EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Mustafa	**v**	**Safestay (HP) Limited**

Heard at: London Central (by video) **On**: 9 June 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Mr. Igor Komusanac, solicitor

For the Respondent: Mr. Paul Lonergan, litigation consultant

JUDGMENT having been announced to the parties and the reasons having been given orally at the hearing and the judgment having been sent to the parties on 9 June 2021, and written reasons having been requested by the Claimant on 10 June 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

Reasons

Background and Issues

1. By a claim form presented on 14 July 2020 the Claimant brought complaints of unfair dismissal, age discrimination, wrongful dismissal (notice pay), redundancy pay and holiday pay. Before the hearing she withdrew her claims for age discrimination, wrongful dismissal (notice pay), redundancy pay and holiday pay.

2. The Claimant claims that she was dismissed by the Respondent unfairly. She accepts that the reason for her dismissal was redundancy but contends that the Respondent has failed to follow a fair procedure in dismissing her for that reason, in particular by failing to warn and consult the Claimant about redundancies and by failing to consider suitable alternative employment.

3. The Respondent avers that in the circumstances it acted reasonably in dismissing the Claimant because the hostel where the Claimant worked closed due to the Covid-19 pandemic, all staff except for two employees were made redundant and there were no alternative roles available.

4. At the hearing Mr Igor Komusanac appeared for the Claimant and Mr Paul Lonergan for the Respondent. The Claimant gave sworn evidence and was cross-examined. Ms Helia Rodrigues gave sworn evidence for the Respondent was cross-examined. I was referred to various documents in a bundle of documents of 225 pages the parties introduced in evidence.

5. The relevant issues were set out in Annex A of the Employment Judge James case management orders of 25 November 2020:

S.98 ERA 1996, unfair dismissal

1. What *was the* principal *reason for dismissal and was it a* potentially *fair one in accordance* with *sections* 98(1) *and (2) of the Employment Rights Act* 1996 *("ERA")? The respondent asserts that it was redundancy.*

2. If there is a potentially fair reason for the dismissal, then in all the circumstances, including the size and administrative resources of the respondent, and in accordance with equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant? In considering that question, the tribunal may consider, amongst other things, the consultation process, the selection pool and redundancy selection process, and the question of suitable alternative employment; and whether the respondent acted within the so—called 'band of reasonable responses'?

Remedy for unfair dismissal

If the claimant was unfairly dismissed and the remedy is compensation:

3.1 if the dismissal were procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed I have been dismissed in time anyway? See: Polkey v AE Qavton Services Ltd [1987] *UKHL 8; paragraph 54 of Software* 2000 *Ltd v Andrews* [2007] *ICR* 825.

3.2 did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A *of the Trade Union & Labour Relations (Consolidation) Act* 1992 *("section 207A")?*
3.3 did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), *pursuant to section 207A?*

6. Because the reason for dismissal was accepted to be redundancy, I did not need to deal with the first issue.

Findings of Fact

7. The Respondent operates hostels across the country. The Claimant was employed by the Respondent in its Safestay Kensington Holland Park hostel

(the "Hostel") as a supervisor in the Food & Beverage Department from 15 September 2015 until her dismissal on 17 March 2020. Her direct line manager was Ms Chwialkowska, the Operations Manager.

8. The Hostel was the Claimant's place of work. On some rare occasions the Claimant covered for other employees of the Respondent working an extra night shift or as a housekeeper.

9. On 16 March 2020, due to the ensuing Covid-19 pandemic the Respondent took the decision to close the Hostel and dismiss all staff. The Respondent, however, decided to retain the services of Ms Chwialkowska to manage the closure of the Hostel and existing bookings, and of a night porter to look after the property by night.

10. On 17 March 2020, the Claimant and the Hostel's other staff were notified by letter that their employment was terminated with the immediate effect. The Respondent did not give the Claimant a prior warning of the impending redundancy and did engage in any consultation.

11. In the termination letter the Respondent said that the Claimant had the right to appeal her dismissal. The Claimant did not appeal.

12. On 23 March 2020, the Claimant wrote to Mr Sacramento, the general manager of the Respondent, asking to be reinstated and put on furlough. The Respondent refused.

13. After the Claimant's redundancy, the Respondent reinstated two housekeepers to prepare the Hostel for re-opening in the summer. They were made redundant in July 2020 together with Ms Chwialkowska.

14. After the March redundancies and having taken legal advice, the Respondent has changed its redundancy process, and in the July round of redundancies it held three consultation meetings with the affected employees over a two weeks' period.

The Law

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

> "(*1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> *(a) The reason (or, if more than one, the principal reason) for the dismissal; and*
> *(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it –*
> *…….*
> *(c) is that the employee was redundant;*"

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

> "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.*"

17. Procedural fairness is an integral part of the reasonableness test is section 98(4) of ERA. In redundancy dismissal "*the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation*" (**Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**).

18. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another reasonable employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (**Williams v Compair Maxam Ltd [1982] ICR 156**).

19. It is generally for the employer to decide on an appropriate pool for selection. If the employer genuinely applied its mind to the question of setting an appropriate pool, the tribunal should be slow to interfere with the employer's choice of the pool. However, the tribunal should still examine the question whether the choice of the pool was within the range of reasonable responses available to a reasonable employer in the circumstances. (**Capita Hartshead v Byard [2012] IRLR 814**)

20. A fair consultation would normally require the employer to give the employee "*a fair and proper opportunity to understand fully the matters about which [he/she] is being consulted, and to express [his/her] views on those subjects, with the consultor thereafter considering those views properly and genuinely*." (per Glidwell LJ in **R v British Coal Corporation and Secretary of State for Trade & Industry ex parte Price and others [1994] IRLR 72**) cited with approval and as applicable to individual consultation by EAT in **Rowell v Hubbard Group Services Ltd 1995 IRLR 195, EAT** "*when the need for consultation exists, it must be fair and genuine, and should… be conducted so far as possible as the passage from Glidewell LJ's judgment suggests*". A fair consultation process must give the employee an opportunity to contest his selection for redundancy (**John Brown Engineering Ltd v Brown and ors 1997 IRLR 90, EAT**)

21. If the tribunal decides that the dismissal is procedurally unfair, as part of considering the issue of remedy it ought to consider the question whether the employee would have been fairly dismissed in any event, and/or to what extent and/or when. This inevitably involves an element of speculation. (**Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT**).

22. *"In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice.* ***In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal****. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*." (see **Software 2000 Ltd v Andrews and ors 2007 ICR 825, EAT per Mr Justice Elias, the then President of the EAT)** ***(emphasis added)***

23. Section 123 of ("ERA") provides that a compensatory award shall be: "*such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer*".

24. The objective of the award is "*to compensate, and compensate fully, but not to award a bonus*": (*see* **Norton Tool v Tewson [1972] ICR 501, per Sir John Donaldson at 504**).

Analysis and Conclusions

Was the Claimant dismissed fairly or unfairly?

25. In her evidence Ms Rodrigues admitted that the Respondent did not conduct any consultation whatsoever prior to dismissing the Claimant. Mr Lonergan for the Respondent, however, argued that in those circumstances, considering the imminent closure of the Hostel due to the coronavirus pandemic, the Respondent acted reasonably in dismissing the Claimant as it did without any consultation.

26. The House of Lords' ruling in **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**, firmly establish procedural fairness as an integral part of the reasonableness test in S.98(4) ERA. Their Lordships decided that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been '*utterly useless*' or '*futile*'.

27. I do not consider that the Respondent's situation was that "exceptional case" for the Respondent to have reasonably concluded that any consultation would be utterly useless or futile. The Respondent, like many other businesses in this country and around the world, was hit by the Covid pandemic, however, in my judgment, on 17 March 2020, and that is before the lockdown was announced,

it cannot be said that warning and consulting its employees of impending redundancies would have been utterly useless and futile.

28. Based on Ms Rodrigues' oral evidence, I find that the Respondent did not even apply its mind to that question. The Respondent did not produce any contemporaneous documents or other evidence to show that it had considered consulting its staff but had decided against that, because it had concluded that it would be a futile exercise. Therefore, I find the Respondent could not have reasonably concluded that any consultation would be futile.

29. I am mindful that I must not fall into the error of substitution, and it does not matter how I or another hypothetical reasonable employer would have gone about in that situation. The test is whether in the circumstances the Respondent's decision to dismiss the Claimant without any prior warning and consultation whatsoever falls within or outside the so-called range of reasonable responses. If it falls within, the dismissal is fair, if it falls outside - it is unfair.

30. In my judgment, in those circumstances it did fall outside the range. I say that because, although the Respondent was planning to shut the Hostel immediately and even before the lockdown was announced, it still had to consider the impact such immediate dismissal would have on its staff. Even if the consultation process would have unlikely to have changed the ultimate outcome, in my judgment, it was outside the range of reasonable responses for the Respondent to dismiss its staff on the spot without any advance warning or giving them any opportunity to express their views and make any suggestions.

31. It appears to be a kneejerk reaction with the sole consideration of avoiding incurring losses with no consideration given to the impact of that decision on its staff. While prioritising cash over employees, by itself, would not have been sufficient for me to find that the decision to make employees redundant fell outside the range of reasonable responses, in the circumstances where the Respondent decided to cut their income with immediate effect and without any prior warning and without giving them any opportunity to express their views on the decision, I find that the decision to dismiss fell outside the range of reasonable responses and therefore the dismissal was unfair.

32. I am further supported in that view by the fact that since those dismissals in March 2020, having taken legal advice, the Respondent must have realised that it was not following a fair process and has changed its redundancy procedure.

Remedy Issues

33. Turning to the question of compensation. First, I need to decide whether if a fair procedure had been followed, the Claimant would have been dismissed in any event and/or to what extent and when.

34. Considering the circumstances as existed on 17 March 2020 and the impeding lockdown, I find that if a fair procedure had been followed, the Claimant would have continued to be employed for a further period of 2 weeks while the Respondent carried out a fair consultation process. I find that a similar process

would have been followed as the Respondent has done in July 2020 in relation to Ms Ranchova, Ms Banu and Ms Chwailkowska.

35. I find that if the Respondent had carried out such consultation procedure when dismissing the Claimant, the decision to dismiss in those circumstances would have fallen within the range of reasonable responses and therefore would have been fair.

36. To put it simply, the Claimant job has gone, there was no reasonable prospect of the Hostel re-opening any time soon and there were no suitable alternative roles the Respondent could have offered to the Claimant.

37. I am satisfied that Ms Chwailkowska role and the night porter role are substantially different roles to that of the Claimant. Therefore, it would not have been outside the range of reasonable responses for the Respondent not to pool them together with the Claimant for the purposes of the redundancy selection exercise. The fact that Ms Chwailkowska had joined the Respondent only on 2 March 2020 and the Claimant in September 2015, in my judgment, is irrelevant, as they were employed to do different jobs, and Ms Chwailkowska was more senior to the Claimant and was the Claimant's direct line manager.

38. I am also satisfied that it would not have been outside the range of reasonable responses for the Respondent not to consider relocating to the Claimant to its other hostel in Elephant & Castle. That hostel was closing in any event and there were no available jobs there.

39. Finally, if a reasonable two weeks' consultation had been carried out by the Respondent, by the end of it the government's coronavirus job retention scheme would have been announced. However, the decision whether to place employees on furlough is the employer's decision. Employees do not have the right to be furloughed and there is no obligation for them to accept furlough. That is a matter of negotiation and mutual agreement between the employer and the employee.

40. While the scheme was specifically designed by the government to minimise the impact of the pandemic on unemployment and encourage employers to keep their staff employed, it was still a scheme that employers were under no legal obligations to join or put all or any of their employees on furlough under the scheme.

41. The question, however, is whether it would have been outside the range of reasonable responses for the Respondent to choose to dismiss the Claimant when it could have placed her on furlough.

42. I accept that the Respondent did bring Ms Ranchova and Ms Banu back and placed them on furlough. However, that was done later in April 2020 and in anticipation of reopening the Hostel for business in the summer, and therefore needing them as housekeepers to do a "deep clean" of the Hostel. There was no such need for the Claimant's role as a supervisor in Food & Beverage department. I am satisfied that Ms Ranchova and Ms Banu roles were materially different to that of the Claimant, and it would not have been unreasonable for the Respondent not to pool them together with the Claimant in selecting who to retain and put on furlough.

43. Therefore, if a fair consultation had been followed, by the end of it, which would have been around 31 March 2020, in my judgment, it would not have been outside the range of reasonable responses for the Respondent to decide to dismiss the Claimant and not to put her on furlough.

44. Accordingly, I do not accept Mr Komusanac's submission, he makes on behalf of the Claimant, that there was a reasonable chance that the Claimant's employment would have continued if she had been properly consulted. I find that it would not have continued beyond a further period of 2 weeks of consultation.

45. Mr Komusanac also submitted that because there was no prior warning given to the Claimant, this should be reflected in her award for unfair dismissal. While I accept that the absence of prior warning and consultation are the reasons why I find the dismissal unfair, as far as the compensation is concerned, it must be assess on the basis of s123 ERA, as interpreted by the case law (see paragraphs 21- 24 above).

46. In other words, there must be a financial loss that flows from the unfairness of the dismissal. The function of compensation is to compensate, and compensate fully, for losses sustained by the employee as a result of unfair dismissal but not to punish the employer or to award the employee a bonus.

47. Therefore, I do not accept that the absence of warning should be taken as allowing me to award a greater compensation than the Claimant's financial losses flowing from her dismissal, assessed using the above principles.

48. Now, turning to the calculation of the award. The Claimant was paid her statutory redundancy. The function of the basic award is to compensate employee for loss of statutory redundancy right. In the Claimant's case there is no such loss, as she has, albeit with some delay, received her redundancy pay. Therefore, no basic award can be made.

49. Turning to the compensatory award. Based on my findings that if the Respondent had followed a fair procedure the Claimant would have been dismissed fairly in any event but two weeks later, to award the Claimant just and equitable compensation, in my judgment, her compensatory award must be assessed as her loss of wages and the employer's pension contributions for that period. Her weekly pay was agreed as £478. Therefore, her total loss of wages was £984. Based on pay slips in the hearing bundle I calculated that the employer's pension contribution for that period would have been £33.

50. Because it is my finding that the Claimant would have been fairly dismissed two weeks later and thus would have lost her statutory rights, given the proximity of that to her actual dismissal date, I do not find it will be just and equitable to award a compensation for loss of statutory rights.

51. I am satisfied that between her dismissal on 17 March 2020 and the end of the two weeks' period for which her losses are awarded, considering the then prevailing circumstances of the ensuing pandemic it was very little that the Claimant could have done to secure an alternative employment especially in the sector she was working in. Therefore, I am satisfied that there was no unreasonable failure by the Claimant to mitigate her losses.

52. The Claimant claims that she should be awarded an uplift of up to 25% for the Respondent's unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "Code"). I reject this. The Code does not apply to redundancy dismissal. It expressly states that: "*The Code does not apply to redundancy dismissals or the non renewal of fixed term contracts on their expiry*".
53. In closing submission Mr Komusanac argued that the Claimant had raised a grievance in her 23 March 2020 email, and it was not dealt with by the Respondent. I reject this. Firstly, it was not part of the Claimant's case until the closing submissions and in response to my question on what basis Mr Komusanac thought the Code applied. Further, I do not accept that the Claimant's email of 23 March 2021 to Mr Sacramento raises any grievance.
54. Therefore, I find that the Claimant's total compensation for unfair dismissal shall be £989 and order that the Respondent pays that that sum to the Claimant.
55. The Claimant's all other complaints are dismissed on withdrawal.

Employment Judge P Klimov
12 June 2021

Sent to the parties on:

14/06/2021.

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For the Tribunals Office

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