondent was actively trying to orchestrate a merger, his reply was unequivocal, he said: "*it was not the case*", and he refuted, as did Mr Gelb, any suggestion that the so-called "merger" had anything to do with the redundancies.
57. I also do not accept that Mr Gelb's evidence on the LinkedIn post by Ms Gross should put into question the credibility of his entire witness evidence. I accept that he said that the post had been removed and did not say that it had been replaced by a modified post, still announcing that the respondent's partners had moved to join SW and that Ms Gross had been made a partner. However, firstly, I find this marginally relevant to the issues I need to determine, and secondly, I accept his evidence on the second day of the hearing that in his initial evidence he had been referring to the original post and had made a mistake by not spotting that a copy of the post in the bundle was the amended version.
58. Finally, to finish off with this issue, while I accept that the amended post could still be read as Ms Gross being made a partner of the respondent, I accept Mr Gelb evidence that she is not, and the "Partner" in the post refers to the partner title she could use when

offering services via SW, pursuant to clause 3.4 of the services agreement with SW.

59. In summary, I am totally unpersuaded by Ms Balmer's arguments that I should find Mr Gelb and Mr Ross evidence unreliable.

Unfair dismissal claim

Was there a redundancy situation?

60. Moving on to deal with the substantive issues in the case, I have no difficulty in finding that there was a genuine redundancy situation at the respondent. In fact, as Mr Cole put it, it was a "classic" redundancy situation.
61. There are clear evidence of the respondent suffering a decline in revenue in 2018 and 2019 because of not having as much work coming its way as it used to have. The pandemic made things even worse.
62. The claimant was put on furlough on 15 April 2020 precisely because there was not enough work for her to do. I accept evidence of Mr Ross that out of all matters she had been dealing with before going on furlough, only one matrimonial matter continued and which he was able to deal with by himself. That is further supported by the invoice for a modest sum of £705 for the period between 31/07 and 20/09 for that matter.
63. Therefore, I find that the respondent's requirements in employees to carry out work of a particular kind (namely legal services work) had diminished and was expected to diminish further. It follows, that there was a genuine redundancy situation.

Was the claimant dismissed for redundancy?

64. Ms Balmer submits that there is a "smoking gun" out there to be found, which is the so-called "merger" with another firms. She submits that a planned "merger" with Gunnercooke or another firm was the real reason for dismissal, and that is what Mr Gelb essentially had

confirmed to the claimant in the telephone conversation on 5 June 2020, when he, according to the claimant's note, said that "*the possibility of the merger led to the redundancy process*".

65. Further, Ms Balmer, says that there were various references made at the all-staff and the claimant's individual meetings to "*offer from another firm for Partners to join*" and "*discussions with a new practice*" and that "*the process was moving ahead*". She also relies on the fact that Mrs Truckwell told the claimant in July that the respondent was merging with Gunnercooke, which Mrs Truckwell accepted in cross-examination as true. Ms Balmer says that as the practice manager of the firm, Mrs Truckwell would have been informed of any such arrangements, and therefore her making such a statement to the claimant is compelling evidence that the merger with Gunnercooke was due to happen in or around September 2020.
66. Therefore, Ms Balmer submits, I should find as a fact that at the time of the redundancy process the merger with Gunnercooke or another firm was actively pursued by the respondent, and the only remaining issue is one of causation, namely whether there is a causal link between the "merger" and the claimant's dismissal, and that link, she says, is clearly evident from the following:
    (i) Mr Gelb telling the claimant on 5 June: "*the possibility of the merger led to this redundancy situation*",
    (ii) "merger" being mentioned in the redundancy process meetings,
    (iii) the respondent's failure to disclose any documents concerning its discussions with Gunnercooke,
    (iv) the respondent not telling the claimant about who else was selected for redundancy,
    (v) the respondent's failure to provide any contemporaneous documentary evidence relating to the decision to make the claimant redundant, such as showing the finances of the firm, internal

discussions about redundancies, notes of the redundancy meetings, etc.

67. Based on that, Ms Balmer invites me to infer that the respondent does not wish the tribunal to see evidence related to its discussions with Gunnercooke on the terms of the proposed merger, which Ms Balmer suggests, would have revealed that Gunnercooke made clear to the respondent that they did not want to have associate lever solicitors joining them and were prepared to accept only partners, or alternatively, the respondent simply wanted to make itself a more attractive proposition for a potential merger with another firm by removing the claimant because she was an associate with four years of continuous service.

68. Mr Cole for the respondent submits that the respondent's evidence were clear that the dismissal was wholly or mainly attributable to the redundancy situation, and that was the reason for the dismissal. A merger (in the true sense of that term) with Gunnercooke had been put aside at the beginning of 2019. The arrangements that the respondent went on to consider thereafter were such that the respondent had to retain its own costs and liabilities, including employees, and therefore there were no reasons that the counterparty would require the respondent to dismiss associate solicitors, or for the respondent to do so to make itself a more attractive partner. He points out that the claimant could not in her evidence give any such reason.

69. He further submits that Mr Gelb denies saying that the possibility of merger led to the redundancy situation, and I should prefer his evidence because his making the alleged statement would have been inconsistent with the respondent's conclusion that a merger was not a suitable option for the firm, other statements made in the course of the redundancy process and the reality of the arrangements contemplated with Gunnercooke and ultimately made with SW.

70. Finally, he says that even if the claimant's evidence on the content of that conversation with Mr Gelb on 5 June 2020 were to be preferred, this does not displace the fact that the principal reason for the claimant's dismissal was redundancy.

71. I agree. I find that what operated on Mr Gelb's and Mr Ross's minds when they took the decision to dismiss the claimant was a set of facts that the respondent's financial position was precarious and the volume of legal work falling and their genuine belief that the respondent's requirements for employees to carry out work of a particular kind had diminished and was expected to diminish even further, and that was the reason why they decided to dismiss the claimant. Put it simply, there was not enough work for the claimant, and they did not see that changing in the near future, and that is why they have decided to dismiss her.
72. I find that the so-called "merger" had nothing to do with their decision, and I reject Ms Balmer's invitation to infer from snippets of largely unconnected information that the respondent actively pursued a merger, and that the merger was the reason for the claimant's dismissal. Considering all the evidence in front of me, such a finding will be simply perverse.
73. Even accepting the claimant's evidence that Mr Gelb told her on 5 June 2020 that the possibility of the merger led to the redundancy situation, and that Mrs Truckwell told her about the merger with Gunnercooke (she was plainly wrong about that), in my judgement, it will still be highly speculative for me to deduce from that the claimant was dismissed because of the "merger" and ignore all other evidence clearly pointing that redundancy was the principal and indeed the only reason for the claimant's dismissal.
74. For completeness I shall say that I do not find that the respondent not disclosing documents about talks with Gunnercooke as indicating that there is a "smoking gun" to be found in those document. I accept the respondent's evidence that the discussions with Gunnercooke were put on hold in early 2020 and therefore any such documents would be

simply not relevant to the issues in these proceedings. I am equally unpersuaded that the respondent's disclosure was otherwise deficient.

75. Finally, I find nothing improper in Mr Gelb's not telling the claimant who else was being selected for redundancy, especially when he had not yet informed those other employees.
76. For these reasons I have not hesitation in finding that the claimant's dismissal was by reason of redundancy.

Did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant?

77. Now I need to decide whether the dismissal was fair or unfair by reference to the statutory test in section 98(4) of ERA.
78. Ms Balmer for the claimant submits that the dismissal was procedurally unfair. She says the claimant should have been pooled together with Ms Gross, and if then objective criteria had been applied it would have been Ms Gross and not the claimant selected for redundancy.
79. She further argues that the process was flawed because:
    (i) warning of impeding redundancy was insufficient,
    (ii) there was no clarity about the process,
    (iii) the respondent failed to provide sufficient information,
    (iv) there was no meaningful consultation with the claimant,
    (v) the respondent was not open and transparent,
    (vi) No proper consideration given to alternatives to dismissal,
    (vii) Ms Gross involvement in the process made it unfair.
80. Therefore, she argues, the process overall was unfair having regard to each of the specific points above and/or the entirety of the process viewed as a whole.
81. Mr Cole submits that the respondent acted fairly in treating redundancy as sufficient reason to dismiss the claimant because:

(i) it was objectively clear as of 11 May 2020 that the initiated discussions were about the possibility of making roles redundant,

(ii) it was made clear to the staff that the respondent was facing financial difficulties,

(iii) it was made clear to the claimant that there was insufficient work in the litigation department and therefore her role was "at risk",

(iv) she was in a pool of one and it was a reasonable pool for the respondent to select,

(v) there were no selection criteria to apply because she was in a pool of one,

(vi) the consultation period was nearly a month long and that gave the claimant ample time and opportunity to ask any questions and make proposals for alternatives to redundancy,

(vii) the respondent properly considered the possibility of redeploying the claimant but there were no such options due to insufficient work,

(viii) the claimant was offered an extended notice period, which she did not take, and

(ix) she was given the option to appeal her dismissal but did not take it up.

82. I shall deal with each element of the process and then look at the process as a whole.

Warning and Clarity

83. I find that sufficient warning was given to the claimant about the impeding redundancies. I find that the staff meeting on 11 May 2020 was when the warning was given, and it was sufficiently clear for the claimant to understand that there would redundancies in the firm. Her solicitor in his letter of 6 August 2020 (page 126 of the bundle) confirms as much.

84. In any event, even if she had had any doubts about that, the follow up individual call on the same day would have removed any such doubts. I reject the claimant's evidence that at that point she had not realised that she was potentially at risk of redundancy. Her own notes of that conversation record clear statements that there was a lack of work in litigation, and that she was asked whether she would be willing to accept voluntary redundancy. The claimant also asked Mr Gelb to explore the possibility of moving to the property department. Put in the context of the claimant being on furlough since 15 April and not doing any work, and the information she had received at the all-staff meeting, I find it is simply implausible that she still did not realise that her job was at risk.
85. I do not accept that the lack of "formality" made the warning ineffective or otherwise the whole process unfair. The fact that the respondent used "Staff Meeting" or "Jessica" in the subject line of Zoom meeting invitations rather than more formal labels, or that no formal written letter was sent to the claimant inviting her to the meetings, or that Mr Ross referred to the meeting on 11 May 2020 as a "chat", in my judgment, is not relevant.
86. What matters is the content of those meetings, and I find the content was sufficient to provide the claimant with adequate warning of the impeding redundancies. I also reject the claimant's criticism that no adequate time was given between the all-staff meeting and the first individual meeting for the claimant to adequately prepare. That was the first meeting to warn the claimant of the risk of redundancy and provide the relevant background information and outline the process going forward. I also find that it was perfectly reasonable for the respondent to notify affected employees as soon as possible after the all-staff meeting announcing redundancies.

<u>No fair pooling</u>

87. I find that the claimant was in a pool of one, and it was well within the range of reasonable responses for the respondent to determine her pool in that way. I reject the claimant's contention that she ought to

have been placed in a pool together with Ms Gross. I am satisfied that the claimant's and Ms Gross's roles were substantially different and not interchangeable. The claimant was a junior solicitor in the litigation department dealing with family and civil disputes with a minimum exposure to employment law work, and Ms Gross was a specialist employment and data protection lawyer, not doing any family or civil litigation work.

88. The facts that both of them were "associates", or had Mr Ross was their supervisory partner, or that they sat together on the same floor next to Mr Ross's office, in my judgment, are simply irrelevant, and in any away, are not sufficient for me to conclude that the pool selected by the respondent was unfair because of those factors.
89. I find that Ms Gross was in a separate department to that of the claimant, but even if the employment department was, as Ms Balmer put it, "sub-stream" under the umbrella of the litigation department, this, in my judgment, does not make the selection of the pool unreasonable.
90. I find that the respondent genuinely applied its mind to the selection of the pool, and the pool selected was well within the range of reasonable responses.
91. Finally, I reject the claimant's argument that the respondent's pleaded case was that the claimant was in the same pool with all other staff. Paragraph 14 of the respondent's ET3 simply denies the claimant's claim in paragraph 3b of her details of claim that the respondent "*failed to explain adequately the pool of workers*". The respondent says it did and explained that "*every member of staff was put into the pool and every member of staff was individually consulted with*". The claimant was not in the same pool as the secretaries, and she was not arguing that she should have been put in the same pool with them, and she was not in the same pool with Ms Gross.
92. Because the claimant was in a pool of one, there was no need to score her against anyone else, and therefore the issues of unfair criteria and unfair scoring do not arise.

<u>Inadequate consultation</u>

93. I find that the consultation process was fair and within the *R v British Coal Corporation* guidance.
94. I have already dealt with the issue of the sufficiency of warning.
95. There is no legal requirement on employers to allow employees to be accompanied to redundancy consultation meetings, and therefore the claimant did not have the right to be accompanied to such meetings. Although in larger employer organisations such practice might be adopted, considering the size and administrative resources of the respondent, I find it was not outside the range of reasonable responses for it not to offer this option to the claimant.
96. I reject that the meetings were inadequate or too few. The notes of the two meetings clearly show that all relevant issues were being discussed and the claimant had ample opportunity to put forward her suggestions.
97. The only alternative she proposed was to move to the corporate department. I find that the respondent conscientiously considered her suggestion, spoke with the head of the corporate department, and decided that it was not a viable option because there was no suitable work for her to do in that department, and on the facts, it was a reasonable decision for the respondent to come to.
98. I find that consultations were meaningful and genuine. In the circumstances, there were simply not that many options open to avoid the redundancy. In those circumstances, the respondent's proposal to extend the claimant's notice period to allow her more time to find an alterative job was, in my judgment, a very sensible suggestion. The claimant, having expressed her interest in it, did not actively pursue it further.
99. Finally, I find that the respondent has shared adequate information during the consultation process and there were no other major flaws in the process, which could be reasonably viewed as making the whole process unfair.

No proper consideration of alternatives to dismissal

100. I reject the claimant's contention that the respondent failed to properly consider alternatives to dismissal. As I have already said, I find that in those circumstances, there were simply not that many alternatives. There were no roles the claimant could move into. Her work in the litigation department was no longer there. The respondent was not obliged to keep her on furlough in the hope that things might change for the better, where all signs were pointing in the opposite direction. At that time, the government support scheme was going to end at the end of June, and the respondent's financial position was such that it could not sustain another fee earner in the firm, which was not generating enough profitable revenue. I also see no reason why the respondent should have been obliged to keep the claimant for another 18 months in the non-existent job just to allow her to qualify for an indefinite leave to remain in the UK.

101. I equally see no fault in the respondent's decision not to keep the claimant employed until they find a potential "merger" partner. The deal the respondent has eventually signed with SW would not have helped to solve the redundancy situation concerning the claimant.

Conflict of interest in relation to Ms Gross's role

102. I accept the respondent's evidence that Ms Gross was not involved in advising the respondent on the redundancy process and reject Ms Balmer's suggestion that I should disbelieve their evidence because Ms Gross was not called as a witness. In any event, even if she were involved, which I find she was not, this, in my judgment, would not have rendered the process unfair.

Fairness in the round

103. Having considered all elements of the process and having found each of them within the range of reasonable responses, I shall now step back and consider the process as a whole.

104. I find no difficulty in concluding that the process viewed as a whole was fair and well within the range of reasonable conduct open to a reasonable employer.

Was the dismissal fair or unfair?

105. Returning to the question I need to answer, namely was the respondent's decision to dismiss the claimant in those circumstances fair or unfair, or using the statutory language - "*whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [redundancy] as a sufficient reason for dismissing the employee"*. I must answer this question in accordance with equity and the substantial merits of the case.

106. For the reasons set out above, I find that in the circumstances, the respondent's decision to dismiss the claimant was within the range of reasonable responses open to a reasonable employer and therefore her dismissal was fair. It follows that her claim for unfair dismissal fails and is dismissed.

Breach of Contract

107. The claimant submits that I should construe clause 9.1 of her contract of employment as giving her a continuing entitlement to receive Commission Payments in relation to fees paid to the respondent after the effective date of termination because there is no general legal bar to her receiving such payments post-dismissal and her contract of employment does not expressly limit the receipt of Commission Payments to fees paid to the respondent before the dismissal.

108. In the alternative, Ms Balmer argues that in the absence of any express clause dealing with the position, the contract of employment should be construed so that the claimant is paid commission for a *reasonable* period post-employment in relation to work introduced by her. She submits that such reasonable period might be the six months' period in which the claimant was subject to post-termination solicitation

restrictions under clause 17 of her contract, which, she says, would be inherently reasonable because the restrictive covenants in clause 17 would have prevented the claimant from simply taking back the clients she had introduced to the firm.

109. Mr Cole for the respondent submits that the contract is clear, and the commission was part of the work - wage bargain, and the claimant's entitlement to it has ceased with the termination of her employment. He points out the wording "The Employee is further entitled…" (my underling) in clause 9.1, the provisions in clause 9.2 that the Commission Payment "will be paid monthly", "in the next salary run", and "is subject to deduction of all taxes". He further argues that if the intention of the parties had been for the Commission Payments to continue post-termination, they would have expressly provided for that in the contract.

110. In relation to the suggested implied term that the Commission Payments will be payable for "*a reasonable period*" after the dismissal, Mr Cole says that the legal test for any such implication is not met, because it is not "obvious" and not "necessary" to make the contract work. It refers me to the Supreme Court judgment in **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC**.

The Law and Conclusion

111. For the present purposes the law on construction of contractual terms and on implied terms can be summarised as follows:

(i) Construing the words used in a contract and implying additional words are different processes governed by different rules. Only after the process of construing the express words is complete, the issue of an implied term falls to be considered. (**Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC**)

(ii) When interpreting express terms of a contract, the aim is to give effect to what the parties intended. In

ascertaining that intention, the words of the contract should be interpreted in their grammatical and ordinary sense, assessed in the light of any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense, but disregarding subjective evidence of any party's intentions. (**Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009 1 AC 1101, HL**)

(iii) implied terms can supplement the express terms of a contract but cannot contradict them (**Johnson v Unisys Ltd 2001 ICR 480, HL**). However, in certain circumstances, implied terms may be used to qualify express terms, or at least restrict the way in which they are applied in practice (**Johnstone v Bloomsbury Health Authority 1991 ICR 269, CA**).

(iv) A term could only be implied if, without the term, the contract would lack commercial or practical coherence. A term should not be implied into a contract merely because it appeared fair or because the parties would have agreed it if it had been suggested to them. (**Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and anor 2016 AC 742, SC**)

112. Clause 9.1 gives the claimant the right to receive Commission Payments. This right comes into effect from the Commencement Date of the Appointment. The contract does not say that the right continues after the Appointment ends. It is part of the work - wage bargain between that parties and, in my judgment, stands and falls with the Appointment. I reject the claimant's argument that because there is no express provision to say that the claimant is not entitled to Commission

Payment in respect to fees received after her dismissal, the clause should be construed as giving her such right. In my judgment such construction will be inconsistent with the overall purpose of the clause, it being part of the work - wage bargain, and the terms in clause 9.2. It will also be in conflict with the terms in clause 13.1 (a), which provide that when the Appointment is terminated with immediate effect, the Employee will only be entitled to receive Payment in Lieu, which payment "*shall not include any element in relation to any bonus or commission payments that might otherwise have been due during the period for which the Payment in Lieu is made*".

113. On this basis I find that the parties' intention was that the right to Commission Payments continued only during the currency of the Appointment and has come to an end with the termination of the claimant's Appointment, and that is how clause 9.1 should be construed.

114. I find that the alternative interpretation suggested by the claimant will not only be inconsistent with other contract terms, but also lead to an absurd result, whereby the claimant would be entitled to Commission Payments indefinitely.

115. While not strictly necessary, given my decision on proper construction of clause 9.1, for completeness I will deal with the claimant's alternative submission on the implied term of "a reasonable period".

116. I find that there is no necessity to imply a term that Commission Payments will be payable for "a reasonable period" after dismissal. Clause 9.1 on its proper construction works perfectly well without the need to imply any term. The contract does not lack commercial or practical coherence without the suggested implied term.

117. Further, implying the suggested term will make clause 9.1 come into conflict with the express provisions in clause 13.1(a) and inconsistent with clause 9.2.

118. Finally, it will introduce unnecessary ambiguity into the contract. "Reasonable period" would be open to interpretation. The claimant suggests that it should be coterminous with the restrictive covenant in

clause 17.1(a). However, in my judgment, it is only one of many possible alterative options of what "a reasonable period" could be.

119. For these reasons, I find that the claimant is not entitled to any Commission Payments in relation to fees paid after the claimant's effective date of termination.

120. It follows that her claim for breach of contract fails and is dismissed.

Holiday Pay

121. On the second day of the hearing the respondent agreed to pay the claimant a sum in respect to her claim for accrued but untaken holiday.

122. On 7 March 2021, the claimant's solicitor confirmed by email that the agreed sum had been received and the holiday pay claim withdrawn. Therefore, the claimant's holiday pay claim is dismissed on withdrawal.

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Employment Judge P Klimov
18 March 2021

Sent to the parties on:

19th March 2021

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For the Tribunals Office

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