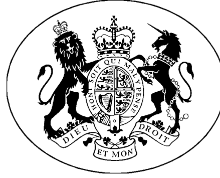

EMPLOYMENT TRIBUNALS

Claimant: Mrs C Watson

Respondent: Ferguson Cars Ltd

FINAL HEARING

Heard at: Midlands (West) (by CVP) **On:** 20 April 2021

Before: Employment Judge Camp

Appearances
For the claimant: Mr H Haycocks, lay representative
For the respondent: Mr P Roberts, solicitor

REASONS

1. This is the written version of the reasons given at the hearing for the decision that the claimant was unfairly dismissed; and that the reason for dismissal was redundancy; and that any compensatory award was to be reduced in accordance with the so-called Polkey principle.

2. This is an unfair dismissal case arising out of a redundancy made in the pandemic. It is what a lawyer would call an ‘ordinary’ unfair dismissal case, meaning one where the claimant is not alleging that the reason for dismissal is one that would make the dismissal automatically unfair under the Employment Rights Act 1996 (“ERA”). It is, however, the claimant’s case that the respondent dismissed her because she objected to transactions the respondent was making or wanted to make that she alleges were or would have been fraudulent. I can see how a whistleblowing / public interest disclosure claim could have been constructed out of the claimant’s allegations, but that has not been the claimant’s approach. I should add that I think the outcome would have been no different if a claim for automatically unfair dismissal under ERA section 103A had been put forward.

3. The claimant was employed by the respondent from around 1 September 2017 to 1 July 2020 with the job title Finance Manager. The respondent is a second-hand car company owned by Mr Lee Ferguson. He has or had other companies

as well. It is a small company with a small number of employees and, in terms of who runs the company, could be described as a one-man band – without meaning any discourtesy to Mr Ferguson or, indeed, to the claimant.

4. In terms of what happened, little or nothing that makes a difference to my decision is in dispute. It was not even in dispute, by the end of the case, that this was an unfair dismissal. In closing submissions, Mr Roberts, the respondent's solicitor, realistically conceded that the dismissal was procedurally unfair due to lack of warning or consultation.

5. In practice, then, there are only two 'live' issues for me to deal with in this part of the hearing. The first issue is: what was the reason, or principal reason, for dismissal? The respondent says it was redundancy. It was agreed at the start of the hearing that the claimant, if successful, would not be asking for reinstatement or reengagement and that I would deal, alongside liability, with the following second issue: is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed and, if so, should any compensatory award be reduced and, if so, by how much? This is the issue often referred to as the '<u>Polkey</u> issue' – see <u>Polkey v AE Dayton Services Ltd</u> [1987] UKHL 8 and paragraph 54 of the Employment Appeal Tribunal's decision in <u>Software 2000 Ltd v Andrews</u> [2007] ICR 825.

6. It terms of the law relevant to the first issue, I note the wording of ERA sections 98 and 139 and, in addition, a couple of points about the legal definition of redundancy.

7. It seems to be being suggested by the claimant, Mrs Watson, and on her behalf that because the respondent still needed someone to carry out the tasks she had been carrying out, she was not redundant. Another part of her case seems to be that the respondent made a bad decision, in economic terms, when it decided to make her redundant, and also that because the respondent business – it is said – did not suffer particularly because of the pandemic and ultimately had a reasonably good financial year in 2020 to 2021, redundancy was not the reason for dismissal.

8. People sometimes think that if the work the supposedly redundant employee was doing prior to their dismissal did not stop or reduce, for example if the respondent's business was doing well and the employee was busy, then there can't have been a redundancy situation. This is not so. The relevant part of ERA section 139 refers to the respondent's requirements "*for employees to carry out work of a particular kind*", i.e. it is focussed not on the needs of the business for particular work to be done but on the needs of the business for <u>employees</u> to carry out work:

> *Redundancy does not only arise where there is a poor financial situation at the employers… It does not only arise where there is a diminution in work in the hands of the employer… It can occur where there is a successful employer with plenty of work but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is over-staffed. Thus, even with the same amount of work and the same amount of income, the decision is taken that lesser numbers of employees are required to perform the same functions. That*

too is a redundancy situation. (Kingwell & Others v Elizabeth Bradley Designs Limited [2003] UK EAT 0661-02-1902 (19 February 2003))

9. It is also sometimes suggested that the respondent is obliged to justify, in business or economic terms, its decision that it could do without the claimant. Again, any such suggestion is wrong in law: see the leading case of Murray v Foyle Meats [1999] UKHL 30 and paragraph 12 of the EAT's decision in Polyflor Limited v Old [2003] UK EAT 0482-02-1305 (13 May 2003): "*It is now well established law … that the question under s139(1)(b) ERA … dealing with the definition of redundancy is whether the dismissal is attributable to a diminution of the requirements of the employer's business for employees to do work of a particular kind. It is not necessary for an employer to show an economic justification for its decision to make redundancies, properly so called.*"

10. Turning to the facts, Mrs Watson worked with Mr Ferguson for his companies from 2014. Until 2017 she was self-employed, largely, as I understand it, as a book-keeper, although she did many things other than book-keeping as well. In September 2017 she became an employee. It is common ground that by March 2020 the great majority of her work was book-keeping: she estimated it was 70 percent of what she was doing by that stage. Mr Ferguson puts it at over 90 percent, but on any view it made up the bulk of her work. The hours Mrs Watson worked for Mr Ferguson varied over the years. By March 2020 they were 30 hours per week. She was the only employee other than Mr Ferguson doing anything like book-keeping or other finance-related work for the respondent.

11. Mrs Watson was evidently committed to Mr Ferguson's ventures and to the respondent in particular. She was proud of what she felt was the business she had helped him build. Her commitment is shown, amongst other things, by her investing significant amounts of her own money in the company.

12. When the pandemic hit, the respondent furloughed everyone. The claimant alleges there was some furlough fraud, which the respondent denies, but it is agreed that the claimant and the respondent's other employees were furloughed from early April 2020 until at least the 1 June 2020.

13. During April and May 2020, Mr Ferguson managed to get a particular bit of computer software to work that he and the claimant had previously struggled with. That piece of software helped with the task of processing invoices and with book-keeping generally. Mrs Watson agrees that it alone meant there would have been a 25 percent reduction in her workload had she returned to work.

14. Over the same period, Mr Ferguson decided to do away with Mrs Watson's role and to dismiss her for redundancy. He did not speak to her about this, or warn her, or consult with her in any way, shape or form, before he told her what he had decided. He did this at a face-to-face meeting on 30 May 2020. Almost the first words he said to her were, "*I am making you redundant*".

15. There is a dispute about how happy Mrs Watson was at this news, but that dispute makes absolutely no difference to the issues that I have to decide. All I will say about it is that Mr Ferguson had a profound failure of empathy and understanding at this time. I get the impression he was caught up in his own

affairs and was giving little thought to the needs and feelings of others and of Mrs Watson in particular.

16. Mr Ferguson's intention was to keep Mrs Watson on furlough for an extended period and then make her redundant at the end of it. He told me he took advice and was told that doing what he intended would not be proper. I accept that part of his evidence because I can take judicial notice of the fact that around this time – that is June 2020 – there was considerable concern in employment law and business circles that it would or might be an abuse of the furlough scheme to use it to extend someone's employment purely to keep them in money when there was no expectation of them ever coming back to work. He therefore confirmed her redundancy by a letter of 30 June 2020 and she was made redundant with effect from 1 July 2020.

17. There was no significant negotiation or discussion between Mrs Watson and Mr Ferguson between the 30 May and 30 June 2020 about the possibility of keeping her on in some capacity, or anything of that kind. She offered to reduce her hours and she wanted to discuss other options, but Mr Ferguson had made up his mind. He was not prepared to talk to her about it except to tell her what he had decided.

18. Mrs Watson sought to appeal against the decision to dismiss her for redundancy. Mr Ferguson dealt with her letters of appeal of 30 June and 9 July 2020 simply by writing back to her. His letter of 15 July 2020 dismissing any appeal speaks for itself.

19. What was the reason for dismissal? The respondent has satisfied me that redundancy was the principal reason for dismissal. Put simply, Mr Ferguson reduced the respondent's headcount by one. Another employee was not brought in to replace Mrs Watson. The work Mrs Watson had been doing was partly being done by Mr Ferguson with assistance from the piece of computer software I mentioned earlier, and partly by an independent contractor book-keeper, HJW Business Services. They started work on 17 June 2020. My understanding is that Mr Ferguson had discussed what he was planning to do with his accountant in or around May 2020 and they had suggested HJW Business Services. I do not find it at all unlikely – as Mrs Watson asks me to – that Mr Ferguson was able to secure their services in just a few weeks.

20. The plan was to replace Mrs Watson with an independent contractor book-keeper who would, Mr Ferguson hoped, have to do no more than a couple of hours a month. With their assistance, and with assistance of the piece of computer software, he thought – and I accept he genuinely did think – that he would be making significant savings.

21. HJW Business Services' invoices show how much work they actually did from June 2020 onwards. They were more than the 1½ hours' work which Mr Ferguson was clearly planning on them doing (and which he continued to insist they had been doing in his witness statement at this hearing, despite the clear evidence to the contrary). Given that the claimant had not been working from April 2020, there would to some extent have been a backlog of work that needed

to be done in June 2020, so it is reasonable to assume that HJW Business Services', starting work in the middle of June, were covering work that would have been done by the claimant perhaps from May 2020. Their invoices run to mid-March 2021. I think it is fair to say they did in total roughly 10 months' worth of work the claimant would otherwise have been doing on the basis of the invoices I have seen.

22. Mr Roberts has produced figures for the amount of work HJW Business Services did, which I haven't checked, but which don't seem to be in dispute: 230 hours between mid-June 2020 and mid-March 2021. I have explained I am taking it that 10 months worth of work was done in that 9 month period. So that averages out at 23 hours per month; 5 hours a week or so. Apparently, their hourly rate was slightly higher than the claimant's, but the respondent did not, of course, have to pay the additional costs associated with having an employee, such as employer's national insurance.

23. Mrs Watson is probably right that her no longer working for the respondent also meant that the respondent has had increased accountancy fees. I don't have figures for that but it is unlikely that the increase would come anywhere close to wiping out the difference in cost between engaging HJW Business Services for 5 hours per week versus employing the claimant for 30 hours per week. The respondent did, then, make significant cost savings as a result of making the claimant redundant, albeit not, perhaps, quite as significant savings as Mr Ferguson was hoping for.

24. It should, in any event, be emphasised that what I am looking at is what was in Mr Ferguson's mind at the time he made the decision to dismiss the claimant for redundancy, a decision that he made in May 2020: what he thought was going to happen rather than what in fact did happen.

25. In the circumstances, the main motivation was money: Mr Ferguson persuaded himself the job the claimant was doing could be done cheaper in another way. It appears he was right about that. It was not, though, a kind thing to do and the way he went about it was objectively appalling, but it was not an inherently unfair reason for dismissal. If his decision had been made after sufficient consultation and without the completely closed mind that Mr Ferguson had it could have been a fair decision producing a fair dismissal.

26. Mrs Watson is suggesting that the respondent sacked her because she was making a nuisance of herself by objecting to dishonest / fraudulent transactions. I am not satisfied that that was the respondent's main motivation.

27. Four issues, or four groups of issues, in particular have been raised by Mrs Watson in connection with this suggestion. In relation to each of them she says that Mr Ferguson was doing or planning on doing something improper and, in essence, that she told him he shouldn't do it.

28. Whether the respondent was acting improperly or not, there is a total absence of any evidence of animosity between Mrs Watson and Mr Ferguson to do with this. I have not been taken to a single text message or letter or anything else suggesting any tension between them over it. The issues each seem to have

been raised once or twice and that was it; Mr Ferguson either gave in or the two of them agreed to disagree. The claimant in her own evidence does not describe any particular difficult meeting, or angry words between them over it, or anything like that. I also get the impression that over the years there had been many occasions when the claimant felt the need to, as it were, rein Mr Ferguson in, yet they continued to work together apparently amicably. Moreover, the thing that was potentially the biggest source of tensions between the two of them came in or around January 2020 when the claimant threatened to withdraw her investment in the company over a particular matter, and that was well before anything with which her claim is concerned occurred and blew over quickly.

29. In summary, the reason for dismissal was indeed redundancy: Mr Ferguson's decision that, to save money, the respondent's need for employees to carry out the work the claimant did had reduced to the point where her work could be carried out by him and by independent contractors. Other things may possibly have come into it, but that does not alter the fact that the principal reason for dismissal was redundancy.

30. Dismissal was for a potentially fair reason under ERA section 98(1). What could have made it a fair dismissal in accordance with ERA section 98(4) would have been reasonable warning and consultation; and reasonable discussions about alternatives to redundancy, approached by Mr Ferguson without a completely closed mind.

31. I should say that a reasonable employer is not expected to start a redundancy consultation process with, as it were, a blank sheet of paper and no notion of, or preferences for, what the outcome of that process will be in terms of who, if anyone, is to be made redundant. Particularly in relation to a company like the respondent, with only a handful of staff and a single individual making the relevant decisions, it is almost inevitable that the employer will have given the matter some thought before beginning consultations and will have at least a strong provisional view as to what the final position should be.

32. It is not unreasonable for an employer to have a strong provisional view of this kind. It does not make any subsequent redundancy unfair, so long as the decision-maker is open to the possibility that that provisional view might be wrong and that there might be a better alternative way of doing things. If they keep an open mind to that extent and consider suggestions made by affected employees, but reject them on the basis that their original view is better, there can be a fair dismissal. The problem in the present case is that Mr Ferguson had completely made up his mind before he mentioned anything to the claimant about it.

33. I now move on to the so-called Polkey issue. Fair and reasonable warning, consultation and discussions with the claimant might have taken, perhaps, two weeks, which I take to run from 30 May 2020. What would have happened then?

34. I have to speculate; I am engaged in, if you like, educated or informed guesswork. No one can be sure what would have happened. On the evidence, this isn't even a case where, being intellectually honest, I can say that any

particular outcome is more likely than not, or that there are a limited range of outcomes to each of which I can ascribe a particular percentage probability. There are numerous possibilities. They include: exactly the same thing would have happened, with the same effective date of termination; an agreement between Mrs Watson and Mr Ferguson to reduce her hours by a lot, or by a bit; an agreement to reduce pay by various amounts, with or without a reduction in hours; an initial large reduction in hours followed some months later by an increase, if and when Mr Ferguson realised he needed more book-keeping services than he thought he was going to need; Mrs Watson being kept on for various periods of time beyond 1 July 2020, but still being made redundant in the end; Mrs Watson being brought back to work in early June 2020, or on 1 July 2020, or later; Mrs Watson being put on flexible furlough from 1 July 2020 (when it came in) for various different period but her hours being permanently reduced at some stage; combinations of these things.

35. There are literally hundreds of possible permutations and I cannot sensibly be scientific or arithmetically precise about it. That said, I can say with confidence that there was almost no chance of Mrs Watson's hours and therefore her pay not being cut significantly; there was a real chance of a fair process making no difference at all to what actually happened; the most likely outcome is that Mrs Watson would have persuaded Mr Ferguson to allow her to continue on reduced hours.

36. I say that that is the most likely outcome because if Mr Ferguson had no ulterior motive for dismissing her – and he denies he did and I have accepted that he didn't – and if he acted in good faith, the previously friendly relationship between the two of them would have meant that he wanted to accommodate her and keep her in the respondent's employment if he could possibly do so. However, an agreement between the two of them could easily have foundered because of a difference of opinion about how many hours a month he needed her services for. He had clearly convinced himself that he only needed somebody for a few hours a month, which was an underestimate but was what was in his head when he was making these decisions, and Mrs Watson might not have agreed to that.

37. Nevertheless, given Mrs Watson's evident keenness to carry on doing at least some work for the respondent, I suspect what would have happened is that she would have briefly come back to work some time in June, gone onto flexible furlough in July for a short while, before have a permanent reduction in her hours to, perhaps, 4 hours per week. That is essentially the basis upon which I have given the Judgment I have given on the <u>Polkey</u> issue. I am alive to the fact that it might well not have been possible for it to work out like that. For example, as flexible furlough did not come in until 1 July 2020, Mrs Watson might have been forced to accept a reduction in her hours in June and not gone onto flexible furlough at all. My Judgment is not intended to mean I am predicting that the claimant would definitely or even probably have worked for the respondent for 4 hours per week at £20 per hour from 1 July 2020 and been on flexible furlough until 31 July 2020; and thereafter simply worked and been paid for those hours. What it means is no more and no less than that, taking the very many possibilities into account, just and equitable compensation in accordance with ERA section 123 is represented by – as set out in the Judgment – "*a sum*

equivalent to what the claimant would have earned if: working for the respondent for 4 hours per week at £20 per hour from 1 July 2020; and on flexible furlough until 31 July 2020; and thereafter simply working and being paid for those hours".

[After Judgment and Reasons were given orally, the parties were invited to attempt to agree compensation in light of it and did so, in the sum of £5,000]

Signed by: Employment Judge Camp
Signed on: 20 May 2021