EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104831/2019 and others (V)

Final Hearing Held remotely on 4, 5 and 6 May 2021

Employment Judge A Kemp

Mr M Mitchell	**First claimant In person**
Mr D Morrison	**Second claimant In person**
Mr A Robertson	**Third claimant Represented by Mr D Morrison**
Ethigen Ltd	**Respondent Represented by Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimants were not unfairly dismissed by the respondent, and the claims are dismissed.

REASONS

Introduction

1. This was a Final Hearing into combined claims, all arising out of the same overall circumstances. The claims were for unfair dismissal, and all claims were defended. The first and second claimants appeared and acted for

themselves, but the third claimant did not appear himself, he being seriously ill at present it is understood, having suffered a stroke. His interests were represented by the first and second claimants so far as was possible. Mr Millar appeared for the respondent.

2. The claims were originally made against two respondents, being Ethigen Limited as first respondent and a company named SKH Logistics (UK) Limited as second respondent. The claims originally made concentrated on an argument that there had been a relevant transfer. After a Preliminary Hearing held on 19 February 2020 it had been determined by Judgment dated 1 June 2020 that there had not been a relevant transfer to the second respondent. The claims against the second respondent were dismissed, and thereafter the claims proceeded against the first respondent, latterly therefore the sole respondent. Further particulars of the claim against the respondent were provided. It was argued that there was no redundancy and that if there was it was unfair.

3. Prior to the giving of evidence I explained to the claimants present how the hearing would proceed, that Mr Millar would give his client's evidence first as they had the onus of proof for showing the reason or principal reason for dismissal, that cross examination should address firstly evidence given by that witness which was not accepted and secondly evidence not given but which that witness was expected to know about which would be given by the claimants in their evidence, that there may be re-examination of matters raised in cross examination or questions from me, and that that process would then apply to their own evidence when given. I explained that when evidence was given by the four witnesses who were appearing on witness order, called by the claimants, that questions should not be leading questions, and set out what such questions were. I confirmed that once the evidence was given it was only in exceptional circumstances that further evidence could be heard, and that the hearing would move to submissions on the facts and law.

4. The hearing was conducted remotely by Cloud Video Platform. The hearing proceeded effectively, and all participants were able to hear and

see the others. I was satisfied that the hearing was conducted adequately and that it was appropriate to make a decision on the basis of it.

The issues

5. At the commencement of the hearing I set out a proposed list of issues, which the parties agreed with. They were:

(i) What was the reason, or principal reason, for the respondent's dismissal of the claimants?

(ii) If that was a potentially fair reason, was it fair or unfair under section 98(4) of the Employment Rights Act 1996 and in that regard

(a) Did the respondent consult each of the claimants as a reasonable employer could?

(b) Did the respondent conduct the process as a reasonable employer could, including in respect of whether or not to "pool" the claimants with other employees?

(c) Did the respondent consider alternative employment for the claimants as a reasonable employer could?

(iii) In the event that the claimants succeed, to what remedy should each be entitled, having regard amongst other matters to the ***Polkey*** issue?

The evidence

6. There was both a Joint Bundle of Documents, and a separate Bundle which the claimants had produced which contained some of the same material as in the Joint Bundle, and some additional documents. Whilst that was not in accordance with the terms of the case management orders, it was possible to work with it. The second claimant had also sent an additional document shortly before the hearing. Not all of the documents in each Bundle were spoken to in evidence. Additional documents were submitted during the hearing.

7. Mr Martin Dunn, Senior Manager and Mr Nigel Kelly, Chairman gave evidence for the respondent. The first and second claimants gave evidence for themselves, and called four witnesses from the respondent,

all of whom attended by witness order, being Ms Kristina McKean their HR Manager, Hugh Starrs their Transport Manager, John Mockus who had been a driver of the respondent and is now retired, and Daniel Bodrus who had been a Transport Manager of the respondent and had latterly been employed as a driver by them for about the last two years.

The facts

8. I found the following facts, material to the issues, to have been established:

9. The first claimant is Matthew Mitchell. He was employed by the respondent as a driver from 18 March 2014. He resides in Fraserburgh.

10. The second claimant is David Morrison. He was employed by the respondent as a driver from 5 January 2011. He had also been employed by them in the period 2006 to 2008. He resides in Hopeman.

11. The third claimant is Alexander Robertson. He was employed by the respondent as a driver from 5 December 2015. He resides in Aberdeen.

12. The respondent is Ethigen Limited. It is a company incorporated under the Companies Acts. It was founded by Nigel Kelly, who is its Chairman. It is a wholesale supplier to retail pharmacies. It has headquarters in East Kilbride, and employs about 260 employees. It has other premises in the United Kingdom and in Ireland.

13. The first and third claimants had a statement of particulars of employment issued which stated the respondent's headquarters as their place of employment. A statement of particulars for the second claimant for his period of continuous employment was not produced in evidence. The second claimant signed a form on 24 January 2017 that stated he had read the respondent's Handbook and Contract Statement.

14. The respondent's Handbook had a brief reference to redundancy which did not set out any process to follow, or other material provisions.

15. The respondent operates under a licence issued by the Medicines and Healthcare Products Regulatory Agency (MHRA). The MHRA acts under

the Human Medicines Regulations 2012 which imposes duties on those providing medicines such as the respondent. The MHRA has the power to suspend or revoke any licence issued. As a part of its regulatory function it conducts inspections of premises of those it licenses both by prior arrangement and unannounced. The respondent supplies medicines to its customer pharmacies. They include over the counter medication, prescription medication, and medication that is controlled by separate regulation such as methadone.

16. The respondent is required by the MHRA to operate under Guidelines issued by the European Commission on 5 November 2013, on Good Distribution Practice of medicinal products for human use. They are referred to as the GDP Guidelines. Chapter 9.1 of those Guidelines state:

> "It is the responsibility of the supplying wholesale distributor to protect medicinal products against breakage, adulteration and theft, and to ensure that temperature conditions are maintained within acceptable limits during transport."

17. The MHRA issued its own guidance to licensees, based on the Guidelines, which the respondent referred to as the Green Book. It was most recently issued in 2017. It was not produced before the Tribunal.

18. The majority of the functions of the respondent, and the majority of its employees, are based in East Kilbride. It has other facilities, including in Bolton and Birmingham. It also used space of third party companies for transportation of supplies to its customers, including depots of Menzies Distribution Limited in both Aberdeen and Inverness.

19. The first claimant and the third claimant initially operated from such a depot in Aberdeen. The second claimant originally operated from such a depot in Inverness. For each claimant a pallet of supplies was prepared for them in East Kilbride, and sent to the depot by lorry operated by a logistics company, one for Aberdeen and one for Inverness. The lorry would then arrive at the depot at a location with CCTV coverage, the claimant or claimants would attend at the depot, the pallet would be unwrapped, unpacked and loaded into a van. That process was generally

known as “cross-docking”. After the van was loaded, the claimants drove it to their customer pharmacies on their routes, involving something of the order of 15 - 20 such customers. Making the deliveries took something of the order of five hours.

20. Each of the claimants knew the customer base they delivered to, and conducted their duties efficiently and effectively. The first claimant for a period of about three years to the point of dismissal operated route 68, based in Aberdeen city and surrounding rural villages. The second claimant operated for at least the last three years route 80. Based in Inverness, the Highlands, and Moray primarily. The third claimant operated route 24 from when he joined the respondent in December 2015, which was based around Aberdeen city and surrounding rural villages.

21. If one of the claimants was absent due to annual leave or otherwise, the respondent arranged for their route to be undertaken by a courier. The claimants each only operated on their own route for at least the last three years of their employment.

22. In about June 2018 the MHRA conducted an unannounced inspection of the Bolton premises of the respondent. Those premises were leased, but used only by the respondent. The MHRA wrote to the respondent after that inspection on 6 July 2018, stating, inter alia:

> “The Inspector found evidence that Ethigen Limited have not conducted wholesale activities in accordance with the EU Guidelines [being those set out above]……The licence holder had not complied with the GDP and had not ensured the proper storage and distribution of medicinal products in respects of security and maintenance of temperature conditions. Specifically, the premises did not provide an adequate level of security while stock movement operations took place.”

23. The Bolton premises were used by the respondents as a “hub”, to which supplies of medicines were sent by lorry on pallets which were shrink-wrapped, those pallets were then unwrapped and unpacked, loaded onto vehicles for individual routes and sent out for deliveries to customer

pharmacies. The inspectors present intimated a concern that the premises could be accessed by those not employees of the respondent, who could then steal the medicines from the premises during that process. They expressed concern over the security of such cross-docking operations. The respondent sourced new premises in that area to increase the level of security, and changed their methods of operation there such that they used premises licensed by the MHRA.

24. Following that inspection and letter, the respondent reviewed all its operations, including those conducted from the depots it used in Aberdeen and Inverness. It did so involving its compliance team and a Quality Team involving more senior management. It conducted risk assessments of the operations including at Aberdeen and Inverness (those risk assessments were not produced before the Tribunal).

25. It was concerned that at the two depots in Aberdeen and Inverness the level of security was similar to that originally in place in Bolton, but that the depots were used by other parties both employees of Menzies Distribution Limited and other customers of that company, such that those with an entitlement to be present at those depots could also gain access to the medicines leading to a risk of theft.

26. The respondent sought to find alternative premises which would resolve the concerns over security in each of those locations, but were not able to do so. They then decided to introduce a new arrangement for those locations, by which a van was used for each route. The van was packed in East Kilbride, and a driver drove it to Aberdeen or Inverness. It was met at a supermarket car park by one of the claimants, who then took that same van to make the deliveries to customers on his route. On his doing so, he returned the van the next working day to the driver who had taken it north, and that driver returned it to East Kilbride. In turn the driver from East Kilbride handed over another van with a new day's stock for distribution to the claimant concerned. In effect the two drivers therefore swapped vehicles each working day. The vans all had the respondent's logo on and the location of the swap of drivers was the same, with the timing about the same, each working day.

27. The respondent was satisfied that that arrangement largely met the concerns over security, and allowed maintenance of temperature, but it involved additional resource in having extra drivers and additional vans. It was not cost effective and unless another solution was found the routes concerned would have been closed.

28. The respondent also operates deliveries to more remote customer pharmacies, which it cannot do cost effectively by its own vans. It does so by outsourcing the deliveries to courier and logistics companies. It calls that Route 51. Approximately 20% of its business is conducted by that method. The quantity of each delivery is smaller than for a pallet for one of the routes operated by the claimants. A risk assessment carried out by the respondent indicated that although there was a risk of theft or other loss of the delivery by use of such third party companies, it was the only cost effective way to do so, and the risk was reasonably controlled having regard in part to the limited quantity of medicines involved in each case. That matter had also been raised with the MHRA which was aware of the arrangement and did not contend that it was in breach of the Guidelines.

29. The respondent contacted a logistics company, SKH Logistics UK Limited ("SKH"), with which it had an existing arrangement, to ascertain if it could conduct the deliveries for customers in the Inverness and Aberdeen areas for it from the East Kilbride premises. It had audited that company for compliance. Chapter 7 of the Guidelines had provision for outsourcing, and a requirement for contractual arrangements on what was to be outsourced. SKH suggested that it could provide a service to the respondent for the three routes, being those operated by the claimants. The respondent decided on a trial of that arrangement.

30. On about 14 November 2018 Mr Martin Dunn of the respondent telephoned each of the claimants to inform them of the possibility of a redundancy of their position, and that a letter would be sent. A letter was sent to each claimant on that date stating that the respondent intended to restructure some of the delivery routes and that his role had been identified as one which was at risk of redundancy. It stated that before any

final decision was to be made, the claimants were invited to a meeting for the respondent to explain fully the situation, and to hear their views.

31. The meetings with the claimants, with Mr Dunn and Ms Kristina McKean of HR, took place on 19 and 20 November 2018. A minute of each meeting was kept by Mr Dunn, prepared that or the following day, and is a reasonable record of the same, subject to its omission of a discussion on alternative employment referred to below, and to points of detail. Mr Dunn explained that the respondent was committed to eliminate the security risk for the routes affected, that the van being swapped between two drivers was not cost effective, and that it had been decided to seek alternative solutions. It had been impossible to find an appropriate depot. The minute did not refer to SKH, but use of a logistics company was referred to. The first claimant indicated that he considered that the proposed system would not be compliant with regulations over driver hours. The second claimant raised a similar concern, and that the company would lose business if the proposal took place as he had strong relationships with customers. The third claimant did not raise particular issues save that he would not find another job. Mr Dunn raised with each claimant the issue of alternative employment. There were vacancies in East Kilbride, but each claimant lived a considerable distance from that location, and each indicated that a position working there was not suitable for them. No specific details of any vacancy was given by Mr Dunn to any of the claimants either at that meeting or later because of that. He understood that the claimants had no interest in such vacancies. Each of the claimants was given at that meeting a form with a calculation of the redundancy entitlement, which included an enhancement to their statutory entitlements.

32. On 20 November 2018 the second claimant received by email from Mr Dunn the Guidelines, and on 22 November 2018 Mr Dunn referred to Chapter 9.1 specifically. The second claimant responded on 24 November 2018 with his comments on that, and referred to customers receiving courier deliveries from mixed use depots, such that he did not consider that the route he operated was not compliant originally. Mr Dunn did not reply to that message. He did not agree with the comments made to him in it.

33. Following the meetings Mr Dunn raised with SKH the issue of drivers' hours, and was assured by them that all duties in law were met by its drivers on the proposed routes. In about late November or early December 2018 a trial of the arrangements was undertaken by SKH, and the claimants were all informed by email that they would take a week of paid leave during that trial (the emails were not before the Tribunal). The trial was repeated with amendments for a second week, and considered thereafter to have been a success by the respondent. The trial latterly involved the medicines for the Inverness route involved being packed in East Kilbride, then taken by SKH to their depot in Shotts, Lanarkshire, from there the van was delivered to customers on a route from Shotts to the locations of customers in the Inverness and Moray areas, with the driver returning the same day to Shotts. For the Aberdeen routes the vans were collected by SKH from East Kilbride, the deliveries made to customers in the Aberdeen area, and the van then returning to Shotts.

34. The service to be provided by SKH was capable of being conducted at materially reduced cost for the respondent, such that those routes could be maintained. It also avoided the risk identified by the respondent in having a branded van arriving in a public place, such as the Tesco supermarket in Aviemore in the case of the second claimant's route, or the Asda supermarket in Bridge of Don, Aberdeen for the other two routes, at about the same time on a daily basis, with the risk of being the target for a theft.

35. The respondent decided that that arrangement should proceed, and that it led to the redundancy of the claimants. It concluded a contract or technical agreement with SKH with regard to that (which was not before the Tribunal).

36. On 10 December 2018 Mr Dunn met the first and third claimants at the office in East Kilbride. He had offered to meet the second claimant but he could not attend due to a dental appointment, and the distances involved. Mr Dunn explained that it had been decided that the roles were redundant given the new arrangements with SKH.

37. Mr Dunn confirmed that formally by letter of that date to the first and third claimants. It referred to "the fact that we have been unable to identify a means of avoiding redundancy or to identify a suitable alternative role for you within the organisation." He wrote to the second claimant in similar terms by letter of that same date. In all letters he set out the fact of redundancy, that that would be effective on 14 December 2018 and provided details of the sums that would be paid. He further indicated a right of appeal. He expressed his regret at the redundancy.

38. The claimants all appealed their redundancy, the first claimant by letter dated 13 December 2018, the second claimant by letter of that same date and a further letter also of that date to Mr Dunn, and the third claimant by letter not before the Tribunal. On 14 December 2018 Mr Dunn replied to acknowledge the second claimant's letter and deferred the termination date to 21 December 2018.

39. On 19 December 2018 Mr Nigel Kelly wrote to each claimant to state that the appeal hearing would not be likely to be heard until January and continued the employment until it was.

40. Appeal hearings with each claimant were heard separately by Mr Kelly on 16 January 2019. A minute of the same was taken in each case and is a reasonably accurate record of the same. The first claimant raised the issue of a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006. He raised issues as to the dates of the letters and financial schedule. The second claimant raised issues as to the requirements for drivers' hours in relation to SKH, a relevant transfer and the GDP, on which he argued that the original arrangements were not a breach of the GDP. He asked why the arrangements had been changed and Mr Kelly set out the reasons for doing so. Mr Kelly referred to the respondent having a regulatory team for such issues. The second claimant indicated that he thought that he was being made a scapegoat with the respondent seeking to curry favour with the MHRA, and when asked to elaborate on an issue said to have arisen with a warehouse did not wish to do so. The third claimant argued that his role was not redundant, and

that he could only do the route undertaken by SKH by breaking the law. He also raised the issue of a relevant transfer.

41. Following those meetings Mr Kelly reviewed matters. He did not consider that the points made in the appeals were correct, although he reviewed matters primarily from the perspective of the process conducted by Mr Dunn. He concluded that the appeals should be refused, and intimated that by letter dated 28 January 2019 to confirm that that date was the last date of employment, and setting out again the enhanced redundancy payments and other sums due. The said payments were duly made to each claimant.

42. The first claimant after his dismissal sought employment, and was then offered a position at a pharmacy commencing in March 2019. His pay at the respondent had been £1,424.20 per four weeks, which is the equivalent of £356.05 per week, and his net pay at the pharmacy is £345 per week. That employment continues. The claimant claimed Universal Credit for a short period. Vouching for the pay received was not provided.

43. The second claimant after his dismissal commenced a business as a self-employed person. He also sought employment. He was employed by Menzies Distribution Limited from about mid-March 2019 for a period of about three months. He applied for about ten posts in total, and was offered employment as a relief driver by Moray Council in July 2019, on an ad hoc basis, starting the work for them in about November 2019. His pay at the respondent, net, had been £1,604.27 per month, and he had pension entitlement under the auto-enrolment scheme. Full details of his net pay from his employments after that employment were not provided, nor was vouching for the same provided.

44. No evidence was given by the third claimant or on his behalf, but it is understood that he has been unwell as a result of a stroke following the dismissal.

Submission for respondent

45. Mr Millar had helpfully prepared a written submission, and the following is a very basic summary of it. He argued that the reason for dismissal was clearly the redundancy created by no longer having the three routes carried out by the claimants undertaken by the respondent itself, and that no other reason applied, including the suggestion from the second claimant that it had been to curry favour with the regulator, with him being a scapegoat. On the issue of fairness, he argued that the position was essentially simple. He referred to the authority of ***Williams v Compair Maxam Limited 1983 IRLR 83***, and to the definition of consultation referred to below. He argued that each element had been met. What was required was adequate information, not all information, and adequate information had been provided. He argued that the claimant had been consulted appropriately and that they had had an opportunity in the period between the first meetings on 19 and 20 November 2018 and the decision on 10 December 2018 to make any points that they wished to. All matters that they had raised had been addressed. There had been discussions with SKH and two weeks of trials to determine that the proposed new arrangements would work. The trials had succeeded. It had been appropriate to form a pool of only those working from Aberdeen and Inverness being the three claimants, and not those who took the vans from East Kilbride. What mattered was the work being carried out and the location of that, not the terms of the contract. On the issue of alternative employment he argued that there had been sufficient discussion at the first meetings, as spoken to by Mr Dunn and Ms McKean. He suggested that if there was any procedural failing there would in any event have been a fair dismissal as there was no vacancy for the claimants where they worked, and none of them would have relocated to East Kilbride or that area even if that had specifically been addressed. The redundancy was he said inevitable. On the issue of remedy he argued that loss had not been established, notice had been paid, and no award should be made in regard to particulars of employment or a protective award as no such award arose in the present claims, as it was not a collective redundancy. His position in summary was that the claims should fail and be dismissed, as the position was a simple one and the issues raised by the claimants were “white noise”.

Submissions for claimants

46. Mr Morrison the second claimant had also helpfully prepared a written submission, and the following is a basic summary of it, and the points he raised orally. He argued that there was no genuine redundancy, that the deliveries were still being made to those he had delivered to, and that the reason for the change had itself changed and did not result from the MHRA requirements. He argued that the process was not a fair one, and complained at various elements including how he had been treated at the meeting with Mr Dunn and Ms McKean, the lack of minutes sent to him before the decision and the lack of proper consultation over the issues raised, particularly the terms of the GDP and the hours that were worked by SKH on the routes they took over. His submission raised a number of rhetorical questions on the fairness of the decision and how it was reached, and also complained at the lack of documentation provided and included within the Bundle. In relation to losses he explained that he had not appreciated the need for vouching, but offered to provide that separately.

47. Mr Mitchell added his own commentary, of which this is again a basic summary, concentrating on the issue of alternative employment, referring to ***Vokes v Bear [1973] IRLR 363*** and arguing that the issue of relocation should have been specifically addressed, including by setting that out in writing.

The law

48. It is for the respondent to prove the reason for dismissal. To be fair potentially, the reason must fall within one of those set out in section 98(2) of the Employment Rights Act 1996. Redundancy and some other substantial reason are potentially fair reasons.

49. If the reason is potentially fair, whether it is or is not fair is determined by section 98(4) of the Employment Rights Act 1996, which provides as follows:

> "… the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer:
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

50. The definition of redundancy is found in section 139 of the 1996 Act, and include where the dismissal is wholly or mainly attributable to the fact that the requirements of the business to carry out work of a particular kind or to do so in the place where the employee was employed have ceased or diminished, or are expected to cease or diminish.

51. Whether or not a dismissal is fair, where the reason is potentially fair, depends on all the circumstances. In the context of redundancy guidance was given by the House of Lords in the case of ***Polkey v AE Dayton Services [1987] IRLR 503*** as follows:

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

52. It is a question of fact and degree as to what level of consultation is required in any case – ***Mugford v Midland Bank [1997] IRLR 208***. The overall picture in the period up to the date of termination is viewed. What consultation means was explored in ***Rowall v Hubbard Group Services Ltd [1998] IRLR 195***, in which guidance from an earlier case in the context of collective consultation was followed:

> "Fair consultation means:
>
> (a) consultation when the proposals are still at a formative stage;
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> (b) adequate information on which to respond;

(c) adequate time in which to respond;

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

25. Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely."

53. The basic requirements of determining the pool of employees at risk of redundancy were set out in ***Capita Hartshead Ltd v Byard [2012] IRLR 814.*** The employer should act within the range of acts of a reasonable employer in deciding which employees are at risk of redundancy given the circumstances. It, and issues of consultation generally, are set out in the ***Williams*** case cited above, albeit in the context of an employer which recognises a trade union, and there was no suggestion of that in the present case.

54. There is a limit to the extent to which the Tribunal can consider the reasons behind the decision to make redundancies. That was discussed in ***James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386***. The Court indicated that it thought that the question whether a dismissal could be unfair because the decision to implement redundancies was itself unfair was a 'troublesome point', but concluded that whilst it could be argued in principle that the courts ought to have that power to decide whether the employer was justified in implementing redundancies, as a matter of law it was not open to the court to investigate the commercial and economic reasons prompting the closure. That was a decision of the Court of Appeal. Two earlier EAT decisions require to be considered in light of it. In ***Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59*** the EAT held that if an employer seeks to justify a dismissal by alleging that it needed to reduce the wage bill, it should produce some evidence to show that there is a need for economy. In ***Orr v Vaughan [1981] IRLR 63*** the EAT held that whilst the choice of method of reorganisation is largely for the employer to determine, the employer must act on reasonable

information reasonably acquired. These cases support the proposition that at least some evidence of there being a redundancy must be produced, such that it has a proper basis in fact, but the limits to it were demonstrated recently by the EAT in ***Berkeley Catering Ltd v Jackson UKEAT/0074/20*** in which the claimant argued that a redundancy was being used cynically that is to be dealt with by concentration on whether the redundancy was the real reason for dismissal and/or whether the dismissal was unfair, and not by stretching the basic concept of 'redundancy' itself, which is an objective concept.

55. The issue of alternative employment is addressed in ***Byrne v Amin Mentor US (UK) Ltd UKEAT/0239/02***, which sets out that the matter is to be conducted within the range of acts of the reasonable employer. The basic principle was set out in ***Vokes***.

Discussion

56. I was satisfied that all the witnesses were seeking to give honest evidence. I considered that Mr Dunn was generally a reliable witness. He gave that evidence in a measured and candid way, and although some aspects of it revealed a lack of understanding of best practice I was satisfied that I could accept his evidence in general terms. Mr Kelly similarly gave reliable evidence, and was candid in his replies particularly as to what he had or had not himself investigated. I was satisfied that I could accept his evidence in general terms.

57. Mr Morrison gave the majority of evidence for the claimants. I considered that there were occasions when his replies did not relate consistently to the documentation. Two examples of this are firstly when he alleged that the first that he was aware of the respondent having a regulatory team was during the evidence of Mr Kelly, when the minutes of the appeal hearing (which he did not challenge the accuracy of with Mr Kelly, or raise in email after the minutes were sent to him at his request) revealed that Mr Kelly had told him of that at the appeal hearing, and secondly when he claimed that he was not aware that Kristina McLean was from HR when the letter calling him to the meeting with Mr Dunn which she attended told him that. He on occasion did not answer questions entirely candidly, for

example in respect of the minutes of the appeal meeting which he said he asked for twice but on receipt said that he had not read, which I did not consider to be likely to have been accurate. Whilst it was received after the decision on the appeal he had been very keen to receive those minutes.

58. Overall I considered that where there was a dispute over a point of fact between the evidence of the second claimant with the evidence of the respondent I preferred the evidence of the respondent. That applied for example to the issue of whether alternative employment was discussed at the meeting with Mr Dunn. I considered it likely to have been raised, firstly as I preferred Mr Dunn's evidence, and secondly as the letter confirming dismissal referred specifically to there being no alternative employment found, and none of the claimants raising that issue in their letters of appeal or appeal hearings. It was also consistent with the fact that neither claimant who gave evidence would ordinarily have been assumed to have wished to move from the location they lived in, neither in fact did so, and Mr Morrison had lived in that area for about 18 years. Most significantly of all in this respect however the claimants called by witness order Ms Kristina McKean, who was present at the meetings and remembered this issue having been raised at each of them, discussed with each claimant, and each claimant stating that they would not commute to East Kilbride or words to that effect. If there had been any interest in a job in that location, it would be expected that that would have been said during that conversation, but when it was not it was I considered reasonable of Mr Dunn to have concluded that there was no realistic possibility of any alternative vacancy with the respondent being appropriate for any of the claimants.

59. Mr Mitchell gave more limited evidence on the facts on the merits, relying on the evidence from Mr Morrison. He was cross examined by Mr Millar, and in answer to the questions asked was clear and candid in what he said. He said that he had not been asked about vacancies at East Kilbride, and that was his honest recollection but for the reasons given above I considered that it was not reliable evidence on that aspect.

60. Not all of the issues raised by the claimants in their evidence had been put to the respondent's witnesses in cross-examination. Much of their evidence was therefore not contested. I took that into account, but recognising that the claimants were acting for themselves that issue alone was not determinative. There was other evidence that led me to conclude that the allegations against the respondent on issues of fact were not likely to be correct. They included the fact that the respondent started the consultation process stating specifically that no decision had been taken and inviting the claimant's input, in the second claimant's case referring to his long service. That is indicative of an open mind. Also indicative of the open mind is the carrying out of a trial with the proposed contractor, not once but twice. Further evidence of it is that when the decision was made the termination date was deferred on two occasions until the appeal was determined. These are all acts that I consider supported the favourable impression I had of the respondent's witnesses. They did not always follow best practice, as I shall address below, but I considered that this was a redundancy which they had sought to avoid, but found that they could not. Overall therefore for the evidence of both claimants, when set against the evidence for the respondent on issues of fact which were material and disputed, I came to the conclusion that the respondent should be preferred.

61. The claimants also called four witnesses. Ms McKean gave evidence briefly, and I considered both credibly and reliably, and I have addressed the issue of the terms of the first meetings above. Her evidence did not assist the claimants in that regard, but the respondent. She also mentioned a form given to the Transport Manager for the drivers working off site to confirm receipt of documentation, one signed by the second claimant indicating that he had seen and read the company handbook and his statement of terms. That document was produced, and had the second claimant's initials. It appeared to me more likely than not that the second claimant had been provided with a statement of terms when he re-joined the respondent, but that issue is not of particular moment in light of the fact that the claim for unfair dismissal on which a claim as to no such

particulars being given is reliant. No particular findings on that issue were made in light of that.

62. The evidence from Mr Starrs, Mr Mockus and Mr Bodrus was relatively brief, but I accepted that they were all credible witnesses who gave evidence in a straightforward and candid manner. Mr Starrs expressed the view that the routes that the claimants had undertaken could be conducted lawfully starting and ending in Shotts as SKH did, but Mr Bodrus thought that that was not the case for the route to the Inverness area that the second claimant had undertaken. I discuss that aspect further below, and subject to that point I considered those witnesses to be reliable. Mr Mockus had retired and acknowledged an imperfect memory, but gave evidence on the steps he had taken particularly in driving the vehicles from East Kilbride to the Aberdeen depot, then for exchange at Bridge of Don. Both Mr Starrs and Mr Bodrus would have looked on applications for vacancies by the second claimant (who asked the question on that) favourably, but in fact the claimants did not apply for those vacancies in circumstances outlined above.

63. I address each of the issues in the case as follows:

What was the reason, or principal reason, for the respondent's dismissal of the claimants?

64. I was satisfied that the respondent had proved that the reason for dismissal was redundancy. They did not require the drivers to carry out the deliveries in the Inverness and Aberdeen general areas in light of their outsourcing that service to SKH. They did not therefore employ the drivers doing so, and their requirement for employees reduced. I did not accept the argument that there was some other reason for the decision such as to curry favour with the MHRA or to have a scapegoat for the issues in Bolton. That was not a credible suggestion. All of the evidence which I accepted pointed to the sole reason being the decision to cease having the three routes performed by employees of the respondent for the reasons set out further below. Redundancy is a potentially fair reason for dismissal.

If that was a potentially fair reason, was it fair or unfair under section 98(4) of the Employment Rights Act 1996 and in that regard

(a) Did the respondent consult each of the claimants as a reasonable employer could?

(b) Did the respondent conduct the process as a reasonable employer could, including in respect of whether or not to "pool" the claimants with other employees?

(c) Did the respondent consider alternative employment for the claimants as a reasonable employer could?

65. There are I consider four material points that are essentially made by the claimants, summarising their arguments for this purpose. The first is that they were not adequately consulted with on whether the roles were redundant, the second is that the outsourcing to SKH necessarily involved arrangements which breached legal duties, either as to maximum hours or maximum speeds, or both, such that the decision to make them redundant on that basis was unfair, the third is that there ought to have been a pool involving other drivers and the fourth is that alternative employment was not adequately discussed with them. They had also raised the issue of a relevant transfer but their arguments on that were addressed at the earlier Preliminary Hearing as set out above.

66. On the issue of consultation it is true to say that best practice was not followed in a number of respects. The minutes of the consultation meetings were not as full as they could have been, omitting for example in the case of the first meetings with Mr Dunn material including as to alternative employment. There were no minutes produced for the second meeting held by Mr Dunn with two of the claimants with him, although Ms McKean spoke to having prepared them. The minutes of the meetings, and the meetings with Mr Kelly on appeal, were not provided before the decisions were made to the claimants. The information provided to the claimants prior to and during the consultation meetings was not as full as it could have been. What exactly SKH were proposed to be doing was not set out for the claimants, for example, and there was no direct answer given to them on the point of the lawfulness of the proposed new arrangements. The process was not as careful as it could have been, with

one meeting to address whether the claimants were redundant, and another to address any alternatives, and what the entitlements were, as both issues were addressed in the first meeting, and the second one was not to consult but to intimate the decision. There was therefore only one true consultation meeting, and no second one was held with the second claimant at all. On the issue of the lawfulness of the new arrangements, Mr Dunn might have asked SKH for written details of how the new route would operate lawfully, particularly as there were two separate tests when that issue could have been specifically addressed. Details of the trials undertaken could have been provided to the claimants (and to the Tribunal in evidence). Mr Kelly could also have followed up on these issues in the appeal hearing. The position on alternative employment, to the effect that vacancies only existed in East Kilbride and setting out the respondent's understanding that these were not of interest to the claimants in the circumstances, could have been set out in writing, or the vacancies that did arise during the process of consultation up to 28 January 2019 could have been sent to the claimants.

67. But best practice is not the test that I am required to apply. The consultation did address, albeit fairly briefly, the essentials of the reasons for redundancy. Those reasons were a combination of the need to keep complying with Guidelines on GDP, particularly in light of the experience in Bolton and concerns that similar issues arose in Aberdeen and Inverness which required change, and the fact that the measures then put in place were not cost effective, and not without continuing risks. Alternatives were explored, but new premises were not found, and the only solution identified which was cost effective was with SKH. There was a concern over the hours a driver could perform and operate within speed limits for the lengthy route from Shotts to the pharmacies in question and back, but that issue was investigated by Mr Dunn at least to some extent. There were two weeks of trials, although details of those trials were not fully explored in the evidence. He asked SKH, and they assured him, that it was compliant. He accepted that assurance, and it appears to me that he was entitled to do so. He did that in the context that the current arrangements were not cost effective, such that in the absence of a

solution those routes may not have been capable of being continued, in which event the claimants would also have been redundant. He was naturally seeking a solution to allow the routes to continue profitably.

68. The second issue is that the claimants believed that the route could not be lawfully performed, but that view, which I accept they genuinely hold, is not determinative by any means. The respondent believed that it was, having had an assurance from SKH. Whilst I do have some concerns over that, that I have concerns is also not the point. It is not for me to substitute my view for that of the respondent. It was for the respondent to consider the issue of compliance with the GDP Guidelines, and how to respond to interventions by the MHRA. I am not the expert, the respondent is. In any event, what they did was I consider perfectly appropriate and reasonable given the circumstances. Potentially large amounts of controlled drugs were being moved, and it is entirely right that steps are taken and continually improved to ensure that they are kept secure. That the Guidelines did not change is not the point, the view of the regulator did change as evidenced by their letter after the Bolton inspection, and required to be responded to not just at that location, but more widely. The case law in my judgment is to the effect that it is not for the Tribunal to assess where or not there should be a redundancy, that is for the employer, provided that it has at least a basic evidence base for it, and that that is the genuine reason for the dismissal, as I consider was the case here.

69. The second claimant sought to argue that he had been made a scapegoat for the issues in Bolton, but there was no evidence of that, and the evidence indicated that the decisions were taken properly in light of the experience there, and the requirements under which the respondent required to operate. They require to comply with the 2012 Regulations referred to, and in turn to follow the GDP Guidelines, which although expressed as guidelines can lead to suspension or revocation of their licence to operate if considered to have been breached by MHRA.

70. In respect of the third issue of the pool of employees, it appears to me that firstly that was considered by Mr Dunn, and secondly that as the

employees were the only drivers based in the Aberdeen and Inverness areas it was within the band of reasonableness for them to consider those employees as forming the pool, with all in that pool at risk. The contract for Mr Mitchell did have his place of work as East Kilbride, but the evidence was clear that in reality that is not where he worked, as he accepted in his evidence. I consider that it was within the range of the acts of a reasonable employer to decide that the three claimants were those at risk of redundancy given the circumstances. The claimants argued that the pool included the three drivers who had been driving the loaded vans north under the new arrangements, but I do not consider that that was the only appropriate way to address matters. They were in fact working from a different location. There was therefore no need for scoring against a selection matrix involving other employees.

71. The fourth issue of alternative employment I have dealt with above, and it does appear to me that it was handled within the band of reasonableness. The issue was raised by Mr Dunn at the initial meetings held with each claimant, but understandably at the time none of the employees indicated a desire to have a job based in East Kilbride where that was a commute of many hours per day, and none indicated an interest in relocating. Whilst that could have been set out in the minutes, and those minutes sent to the claimants, or vacancies that existed during the process, including during the appeal, sent to the claimants, doing so was not required of all reasonable employers given the circumstances.

72. I then looked at the issue of fairness in the round, and taking account of all the circumstances I considered that the level of consultation, whilst at the lower end of the scale of that which would be sufficient, was within the range of being that held by a reasonable employer. In doing so I took into account both that the respondent postponed the termination of employment until after the appeal, which they were not required to do, and that in the appeal both the issue of alternative employment was not raised by the claimants at all, and that Mr Kelly considered all that they said in a meeting that the claimants who gave evidence accepted was carried out in an entirely appropriate manner.

73. It seemed to me that more might have been done but overall I consider that the dismissal does fall to be considered as a fair one in law. It was through no fault of the claimants, who were good employees and so viewed by the respondent. The combination of the need for a high level of security, and a sufficiently low cost to make the arrangement affordable, led to their roles in the respondent not being required, and thus redundant. There is at first glance something of a disconnect with how their routes and route 51 was treated, but there are material differences between them. Route 51 deliveries are individual deliveries not large vanloads, to a variety of remote places. That is different to the risk profile of a large vanload of deliveries in one place consistently. That issue has been risk assessed by the respondent, which needs to consider not just the level of risk, but what happens if that risk is run unsuccessfully, and how serious the consequences would then be. That is a matter for them and it was handled within the range of acts of a reasonable employer in my judgment.

74. All this does not detract from the sense, as with redundancies in general, that the outcome seems unfair to the employees who had carried out their roles effectively and efficiently, and where the redundancies arose through no fault of their own. They clearly feel that the outcome is unjust as they believe that the old arrangements were complaint, and the new routes are not operated lawfully. They did not however carry out regulatory work, and those who did held a contrary view, as they were entitled to. Outsourcing the routes to SKH was undertaken because it was cost effective and considered to be appropriate. The tasks the claimants had performed for the respondent are therefore not now performed by the respondent but by a third party, and that change which took their work out of the respondent and into SKH had been held not to be a relevant transfer. What is left is a redundancy, and I have concluded that the redundancy was handled fairly by the respondent in law.

75. I do not therefore address the issues of losses, mitigation and other matters as to remedy.

Conclusion

76. It follows that I must dismiss the claims for unfair dismissal. Although claims were made for not having had written particulars of employment, that claim is dependent on the unfair dismissal claim succeeding, and must also be dismissed. In any event a document signed by the first claimant was produced by the respondent, and the document initialled by the second claimant referred to his having received a contract as referred to above. Whilst there was a question raised over the document issued to the third claimant, relating to his signature, there was provided a further document indicating that it had been prepared at the time he commenced employment in December 2015, and it did not appear to me that the claims for failure to provide written particulars had merit. The Schedules of Loss included claims for a protective award but such a claim only arises where there are at least 20 redundancies and that did not arise here. All claims are therefore dismissed.

77. I should like to record that the two claimants conducted the hearing before me passionately but responsibly, and made their arguments as well as they could. Mr Millar ably represented the respondent and I am grateful to all of them for the manner in which the hearing was conducted.

78. I consider that I should make finally a comment about the routes I understand that SKH carried out, collecting from East Kilbride, taking the delivery to Shotts, and then to and from Shotts delivering to a number of pharmacies in the Highlands area, or Moray, and to and from East Kilbride making two routes delivering within the areas around and in Aberdeenshire. Doing so lawfully within the applicable speed limits, and within the rules as to drivers' hours, is liable to be difficult, particularly for the Inverness route. I did not have before me sufficient evidence that it would be, or was, either lawful or unlawful. The evidence I had indicated that it was not certain that the routes were either lawfully or unlawfully operated, SKH had assured Mr Dunn that it was, the claimants considered that it was not, Mr Starrs and Mr Bodrus had different views, and nothing in reliable detail was in the evidence before me beyond that. It is possible that each route is indeed lawfully carried out, particularly if the drivers

doing so simply drop off the delivery rather than engage with the customer as the claimants appeared to have done, but including provision for a necessary break, and issues such as traffic delays, complicates matters. The combination of the distances, speed limits, and the number and locations of deliveries means that I do not know whether in fact the route is and has been carried out lawfully or not. SKH are not now a party to the case following the decision on relevant transfer and they were not therefore present as a party before me to give evidence on the issue. It is not for me to seek to regulate that aspect. It is for other statutory bodies to do so if the matter is raised with them. For the avoidance of doubt this Judgment should not be taken as indicating that these routes are either lawfully or unlawfully operated.

Employment Judge	**Judge A Kemp**
Date of judgment	**13th of May 2021**
Date sent to parties	**13th of May 2021**