EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103323/2020

Hearing held at Dundee on 26 and 27 April 2021

10 **Employment Judge McFatridge**

Ms K Lindsay	**Claimant** **Represented by** **Mr Lawson,** **Solicitor**
Transis Ltd	**Respondent** **Represented by** **Ms Melville-Evans,** **Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

(One) The claimant's claim of unfair dismissal succeeds. The respondent shall
30 pay to the claimant a monetary award of Five Hundred and Thirty Nine Pounds and 99 Pence (£539.99). The prescribed element is Four Hundred and Fifty Five Pounds and 91 Pence (£455.91). The monetary award exceeds the prescribed element by Eighty Four Pounds and 8 Pence (£84.08).

(Two) The claim under s38 of the Employment Act 2002 does not succeed and
35 is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondent. She also claimed a statutory redundancy payment and notice pay. She claimed that at the commencement of the proceedings the respondent were in breach of their obligation under section 1 and section 4A of the Employment Rights Act 1996 to provide particulars of employment. The respondent submitted a response in which they denied the claim. They confirmed that the claimant had been paid her redundancy payment and notice pay albeit the date of payment was subsequent to the date of lodging of the ET1. They denied unfair dismissal. They denied that they had failed to provide the claimant with the appropriate particulars of employment. The claim for a statutory redundancy payment and the claim for notice pay was withdrawn and on 30 September 2020 the Tribunal issued a judgment dismissing these claims. The remaining claims proceeded to a final hearing which took place on 26 and 27 April 2021. At the hearing Ms Melville-Evans the respondent's Director and Gail Reid the respondent's Filling Station Manager gave evidence on behalf of the respondent. The claimant gave evidence on her own behalf. A joint bundle was lodged by the parties. This included a jointly agreed chronology at page 47 and a joint list of issues at page 48. On the basis of the evidence and the productions the Tribunal found the following factual matters relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent are a family owned company which has operated for many years. The family's principal business interest is as tenant farmers. The respondent operate a service station on the A90 close to Stracathro Hospital. On that site they have a shop, café and filling station. The respondent's Chief Executive is Ms Melville-Evans who took over the business in the 1990s when her father died. In or about March 2020 the respondent employed around 37 full time and part time employees. Of these 10 were employed in the filling station business. The manager of the filling station business was a Ms Gail Reid. The claimant commenced employment with the respondent on or about 25 July 2005. The effective

date of termination of her employment was 2 April 2020. The claimant was employed in the filling station as a cashier/attendant.

3. When the claimant commenced employment it was the respondent's practice to issue new staff with a welcome letter. When the claimant commenced her employment the respondent's manager who dealt with this matter was Lesley Gray. Lesley Gray issued the claimant with a welcome letter on behalf of the respondent. The format of this letter was identical to the form lodged at page 151. This document was said to be a statement of required information under the Terms of Employment Protection (Consolidation) Act 1978. It gave the employer's name, the employee's name, the date of commencement of employment, whether it was continuous, the job title, wages pay interval and hours. A copy of the document was given to the claimant and a copy was retained for a while on the claimant's employee file. The claimant was married at the time and used her married name at the time the letter was issued. The letter was issued in her married name. She subsequently reverted to her maiden name. At some point within the last few years the respondent carried out a cull of their records as part of the process of compliance with incoming GDPR regulations. At that time the employment file in the claimant's married name was disposed of. No copy of the document issued to the claimant was kept by the respondent. The claimant no longer has a copy of this document. On the balance of probabilities I find that the claimant was provided with a completed document in the style of the document provided at page 151.

4. In the period leading up to March 2020 the claimant worked as a part-time lecturer with Angus College at the same time as she worked for the respondent. At that time she had a series of temporary contracts with the college which provided her with certain teaching hours during the week. She also had a fixed commitment to provide support to an individual every Friday. Her normal working pattern with the respondent was to work eight hours shifts on Thursday, Saturday, Sunday and Monday. This gave a total of 32 hours per week. A document setting out the sums paid to the claimant during her final 13 weeks of employment was lodged (page 174).

5. The respondent saw themselves as paternalistic employers who treated their employees as members of the family. They do not have any written redundancy policy and at no point prior to March 2020 had they been required to make any staff redundant. The company's financial position in March 2020 was weak. The company had suffered a loss the previous year. The book value of the company according to Companies House was around £8000. The company essentially relied on cash flow to pay their weekly wage bill of around £12,000 per week.

6. As is well known, in early January 2020 the World Health Organisation were alerted to the existence of the Covid-19 virus in China. The first deaths in Europe were reported in mid-February and the first case confirmed in Scotland on or about 1 March. On 3 March the UK government announced an action plan to contain the spread of the virus. This essentially involved asking people to voluntarily avoid risk situations and restrict unnecessary travel.

7. During this period a member of the respondent's filling station staff left to go to Australia. As it happens, on arrival in Australia she was put into quarantine and thereafter found it impossible to return to the UK for a time. The respondent arranged for the claimant to attend a course in Dundee to become the alcohol licence holder for the petrol station. The claimant attended this course on or about 9 March 2020. Notably at that point there were absolutely no restrictions. Matters deteriorated worldwide during the course of that week and on 11 March 2020 the World Health Organisation declared a pandemic. The first death in Scotland occurred on 13 March. Clearly, as a customer facing business, the respondent's management became concerned on the effects of a reduction in travel on their turnover. There were various informal conversations with the claimant and other employees regarding what would potentially happen.

8. On 16 March the French government ordered all service stations in France to close. The respondent's management considered it highly likely that unless things changed the UK government might well make a similar announcement. On 16 March the UK government announced that where possible people should work from home and avoid restaurants and bars. The respondent's management noted an immediate massive downturn in

their business. The respondent's filling station manager started talking to staff (including the claimant) about the changes which would likely require to be made. At that time there was considerable uncertainty about precisely what was likely to happen. These conversations were not organised meetings. Staff worked to various rotas and Gail Reid the respondent's Filling Station Manager would simply arrange to go out and have a chat to a member of staff at the cash desk when it was not busy. She discussed various changes in working practices. One of the things which the respondent wished to change was the shift pattern. The existing shift pattern had staff working eight hour shifts with various periods of overlap when there would be two members of staff on duty at the same time. This allowed for members of staff who were working eight hours to get the long break period to which they were entitled under the Working Time Regulations. The respondent decided to reduce the length of each shift and have only one employee on duty at a time. This would mean that there were no overlaps. The reduction in length of a shift was so as to ensure that the employee did not require a break. The claimant expressed considerable unhappiness about the idea of working for five or six hours without a break. The claimant is a smoker and the respondent's management understood that she wanted to have a proper break away from the filling station so she could have a cigarette.

9. Similar alterations to working practices were put in place for the café and shop. The respondent's management discussed having to work in a different way going forward so as to comply with the new covid restrictions. On 20 March 2020 it was announced that pubs and restaurants should close. A business support package was announced by the government on 17 March. In Scotland the First Minister made a speech in which she confirmed that life would change significantly.

10. On Friday 20 March the respondent closed the café and shop. They left the filling station open. During the course of the weekend their turnover was approximately 70% below what they would expect on a normal weekend. The respondent's Chief Executive remarked on the Monday morning that business could not continue at this level. On that date (23 March) the UK government ordered a lockdown. At the same time the

Chancellor announced business loans would be available to assist companies survive the pandemic and also announced the coronavirus job retention scheme (CJRS) known as the furlough scheme.

11. At that time the respondent's management considered that the covid situation would last around three to six weeks. They were looking for funding to allow them to get through that short period. The respondent's Chief Executive Ms Melville-Evans immediately telephoned her bank manager and applied for a loan under the Coronavirus Business Interruption Loan Scheme (CBILS). The respondent's management considered that the company met the criteria which were that it was a UK business that had been adversely affected by coronavirus. It had a turnover of over £200,000 over three years' trading history, over 50% of turnover from trading activity (e.g. not from investments) that the loan would be for business purposes and the loan was primarily for trading in the UK. The respondent's hope was that this loan would be granted and give the company the funds to continue paying staff over the next three to six weeks.

12. Ms Melville-Evans also considered the furlough scheme which had been announced. She was concerned that although the announcement had been made this was in fairly general terms and she was only able to obtain details from the internet over the course of the next few days. She used the government UK website. Her concern was that there would likely be a delay in claiming back furlough money from the government. Her understanding was that if the company furloughed employees under the government scheme they would be taking on an obligation to pay these employees their weekly wages as they fell due. They would then require to obtain a refund of this money from the government. Ms Melville-Evans was concerned that there may be some delay in obtaining such a refund from the government. Initially she understood that the refund of furlough payments might well be repaid by the government in the same way as statutory sick pay payments made by the employer. Her understanding was these would be repaid through the PAYE scheme. She was aware that many of the respondent's employees being part time their monthly PAYE bill was relatively small. She was concerned that the company

would require to pay out money and then perhaps wait several years for this to be refunded through the PAYE scheme.

13. In actual fact of course the furlough scheme provided for refunds to be processed and paid relatively quickly but at this point in time (late March early April) the respondent was unaware of this.

14. Ms Melville-Evans was also aware that as a director of a limited company she had a responsibility to ensure that the company was trading solvently. She was aware that the companies accounts were not in good shape. She was concerned that if staff were furloughed the company would be taking on an open-ended financial commitment and that at some point very soon the stage would be reached where the company simply could not pay. She decided not to pursue the furlough route. As it happens despite the length of the pandemic and the fact that the arrangements regarding furlough repayments have now been clarified the respondent has not to date taken advantage of the furlough scheme for any of the employees even of the two parts of the business which were completely closed for periods namely the café and shop.

15. With regard to the filling station the respondent's view was that they would try to keep this partially open at least until the point where the government told them they must close. As noted above the respondent were aware that all service stations in France had been closed down by government decree the previous week. She considered it highly likely that this would also happen in the UK.

16. On 26 March Ms Melville-Evans received a call from the bank saying that their application for a CBILS loan was refused. Ms Melville-Evans emailed the bank manager asking if he could put their reasons in writing. The bank did so in an email dated 26 March 2020 which was lodged. It is probably as well to set this letter out in full as it provides some of the context with which the respondent's management were operating at the time

> "Good afternoon Pat, as requested I hereby set out the position as discussed earlier today.
>
> Coronavirus Business Interruption Loan Scheme (<u>CBILS</u>)

The full terms of this scheme are contained within the British Business Bank website www.british-business-bank.co.uk I would highlight that these terms are not those of Clydesdale Bank but of the scheme itself. As part of the scheme eligibility criteria is stated that the lender must establish that the borrower has a viable business proposition assessed according to the bank's normal commercial lending criteria. This relates to the pre-coronavirus period.

As has been discussed and explained at numerous points in the past based on Clydesdale Bank's normal commercial lending criteria it cannot be evidence that Transis Ltd is in a viable position to allow additional debt funding to be provided i.e. it cannot be evidenced that the business generates sufficient cash to service and repay any additional funding. Therefore this scheme is not available to Transis Limited.

Annual accounts to 31 March 2019 show a loss before tax of £59,861 – even after adding back depreciation of £24,770 (which is acknowledged is a non-cash item) there remains a deficit of £35,091. The company's net worth fell to £8960 (from £68,811 in 2018).

Annual accounts to 31/3/2018 show a loss before tax of £45,718 – the company's net worth fell to £68.811 (from £117,047 in 2017).

Clydesdale Bank Funding

At the risk of repeating the comments above – again which have been discussed and explained in the past – set out the lack of evidence of debt service ability and the continuing deteriorating trend. As such the Clydesdale Bank continues to be unable to provide additional debt funding based on its normal commercial lending criteria. I hope this helps explain the current position." (page 61)

17. The respondent appealed the bank's decision on or about 18 April under the appeal provisions of the CBILS scheme. The appeal was turned down and the decision not to lend confirmed. In the meantime, Ms Melville-Evans discussed matters with Ms Reid and it was decided that they would close the filling station at evenings and weekends. This, together with the shift changes which they made, meant that their need for filling station attendants/cashiers doing the same job as the claimant reduced considerably. As at 23 March the respondent had 10 employees carrying

out this role. They decided that going forward with the various changes (closure at night and weekends, change shift pattern) they would only need two or a maximum of three going forward. Ms Melville-Evans then asked Gail Reid to speak to all staff and make enquiries as to whether they were prepared to voluntarily assist. The various proposals which were made would be for the employee to go home for a short time essentially on unpaid leave, to take their holidays and in some cases to retire. Ms Reid and Ms Melville-Evans used the word retire since they were well aware that a number of their employees were of advanced years and were in receipt of pensions and may wish to voluntarily leave their job. The proposed steps were essentially take unpaid leave for a while, use up paid holidays or voluntarily redundancy.

18. Ms Melville-Evans then said that if there were insufficient volunteers the respondent would have to consider making people redundant. She asked Ms Reid to check online to ascertain the appropriate process. She also asked Ms Reid to draw up what she termed a list of the 'plus and minuses' in respect of each member of staff with a view to deciding which employees should be made redundant.

19. Over the course of the following week (from 23 March onwards) Ms Reid spoke to all of the filling station staff. She spoke to the claimant on 24 March and discussed with her what would be happening going forward. This was not a formal meeting. The claimant was not told in advance that the meeting would be happening. The claimant was not told that the company was considering redundancies. The claimant was not told that the answers she gave may be used by the respondent in considering whether she rather than another employee ought to be selected for redundancy. She was not told of her right to be accompanied at this meeting.

20. Meetings were informal and took place at the cash desk where the claimant worked. Ms Reid simply went out to the cash desk and had a chat with the claimant about the current situation and asked her how she would feel about various proposed changes. Whilst the context of the covid pandemic was obvious and whilst the claimant was aware in general terms that redundancies may well be something that were on the cards

she did not appreciate that this was anything which was likely to be happening soon. It was also her view that she was a model employee and had been with the company for over 15 years. It was her view that even if the company were considering redundancies that it was highly unlikely that she would be chosen. During her conversations with Ms Reid the claimant indicated that she required to have a wage coming in and could not afford to go “on hold” as the respondent put it which would have meant essentially going home on unpaid leave. She was also not keen to take paid holidays. The respondent operate their holiday pay scheme in such a way that employees do not get paid their holiday pay at the time they take the holiday. Instead, their holiday pay is rolled up and they receive this every 13 weeks. The claimant indicated she was not keen on accepting a reduction in hours. She pointed out that she had now been furloughed from one of her roles at Angus College and was in a position to work extra shifts.

21. Following her interviews with staff Gail Reid produced two documents. The first of these was essentially a list of staff together with notes of the meetings (pages 57-58). It should be noted that all of the meetings with staff took place under the same circumstances as the meeting with the claimant. As it happens, it suited a substantial number of the staff not to work for a time as they had been told to shield in terms of the government advice. Five came into this category. One chose to go on hold and the note at page 58 states

> “Chose to go on hold until further notice – refused redundancy.”

One had by this time been locked down in Australia and agreed to the termination of her employment. The wording states “P45 prior to covid lockdown in Australia agreed to P45 – expected.” The list also includes the forecourt cleaner. This left four members of staff who were not prepared to enter into a voluntary arrangement with the respondent. These were listed on page 57. The note for the claimant states

> “Works TSS and Mond due to other job as a college lecturer less able to be flexible with shifts due to other job not willing to cover nightshift

not a good timekeeper but reliable not willing to work own without breaks alcohol licence holder."

The other three individuals are all noted as being flexible but albeit with some not willing to cover night shift. One is stated to have a 'knowledge of office work and the ability to keep the company running if Gail went off sick'. The other two indicated they were willing to work any shifts and had good timekeeping and were reliable. They were willing to work alone without breaks. From this information Ms Reid put the information for each of the four into a scoring matrix. This was lodged (p55-56A). The scoring matrix had 10 people in the pool. This was on the basis that the forecourt cleaner was not included nor was the attendant/cashier who had gone to Australia. Of these 10 six were noted as having either agreed termination or agreed to go on hold. The other four were scored on reliability, punctuality, flexibility, disciplinary actions, knowledge and 'willingness to work under covid risk'. Scores were allocated by Ms Reid between 0 and 5. This was based on her own personal knowledge of the individuals together with whatever she could glean from their personnel file.

22. It should be noted that at no time did the respondent write down a redundancy plan. They did not have any pre-existing redundancy policy. The process appears to have been that Ms Reid checked the ACAS site and checked on the internet. She accessed the site for ACAS, the gov.uk site and also an advice site ran by Sage their payroll software provider.

23. The claimant scored 5 under reliability, 3 under punctuality, 3 under flexibility, 4 under disciplinary actions, 4 under knowledge and 5 under 'willingness to work under covid risk'. The 4 for disciplinary was reduced from 5 on account of two disciplinary warnings which the claimant had been involved in. It was unclear precisely when these disciplinaries took place although the respondent conceded that both were some time in the past. The claimant's total score was 24. The other three members of staff all scored 29.

24. Neither the claimant nor any other member of staff were told what Ms Reid was doing. They were not told that redundancies were in contemplation, albeit, like everyone else, they may well have had considerable concerns

as to whether their job was sustainable going forward in the pandemic. None of the four were told that they were at risk or that they were being scored in a redundancy matrix.

25. Ms Melville-Evans decided on the basis of the matrix score produced by Gail Reid that the claimant should be dismissed by reason of redundancy. She was aware that the claimant had many years' service. She was aware that there would be a financial cost to the company in paying the claimant a redundancy payment together with her notice pay. Her view however was that there was no alternative but to make a member of staff redundant and the claimant as the lowest scoring employee in the pool was the member of staff who should go. She was aware that the claimant's redundancy payment was such that it would probably be cheaper to pay the claimant's furlough for a number of weeks however she did not wish to do this because the company would then be entering into a long term commitment. She was also aware that she would be able to pay the redundancy money after a period of a few weeks. If necessary she was prepared to pay this out of her own private resources. The difficulty with the furlough scheme as she saw it was that she understood she would require to pay the furlough money immediately and without any cash flow coming in there was simply no immediately available funds to make this payment. She also felt that it would be unfair to only furlough the claimant because she had long service and not furlough all of the other employees. She could not afford to pay furlough money for all of the other employees even in the short term.

26. The claimant attended work as normal on 30 March. By this time the claimant had agreed to work shorter shifts of five hours. 30 March was the second such shift she would be doing. On arrival, the claimant clocked in and was then told by Ms Melville-Evans to come to a meeting in her office. At that meeting the claimant was told she was being dismissed by reason of redundancy. Ms Melville-Evans explained to the claimant the dire financial position the company was in. She explained that the company's bank had refused to extend their overdraft or provide them with a covid loan. It was explained to her that no money was coming in to the company and that the company would very quickly be trading insolvently.

She was told that whilst she was being made redundant she would be invited back to work just as soon as the company was in a position to re-employ her. The claimant asked if she could be furloughed and Ms Melville Evans explained to her that this was not an option for the company.

27. The claimant was extremely upset at this meeting. The claimant had not received any notice that the meeting was to take place. She had not received any notice that the issue of redundancy was to be discussed. She had at no time been told by the respondent that the company was considering redundancies or that she was at risk of redundancy. She was not advised that a redundancy matrix had been used. She was not advised of her right to be accompanied to this meeting. She was not advised of her right to appeal the decision to dismiss her.

28. The claimant's last day of work was to be 2 April. On 1 April the claimant attended work. Gail Reid spoke to her and told her that the redundancy could be revoked if the claimant changed her mind and was prepared to either "go on hold" or take holidays. The claimant was not prepared to take either option. She explained that she needed money coming in from employment.

29. On 2 April the claimant was provided with her P45 together with a letter confirming that she had been dismissed by reason of redundancy. The letter was lodged (page 64). It states

> "It is with great sadness that we have had to take the decision to close much of the business with immediate effect.
> We do not have the Clydesdale Bank's support to access either a commercial loan or the government's business interruption loan and therefore are not able to furlough our staff.
> Your redundancy notice will enable you to claim any government benefits due to you.
> I fully intend to re-open all of the business when this crisis is over. Meanwhile we hope that you and yours will remain well and that we will all emerge from this experience able to start afresh."

30. The respondent's management view was that although the business was still open it was likely to be a matter of days before they were instructed by the government to close. As it happened due to pre-existing rotas and shifts they remained open on the weekend of 28 and 29 March. They also remained open on 4 and 5 April. On 8 April the respondent received an unexpected email from the police which turned out to be a 'game changer' in respect of the future continuation of the business. The respondent were advised that the government had drawn up a list of businesses which were considered to be part of the UK's critical national infrastructure. The respondent's location meant that they were used by ambulances and the emergency services for re-fuelling. They were also a service station heavily used by commercial vehicles servicing the supermarkets. For whatever reason (and the respondent's Chief Executive indicated she could only speculate) the respondent's business had been placed on this list. That meant that they would receive financial support from the government to remain open 24 hours a day. Essentially this meant that the anticipated reduction in the need for filling station staff had been reversed.

31. Ms Melville-Evans asked Ms Reid to contact the claimant and essentially offer her her job back. Ms Melville-Evans had in mind to offer the claimant her job back on the basis of preserving her continuity of employment albeit that in terms of the legislation it may well already have been too late to do this.

32. Ms Reid texted the claimant on 9 April. The exchange of texts was lodged (page 65). Ms Reid said to the claimant

> "Will have two by six hour shifts min available per week from some point next week if you're interested"

The claimant responded the following day

> "Struggling to do anything at mo apart from care for parents"

33. Ms Reid was aware that both of the claimant's parents had recently undergone operations and she understood the claimant to be saying that

during the pandemic she required to stay at home so that she could be in a position to look after her parents. Ms Reid responded

> "OK so not viable for you at mo"

The claimant responded "not at mo".

5 34. Over the course of the next week or so the respondent re-hired staff to enable them to run the filling station 24/7. Most of their staff agreed to come back. Some of their staff had received redundancy payments (those who had voluntarily agreed to retire) and they kept their redundancy payment whilst still getting their job back. Most are still in the respondent's
10 employ.

35. On 16 April 2020 Ms Reid again texted the claimant stating

> "When are you likely to be ready to start back".

The claimant did not respond to this. Ms Reid sent a further text to the claimant on 24 April asking her how her father was getting on to which she
15 did not receive a response.

36. On 20 April the claimant wrote to the respondent (page 66). This stated

> "Following your letter dated 2 April 2020 dismissing me by reason of redundancy I am still waiting on my notice pay and redundancy payment following your letter issuing my P45 I expect that these
20 monies to follow.
> I believe that you have not only unfairly but wrongfully dismissed me in this manner. This has caused me significant stress and the complete breakdown in the trust between us. I cannot return to working for you in any capacity. You did not even afford me the right
25 of appeal against my dismissal.
> I look forward to hearing from you in regard to the monies that are owed to me."

37. The respondent's Ms Melville-Evans wrote to the claimant in reply on 27 April (page 67). She set out the respondent's position and indicated
30 that they had acted as they had because the survival of the company

required them to take immediate action. She confirmed that she had asked Ms Reid to contact the claimant on 9 April offering her a return to work under the new rota. She went on to state

> "As discussed with you at the time you left your redundancy would be reversed if work could be found for you or the company was later to be able to offer you furlough. You were the first person to be offered reinstatement as soon as work became available and had you wished to return to work the issue of redundancy payments etc would not have arisen. Your wish not to return to work also made it impossible for us to even consider reinstatement and furlough under the HMRC terms."

She went on to confirm that the company intended to make the statutory payments due.

38. On or about 23 April the respondent had received a business interruption grant from Angus Council amounting to £25,000. This sum was used to pay other pressing bills and was not utilised in paying the redundancy payments for the claimant or anyone else. The respondent finally made the payments of redundancy pay and notice pay due to the claimant on 28 June 2020. Payments were made not only to the claimant on this date but also to various other employees who had been employed in the café business who had been made redundant. The payment was delayed until this point due to the respondent's cash flow issues.

39. Following her dismissal the claimant applied for and was granted Universal Credit. A schedule showing the Universal Credit payments which she received was lodged (page 177). As part of the qualifying requirements for Universal Credit the claimant required to make various job applications and keep a list of these. The document listing the claimant's job search related activity was lodged (page 178-181). The claimant completed various application forms between April and May 2020.

40. As noted above the claimant had a temporary contract with Angus College. She was able to devote more of her time to Angus College as a result of not having the job with the respondent. She was successful in August 2020 in obtaining a full time permanent position with Angus

College. From around mid September 2020 her pay from Angus College reached the point that it was slightly higher then the combined pay which she had previously received from both Angus College and the respondent.

41. The claimant's pay slips with Angus College for the period from December 2019 to March 2021 were lodged (page 182-197). These show that in the period of 12 months to 26 March 2020 (i.e. whilst the claimant was working for the respondent) her total taxable pay with Angus College was £9874.15. This figure is gross. The precise pay that the claimant would receive for a particular period was dependent on the number of hours she worked and the type of work she was doing. In the period to March 2021 (i.e. after her dismissal) her pay amounted to £15,526.64 gross. The claimant's view is that by around mid-September 2020 her weekly income from Angus College was around the same as her total income from Angus College and the respondent in the period up to March 2020.

Matters arising from the evidence

42. At the end of the day there was a considerable amount of agreement between the parties as to the events which had occurred. I was prepared to accept the evidence of the respondent's Ms Melville-Evans as to her thought processes at the time. She was clearly faced with a very difficult position which she saw as posing an existential risk to the business. Some of her evidence indeed was fairly apocalyptic in its terms. At one point she expressed the view that she believed the army would probably take over fuel distribution. I accepted her evidence that the company was already in an extremely delicate financial position before the pandemic hit. This is corroborated by the email from the claimant's bank. I considered that Ms Melville-Evans was genuine in stating her belief at the time that the company could not afford to make the upfront payments which would be required under the furlough scheme and that she anticipated that repayments by the government to the company would take place on a much longer timescale than was indeed the case. I also accepted the evidence of both respondent's witnesses that Gail Reid had sat down and produced the document listing the strengths and weaknesses of the various employees and that she had produced the matrix document. The respondent's witnesses also accepted that they had at no time specifically

told the claimant that she was at risk of redundancy. They confirmed that the claimant did not have any formal notice of any of the meetings/conversations which she had had with Gail Reid. She was not told that these were anything to do with a redundancy process. She was not told that a redundancy process was ongoing. I accepted the claimant was genuine in her evidence that she was absolutely devastated and surprised to be told that she was being dismissed by reason of redundancy. I accepted that she was genuine in stating her view that whilst she was aware that the pandemic might lead to redundancies she thought this would be at some future date and that she would have had some notice of this. I also accepted she was genuine in her view that she felt that if compulsory redundancies were on the cards that she would be last in line given her length of service and indeed the fact that she had just completed a course to be the alcohol licence holder for the business.

43. The claimant's evidence regarding the steps she had taken to mitigate her losses was fairly vague. I accepted that she had carried out the job search activity listed by her. I note that some of this simply refers to doing research about possible jobs rather than actual job applications. The claimant also accepted that she had caring obligations to her parents over this period and I entirely accepted that in those circumstances she might wish to reduce her risk of exposure to covid. I accepted the claimant's evidence that her income had not returned to its pre-dismissal level until around mid-September.

44. In evidence the claimant accepted that Ms Melville-Evans had outlined the reasons for the redundancy to her at the meeting. She had discussed with her the fact the business had been turned down by the bank. The claimant's position was that none of this was really her problem. The claimant also accepted that Ms Reid had approached her following her dismissal and said that this could be reversed if the claimant agreed either to go on hold or take paid holiday. I accepted the claimant was genuine when she stated that she was not in a position to afford this. The claimant's evidence was that she was not prepared to go back to work when approached by Gail Reid on 9 March because she was so upset and angry at the way she had been treated. She also indicated she was

unhappy about working a six hour shift without a break. Oddly, the claimant also indicated in evidence that had she been aware that her supposed lack of flexibility was likely to count against her in a redundancy selection process then she would not have objected to the altered shift pattern. She pointed out that she had in fact worked two shifts under the new pattern. Her position was that she was not happy about working the altered shift pattern but was actually prepared to do it.

45. The claimant did not seek to challenge the redundancy matrix in any specific way other than on the issue of her perceived flexibility. She did not challenge the issues raised about her time keeping. Although it was suggested in cross examination that the disciplinaries the claimant had been involved in were not recent (and accepted by the respondent) no evidence was given from any party as to precisely when these disciplinaries dated from and whether or not it would have been legitimate to include reference to them in redundancy scoring.

46. On the issue of the statement of terms and conditions the claimant accepted that she had received a document at the time she started working for the respondent. When the document at page 151 was put to her she said "I would say this was something similar – yes." There was a dispute between the parties as to whether the claimant was working under a zero hours contract as Ms Reid understood the position to be or whether she had fixed hours of work as the claimant understood the position to be. If I were required to make a finding of fact in relation to this then my finding would be that the claimant probably was on a zero hours contract. It appeared to me from the work pattern provided that the claimant worked to a rota and worked different hours each week. If she did have a minimum number of hours of work guaranteed to her then I would have expected the claimant to know what this was and for this figure to feature in negotiations over rotas etc so that both parties would have been well aware of this.

Issues

47. A list of issues was agreed between the parties and lodged (page 48). The claimant claimed that she had been unfairly dismissed. It was

common ground between the parties that she had received a redundancy payment which would be equivalent to the basic award to which she would be entitled. If I found that she had been unfairly dismissed I would require to determine what compensatory award should be made. The claimant also claimed that when the proceedings commenced the respondent were in breach of their obligation under section 1 of the Employment Rights Act 1996 to provide a statement of initial particulars of employment.

48. Both parties made full submissions. The claimant's representative referred me to the well-known case of ***Polkey v A E Dayton Services Limited***. It was their position that the dismissal was procedurally and substantively unfair and that no Polkey reduction ought to be made from any compensatory award. The claimant's position was that the dismissal was fair given the size and resources of the respondent. It was their position that the claimant had failed to mitigate her loss. The respondent did not specifically put forward a defence under section 141 of the Employment Rights Act 1996 to the effect that the claimant had been offered suitable alternative employment and in any event I accepted the claimant's position that such a defence would not have been appropriate given the respondent's position that the offer had been made by Ms Reid after the effective date of termination. Rather than repeat the submissions at length I will deal with them where appropriate in the discussion below.

Breach of section 1 of the Employment Rights Act 1996

49. Both parties were in agreement that this was a question of fact which I required to determine on the basis of the balance of probabilities. My view was that on the balance of probabilities the claimant had received a statement of initial employment particulars which was in the same form as the document lodged at page 151. It appeared to me that the document at page 151 would, if properly completed, contain particulars of the various matters which are set out in paragraph 1. The factors which led me to this conclusion are

1. The fact that the claimant accepted that she had received a document at the outset of her employment and that this was "something similar" to the document at page 151.

2. The respondent's explanation for the fact that the original document was no longer in their records.
3. The inherent unlikelihood that the respondent having been in the habit of issuing a compliant document for employees starting in 1988 would by the year 2005 have changed that document for something which did not comply with the legislation.

50. I had some hesitation in coming to this view given that one of the difficulties here is that given that neither party had a copy of the document it is not possible for one to say with any certainty what was in it. It could well be said that the purpose of section 1 is to ensure that both parties are aware of their basic rights and obligations under the contract and this was not fulfilled here. That having been said, the terms of the 2002 Act require me to be satisfied on the balance of probabilities that when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) of the Employment Rights Act 1996. The duty under section 1 is to "give to the employee a written statement of particulars of employment." Section 1 says nothing about keeping a copy of it. In this case I was satisfied that a written statement of particulars of employment was given to the employee.

Unfair dismissal

51. The right not to be unfairly dismissed is contained within Part X of the Employment Rights Act 1996. Section 98 provides

> "(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."

52. In this case it was the respondent's position that the reason for dismissal was redundancy which is a potentially fair reason for dismissal falling within section 98(2)(c) of the said Act.

53. Redundancy has a statutory definition which is contained in section 139 of the Act. Section 139(1) provides

> "For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
>
> .....
>
> (b) the fact that the requirements of that business -
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish."

54. It was the respondent's position in this case that a redundancy situation existed because the requirements of the respondent's business for employees to carry out work of a particular kind namely the work of filling station attendant/cashier were expected to diminish. The reason the need for filling station attendants was expected to diminish was firstly because there had been a significant downturn in the turnover the business due to the onset of the pandemic and secondly the respondent's decision that in response to that downturn in business they would require to curtail the opening hours of the business so that it did not open at night and weekends. In addition to this the respondent required to change the shift pattern of employees so as to comply with social distancing requirements by only having one attendant on at a time.

55. I found as a fact that there had been a downturn in business and that the respondent had a genuine plan to reduce the opening hours of the business by closing at evenings and weekends. I accepted that the requirements of the business for filling station attendants/cashiers had diminished as a result of the new shift pattern and was expected to further diminish as a result of the closure at evenings and weekends. It was therefore my view that there was a genuine redundancy situation involving filling station attendants/cashiers. There was no evidence that there was any ulterior motive for dismissing the claimant other than this redundancy situation and the fact that the respondent required to reduce the number

of filling attendants/cashiers they employed. It is therefore my view that the terms of section 98(1) had been met and that the reason for the claimant's dismissal was redundancy.

56. Section 98(4) of the Act goes on to state

5 "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking)
10 the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

57. I was referred by the claimant's representative to the well-known case of
15 ***Polkey v A E Dayton Services Ltd*** [1988] AC344. This makes it clear that procedural fairness is an important part of overall fairness. As Lord Bridge of Harwich stated

"In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees effected or
20 their representative, adopt a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case the one question the industrial tribunal in not permitted
25 to ask in applying the test of reasonableness goes by section 57(3) the forerunner of section 98(4) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. …"

58. The well-known case of ***Williams v Compair Maxam [1982] IRLR 83*** also
30 set out the steps which an employer is required to take before a redundancy dismissal can be regarded as fair. These are

(a) Were any affected employees warned and consulted,

(b) did the employer adopt a fair procedure in deciding who to select for redundancy, and

(c) did the employer take reasonable steps to consider whether it could redeploy or find alternative employment for the employee.

5 59. In each case the approach which the Tribunal required to take to each question is that of the band of reasonable responses. It is not enough for the Tribunal simply to consider that the Tribunal would have done things differently. The Tribunal requires to make a finding that the employer's behaviour was outwith the band of reasonableness.

10 60. In this case it was clear to me that there were procedural defects in the way that the respondent approached matters. In terms of section 98(4) I am required to take into account the size and administrative resources of the respondent. The claimant's representative pointed out that the respondent had around 47 employees. I would agree that they could not 15 be considered a small employer. That having been said it was also clear to me that they had fairly limited administrative resources. Their Managing Director Ms Melville-Evans described herself as first and foremost a tenant farmer. The filling station manager Ms Reid accepted that she had no training in HR. The claimant's representative pointed out that the 20 respondent would have had access to outside agencies for advice. It was clear to me that they had used such outside agencies as were available to them free namely ACAS and the limited helpline provided by their payroll software provider Sage. It was clear from the letter from the bank manager that the respondent were not in a good way financially. In such 25 circumstances it is perhaps understandable that the management would not wish to incur additional expense by hiring a paid external HR Consultant. On the other hand modern businesses are subject to a substantial amount of regulation and in all fields businesses are expected to know the rules relating to what they are doing. In my view this also 30 applies to employment law. Just as the respondent required to comply with health and safety rules in their café kitchen they would be expected to know what the rules were in respect of employment of staff. I therefore did not consider that the respondent's failures could be entirely excused on the basis of their lack of administrative resources. It was up to the

respondent to ensure that they had sufficient administrative resources to take on the task of employing staff and complying with modern employment law.

61. The claimant's representative indicated that although there was some consultation in this case it was entirely inadequate. I would agree with that. The main difficulty was that the claimant was at no time specifically told that a redundancy situation existed and that her job was on the line. It was clear from the evidence that the discussions with Gail Reid were informal chats held in between customers at the cash desk. The claimant was therefore denied the opportunity of considering whether there were any proposals which existed which might allow her to keep her job. The fact that the claimant was being asked in general terms whether she was happy about the new shift pattern and whether she would be prepared to take holidays or a period of unpaid leave was not in my view sufficient consultation. With regard to the issue of consultation and for the avoidance of doubt I did not consider that the final meeting with Ms Melville-Evans on 30 March was part of a consultation process. There was no consultation. Ms Melville-Evans simply called the claimant in to tell her that she was being dismissed by reason of redundancy.

62. On the other hand, it did appear to me that the procedure adopted by the respondent in deciding who to select for redundancy was a fair one. It was clear to me that Ms Reid had not only consulted the ACAS website but taken on board what she had to do and I do not find anything wrong with the methodology adopted in producing the matrix nor indeed in the scoring of the matrix. The claimant argued that she should not have been marked down so much in her score for flexibility since she had not appreciated that she was being asked about flexibility in the context of a redundancy situation. She did not question the score for timekeeping. Apart from the fact that the disciplinary was some time in the past I did not hear any further evidence regarding what this was about or indeed whether this was a disciplinary warning which had expired or was still extant on her record.

63. It appeared to me that Ms Reid had approached the scoring process conscientiously and that her scoring had been an honest attempt on her

part to, in Ms Melville-Evans' words, "set out the pluses and minuses for each member of staff".

64. On the issue of alternatives to dismissal I also find that the respondent's decision was within the band of reasonable responses.

65. I accepted the respondent's evidence that they considered they were faced with an unprecedented crisis which was existential so far as the business was concerned. Without cash coming in they would run out of money to pay wages within a week or so. It was clear that the bank were entirely unwilling to help and the bank manager's comments with regard to the financial strength of the business made it highly unlikely that the respondent would be able to obtain funds from any other source. They were faced with the need to move quickly.

66. It was clear that the respondent did take considerable steps to try to avoid compulsory dismissals on the basis of redundancy through the consultation process which they did carry out with staff. Without in any way detracting from the fact that I consider the claimant's criticisms of the consultation process to be entirely justified the process was successful in obtaining an amicable resolution in respect of six of the 10 members of staff and indeed the other two who were not specifically in the same pool as the claimant. Matters were no doubt easier for the respondent given that many of their employees had been instructed to shield by their medical advisers and that it therefore suited them very well not to come in to work. It was clear to me that the respondent were doing what they could to avoid compulsory redundancies by reaching voluntary agreement with other members of staff. The question arises as to whether a reasonable employer in those circumstances would have used the government's furlough scheme. I believe the correct question to ask is whether it is, in the circumstances, outwith the range of reasonable responses for the employer to decide not to use the furlough scheme.

67. With regard to this issue I accepted the evidence of Ms Melville-Evans that at the time she considered the terms of the government's furlough scheme. Her view was that it would not be fair to furlough the claimant and not furlough all staff who were affected. I accepted her evidence that

her concern was that the company would not have sufficient cash flow to pay the 80% of their wages bill going forward until such time as they received reimbursement from the government. It was clear to me that at least initially she had based this assessment on a faulty understanding of when the government were likely to reimburse the company but even without that misunderstanding I consider that the decision not to furlough was one which, as the custodian of the company's finances, she was entitled to make. I also did not consider that it would have been appropriate for the respondent to wait a little bit longer before instituting redundancy dismissals. The information which they had at the time suggested that the company required to take immediately steps to reduce its wage bill in order to remain solvent. Ms Melville-Evans mentioned her duties as a director not to trade the company while insolvent. She indicated that given that the last trading accounts showed that the overall capital value of the company was £8000 or so she was highly aware of her responsibilities in this regard given the company's weekly wage bill.

68. At the end of the day my view is that the failure to consult in this case renders the dismissal procedurally unfair. In addition to this I was entirely satisfied that the claimant was not given a right of appeal. I accepted Ms Reid's evidence that, on the instructions of Ms Melville-Evans, she spoke to the claimant the day after her dismissal was announced to say that "things did not need to be this way" and that the claimant could remain in employment if she agreed to one of the (fairly unpalatable) alternatives suggested by the respondent. This was not in any sense an appeal.

69. Given the lack of consultation in this case it is my view that the dismissal was unfair in terms of section 98(4). That having been said I am required to go on to consider whether or not to make a ***Polkey*** reduction in this case on the basis of the respondent's contention that even if a fair process had been carried out then the claimant would have been dismissed in any event and that any compensatory award should be reduced accordingly. I believe it is better to do this before discussing the amount of any compensatory award and before discussing any question of how or if this should be reduced due to the claimant's alleged failure to mitigate.

70. As noted above I consider that the dismissal was unfair due to a lack of consultation. As is noted in the ***Polkey*** case the test of reasonableness may be satisfied if in the exceptional circumstances of a particular case the procedural steps normally appropriate would have been futile and would not have altered the decision to dismiss. If it would not have been entirely futile I am obliged to consider the likelihood of the claimant having been fairly dismissed in any event had a fair procedure been carried out.

71. In making the assessment of a ***Polkey*** reduction I am required to indulge in a speculative exercise. In this case I believe that had the respondent behaved appropriately they would have still felt themselves under enormous time pressure to make a decision. They ought to have advised the claimant in writing that a redundancy situation existed and that the respondent would be carrying out a redundancy selection exercise. The claimant should have been formally advised that volunteers for voluntary severance, unpaid leave or staff taking holidays were being sought. The claimant should have been formally invited to a meeting. She would have been given the right to be accompanied at this meeting. She would have been told that one of the factors being considered was that of flexibility. This process would have been carried out for all staff and the respondent would then have produced the documentation they did regarding the strengths and weaknesses of members of staff and a redundancy matrix.

72. In my view had this process been carried out there was a virtually 100% chance that the claimant would have been selected for redundancy in any event. The claimant's representative made much of the fact that the claimant was being asked about her flexibility to work the new shift pattern in a vacuum. She was not told that her answers might affect her scoring in a redundancy matrix. On the other hand Ms Reid was quite clear that she did the scoring essentially on the basis of her own knowledge of each of the employees concerned. Ms Reid indicated that most employees stay with the company for a long time. She had worked closely with all of them and knew them. I do not consider that the marks for flexibility were based entirely on the consultation process. They were based on Ms Reid's personal knowledge of each employee gleaned over a number of years. It is also clear that even if the claimant had managed to increase her score

by one or two points this would have made no difference since she was five points below the score which the other three members of staff had.

73. The claimant's representative indicated that if a proper procedure had been carried out then this would have dragged on until after the 8 April. On that date the respondent received the call from the police which Ms Melville-Evans described as a gamechanger. This led to the plans to close the filling station at weekends and at night to be shelved. In my view there is little doubt that if the redundancy process had dragged on and still been ongoing as at 8 April then the claimant would not have been dismissed. The question I therefore have to answer is how likely it is that a fair redundancy process would in fact have dragged on until 8 April. My view is that, unfortunately for the claimant, there was a very low possibility that this would have happened. The reason for the respondent dealing with things quickly was not because they were rushing the process. The reason they rushed the process was because they were under enormous time pressure. If the respondent had taken proper advice then their advisers would have taken that time pressure into account and in my view there is a very high chance that the claimant would have been dismissed prior to 8 April. In my view therefore the chance of the claimant having been dismissed in any event had a fair procedure been carried out was extremely high. I do not agree with the respondent that there was a 100% possibility of this happening but for the reasons outlined above I consider that there was a 90% chance of this happening.

74. The claimant has already received a basic award. The respondent is seeking a compensatory award and lodged a schedule of loss. The basis on which this was calculated was not entirely clear to me given the claimant's own evidence that by about mid-September 2020 she was earning the same if not more than she had been previously due to the new contract which she had received from her employment at Angus College. Both parties mentioned the fact that the claimant's final pay slip in March 2021 from Angus College showed that in fact over the course of the year she had recouped much of her loss. In my view the appropriate way to calculate the claimant's wage loss is to look at how much she has lost up

until mid-September 2021 when on her own admission her earnings returned to their pre-dismissal level.

75. Before I make that calculation I require to address the issue of mitigation of loss. The respondent's position was that the claimant could have mitigated her losses entirely by accepting the offer of re-engagement made by Ms Reid on 9 April. The claimant's position was that she did not accept this because by that time all trust and confidence had gone. She said this was because of the way she had been treated. It is noteworthy that this is not the explanation which the claimant gave at the time. She indicated at the time that she wished to look after her parents. That having been said I accepted the claimant's evidence that her dismissal had come as a tremendous blow to her. She had been employed by the respondent for 15 years. It was clear that she had absolutely no empathy with the position which the respondent found themselves in as a result of the pandemic. Whilst many employees would have taken a different attitude I consider that, on balance, in the circumstances of this particular case, the claimant's duty to mitigate her losses did not extend to forcing her to return to work for the respondent in those circumstances.

76. The claimant's gross weekly wage was £230.37 and her net weekly wage £224.64. She received notice pay until 30 April 2020. In my view she is entitled to receive her wage loss for the period between 30 April 2020 and 15 September 2020 when on her evidence her earnings were restored to their previous level. This is a period of 20 weeks. This gives a figure of £4492.80. I note this does not in fact differ significantly from the wage loss figure provided by the claimant for the year to April 2021 after deduction of the claimant's total earnings from Angus College. The claimant sought repayment of an additional sum in respect of the employer's pension contributions which would have been paid. He accepted the figure contained in the schedule of loss was incorrect but did not provide an updated figure. On the basis of the evidence the respondent paid 3% of wages excluding the first £120. On my figures this means that the claimant paid 3% of £110.37 per week = £3.31 per week. The claimant is entitled to reimbursement of this amount for the 20 week period amounting to £66.22 and then that brings the total wage loss to £4559.02.

77. To the figure of £4559.02 I would add a sum of £350 for loss of statutory rights. The claimant sought a higher figure but I note that in this case the claimant probably does have statutory rights in her new employment. In any event I considered the figure sought by the claimant to be too high. This gives a total compensatory award before adjustment of £4909.02.

78. The claimant sought an uplift of 25% in this case due to the respondent's failure to follow the ACAS Code by giving a right of appeal. There was a failure to comply with the ACAS Code in that respect. I consider the sum sought by the claimant to be too high. As noted above the respondent, although a reasonably large employer, have very limited resources. Ms Melville-Evans had been heavily involved in all of the decision making including the decision to dismiss. Had the respondent been better advised from the start they would have avoided this state of affairs or alternatively arranged for an outside agency to carry out the appeal. That having been said given my other observations such an appeal would have been very unlikely to change the final result. The claimant was, after all, offered her job back. In all the circumstances I consider a 10% uplift to be appropriate.

79. This would give a total compensatory award before ***Polkey*** reduction of £5399.92. A ***Polkey*** deduction of 90% reduced this sum to £539.99.

80. The recoupment regulations apply. The prescribed element is £455.91 (wage loss x 10%) and relates to the period between 30 April and 17 September 2020. The monetary award exceeds the prescribed element by £84.08.

Employment Judge: **Ian McFatridge**

Date of Judgment: **19 May 2021**
Date sent to parties: **19 May 2021**