EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4103576/2020 & 4103648/2020

Remote Hearing by Cloud Video Platform on 10, 11 and 12 May 2021

Employment Judge S MacLean

Mr David Rainey	**Lead Claimant** **Represented by:** **Mr R Clarke,** **Solicitor**
Mr Fernando Garcia Sanchez	**Claimant** **Represented by:** **Mr R Clarke,** **Solicitor**
Prestwick Aircraft Maintenance Limited	**Respondent** **Represented by:** **Ms D Dickson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims are dismissed.

REASONS

Introduction

1. Fifteen claimants bring claims under sections 100(1)(c), 104(1)(b) and 105(1) of the Employment Rights Act 1996 (the ERA). The first claimant is the lead claimant for fourteen of those claimants who have less than two years' service. The second claimant also brings those claims and a claim of unfair dismissal under section 98 of the ERA as he asserts that he has more than two years' service which the respondent disputes. The respondent resists the claims.

2. The merits hearing was conducted remotely by Cloud Video Platform (CVP) at the request and consent of the parties as the second claimant and Edwin Cunningham, Director of the respondent were giving evidence from abroad. The first claimant and the second claimant gave evidence on their own account. David Avery, full-time trade union official with Prospect gave evidence on their behalf. Mr Cunningham gave evidence for the respondent. The witnesses provide witness statements which were treated as their evidence in chief. They were cross examined and re-examined in the usual way.

3. The Tribunal has set out facts as found that are essential to its reasons or to an understanding of the important parts of the evidence. The representatives prepared detailed written submissions for which the Tribunal was grateful. The submissions contained comments on the evidence and referred the Tribunal to the relevant law legal principles. The Tribunal carefully considered the submission which are summarised below.

Issues

4. Following the merits hearing Mr Clarke wrote to the Tribunal confirming that having heard the evidence the second claimant no longer contends that he has sufficient qualifying service to enable him to bring a claim of unfair dismissal under section 98 of the ERA.

5. The Tribunal's approach was to consider the remaining issues to be determined.

   a. What was the reason for the dismissal of first claimant and the second claimant?

   b. Were the dismissals of the first claimant and the second claimant automatically unfair in terms of section 104(1)(b) the ERA

   c. Further and/or alternatively were the dismissals of the first claimant and the second claimant automatically unfair in terms of section 100(1)(c) of the ERA

   d. Further and/or alternatively were the dismissals of the first claimant and the second claimant automatically unfair in terms of section 105(1) the ERA?

Relevant Law

6. Section 100(1)(c) of the ERA provides that an employee will be regarded as automatically unfairly dismissed if the reason (or principal reason) for dismissal was that the employee brought to the employer's attention, by reasonable means, circumstances connected with their work which they reasonably believed were harmful or potentially harmful to health or safety. This section only applies where there is either no health and safety representative or safety committee or it was not reasonably practicable for the employee to raise the matter by those means.

7. Section 104(1)(b) of the ERA provides that the dismissal of an employee by an employer is automatically if the reason (or principal reason) was that the employee alleged that the employer had infringed a right of his which is a relevant statutory right.

8. Section 105 of the ERA provides that an employee selected for redundancy for health and safety reason specified in section 100 of the ERA and/or a reason related to the employees assertion of a statutory right as specified in section 104 of the ERA will be treated as automatically unfairly dismissed

where the reason or principal reason for the dismissal for the dismissal was redundancy, but the redundancy situation applied equally to one or more employees in the same undertaking who held positions similar to that of the employee and who were not dismissed.

9. The Tribunal was referred to the following authorities:

Kuzel v Roche Products Ltd [2008] ICR 799: The unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.

Smith v Hayle Town Council 1978 ICR 996 CA: Where an employee has less than two years' service, they have the burden of proving, on the balance of probabilities that the dismissal was automatically unfair.

Mennell v Newell and Wright (Transport Contractors) Ltd [1997] ICR 1039. This is the leading case in relation to section 104 and sets out the relevant legal principles. It is sufficient if the employee has alleged that his employer has infringed his statutory right and that the making of that allegation was the reason or the principal reason for the decision. The allegation need not be specific, provided it has been made reasonably clear to the employer what right was claimed to have been infringed. The allegation need not be correct, either as to the entitlement to the right or as to the right or as to its infringement, provided that the claim was made in good faith. The important point for present purposes is that the employee must have made an allegation of the kind protected by section 104; if he had not, the making of such an allegation could not have been the reason for his dismissal".

Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) UKEAT/0142/18: An assertion of a statutory right not to suffer an unlawful deduction from wages can only be made after the deduction has been made or the employee believes in good faith that an infringement has already occurred. The thrust of the allegation must be "you have infringed my statutory right", not merely "you will infringe my right".

Balfour Kilpatrick v Acheson and Others 2003 IRLR 683 EAT, the EAT identified three requirements that need to be satisfied for a claim under section 100(1)(c) to be made out: (1) it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee; (2) the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believed were harmful or potentially harmful to health and safety; and (3) the reason or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

Findings in fact

10. The Tribunal makes the following findings in fact.

11. The respondent, a Scottish registered company was incorporated in 2003. It is an aircraft maintenance company based at Prestwick International Airport (Prestwick). It employs around 500 employees in Scotland and around 1,300 employees in Europe.

12. Ryanair is the respondent's only client. The respondent has five bays at Prestwick at which heavy maintenance and servicing of Ryanair's aircraft is carried out.

13. Mr Cunningham is a director and shareholder of the respondent. In 2020 he was involved in the operational management of the respondent. Mr Cunningham was involved in recruitment, day to day performance management, grievance and disciplinary matters. He was supported on HR matters by an HR Manager.

14. For a number of years, the respondent has operated a training programme which ran for up to two years. Its purpose was to train people to carry out a specialist tasks in the future from the current skills that they possess. The trainees were not employed to carry out a specific role. Trainees and Mechanics 2 complete a 12-month probationary period to assess performance, attitude, conduct and general suitability. They were assessed by Andy Marshall, Hanger Maintenance Manager and supervisors on

performance. As part of this process if the respondent is dissatisfied with performance or conduct some trainees' employment is terminated during the probationary period on statutory notice or payment instead. Trainees and Mechanic 2 continued to be assessed on whether they would remain with the respondent post training. This assessment was also carried out by Mr Marshall and the supervisors before trainees had two years' continuous service.

15. The respondent employed the first claimant as a Trainee Mechanic on 10 September 2020. The respondent employed the second claimant as a Mechanic 2 on 1 October 2018.

16. The contracts of employment of the first claimant and the second claimant contained identical clauses. Each required to complete a 12-month probationary period. On successful completion of the probationary period the first clamant and the second claimant were entitled to receive company sick pay in accordance with the company sick pay scheme which is non-contractual in status and was not intended to be incorporated into the contract of employment. The respondent may at its discretion amend, vary or withdraw the scheme by giving reasonable notice of such changes. The scheme is a company benefit not a statutory right.

17. The contracts of employment contain clauses that show that employees are paid an annual salary which accrues day to day and is payable in equal monthly instalments on the 28 day of each month into their bank accounts.

18. In March 2020 the worst effects of the COVID-19 pandemic began to severely affect the aircraft industry. The survival of the respondent's only customer, Ryanair was key to the respondent's survival. Mr Cunningham was monitoring the situation on a daily basis.

19. On 18 March 2020 Mr Cunningham participated in a conference call with senior staff in the Ryanair Group. A message was sent from Michael O'Leary, Ryanair CEO to Ryanair Group Team Leaders. Mr O'Leary anticipated that until late March 2020 the mission was to operate the maximum flight schedule

to repatriate customers and operate rescue flights where necessary. Then the focus would be on protecting future operations which would involve flying each aircraft for one or two hours each week even without passengers to ensure that the aircraft remain serviceable.

20. Mr Cunningham sent an email to the respondent's employees (the 18 March Email) attaching Mr O'Leary's message. The 18 March Email said that staff across the Ryanair Group were requested to work the months of April and May on a reduced salary rate of 50 percent. The 18 March Email intimated that the situation was dire. This was best option available. Mr Cunningham would communicate with employees regularly in the next few days about sick pay and other conditions of service.

21. The respondent had discussions with employees seeking their agreement to amend the contracts of employment to cut pay for the temporary period of April and May 2020. Mr Cunningham believed if a sufficient number of employees agreed to the contractual changes this would mitigate the need for redundancies, but some job losses would be inevitable.

22. On 19 March 2020 Mr Cunningham met with senior staff to discuss issues that had been raised by shop-floor staff about the proposed pay cut of 50 percent for the temporary period of April and May 2020.

23. Afterwards Mr Cunningham issued to staff a Questions and Answers document. The clarification included the proposal was that employees would receive 50 percent of basic and shift pay if applicable; if the changes were accepted there could be a new shift pattern introduced which would reduce hours in line with the reduction in pay to ensure that minimum wage rules were not breached; and unpaid leave was an option subject to application through the HR Manager.

24. The situation was developing quickly. On 20 March 2020 the UK Government announced the Coronavirus Job Retention Scheme (CJRS) which was anticipated to last for three months. This required employees not to work; the

employer to pay wages to employees and reclaim from the UK Government up to 80 percent of wages (up to a cap of £2,500 per month).

25. The second claimant was in Spain undertaking examinations. He returned to work on 20 March 2020 before speaking to Mr Marshall to whom the second claimant sent an email to ask if he should be at work. Mr Marshall responded that the second claimant should have contacted him before returning to work. The second claimant was told to go home for seven days and report to HR if his situation changed. The second claimant returned to work on 28 March 2020.

26. A national lockdown was announced on 23 March 2020.

27. The respondent considered that maintaining aircraft and therefore the safety of them for passengers was work that was critical and essential. As employees needed to attend work on 24 March 2020, Steve Davis, Base Maintenance Technical Manager issued a Special Base Instruction: mitigation risk and employing best practices in heavy maintenance covering all the health and safety measure put in place for employees who were working.

28. On 25 March 2020, a letter was sent from the HR Department regarding the proposal with the agreement of staff to reduce wages by 50 percent from 1 April until 31 May 2020 (the 25 March Letter). This was to reduce the possibility of short-term lay-offs or even redundancies. The 25 March Letter confirmed that the employees' written consent to the reduction was required. If there was no agreement with the employee to reduce their wages, they would be placed on short term lay off as per company policy. This would be with no pay as it would be unfair on those agreeing to reduce their wages while attending work while other employees may be paid at 80 percent of normal levels and not attended work.

29. The 25 March Letter confirmed that, "These unprecedented times also effect Company Sick Pay Benefit, therefore if you are off sick during the period 1

April until 31 May you will receive statutory sick pay only as per Government guidelines."

30. Enclosed with the 25 March Letter was a form which the respondent asked the employees to sign and return by 31 March 2020. It stated, "I [ ], staff number [ ], hereby agree and authorise my employer, Prestwick Aircraft Maintenance Limited to reduce my salary by 50% from 1 April. I understand that this change will be on a temporary basis until 31 May 2020 and further reduction past this date will be discussed and agreed with me."

31. The respondent does not recognise any trade unions. Many of its employees are however members of trade unions including Prospect and Unite. The respondent was unaware which employees were trade union members.

32. On 27 March 2020 David Avery, Negotiations Officer, Prospect Union had virtual meeting with members following which it was agreed that the proposed pay cuts were unacceptable.

33. Mr Avery wrote to Mr Cunningham (the 27 March Letter). The 27 March Letter stated that members had been asking about the 25 March Letter seeking to amend their contracts and the insistence that they attend work as critical workers. Mr Avery did not consider that the respondent's employees fell within the definition of "critical worker" as defined on the Scottish Government website on 27 March 2020. He had written to the Health and Safety Executive to request the intervention of an Inspector as the respondent "forced staff to undertake non-essential work contrary to Government instructions". Mr Avery referred to the new powers of the Police to close workplaces which are not undertaking critical work. He referred to the Scottish Government's assistance scheme to business and the CJRS. The 27 March Letter concluded, "Today I will be advising members to formally reject the unilateral changes to their contractual pay and sick absence terms."

34. The respondent did not know how many employees would follow the advice to reject the proposed contractual change.

35. Around 27 March 2020 the respondent received and health and safety audit by the Scottish Health and Safety Executive. There were also visits in early April 2020 by some Members of the Scottish Parliament and the Police. All bodies were content with the measures to mitigate the transmission of COVID-19.

36. On 28 March 2020 the first claimant wrote to Mr Cunningham (the First Objection Letter) advising that,

"I do not accept your unilateral changes to my contractual terms and that my continued attendance at work should not be taken as acceptance of those changes, which I consider to be a breach of contract.

Moreover in light of the current government information relating to safe working practices, attendance at work for essential purposes and fair work principles I hold you as an employer to be in breach of all guidance about safe and fair working.

I am therefore working under protest.

As a result, I reserve the right to take legal action against you for, but not limited to breach of contract, unlawful deduction of wages, and personal injury."

37. The HR Manager brought other letters in similar terms to Mr Cunningham's attention. Mr Cunningham did not consider that he had unilaterally changed contractual terms. He hoped that by 31 March 2020 deadline the workforce would agree to the temporary changes. He considered that the work was critical and that health and safety measures were in place for the employees who were working.

38. By 1 April 2020 of the approximately 400 employees consulted about the contractual change 318 agreed to the variation. Mr Cunningham did not consider that this alone would avoid job losses.

39. Given some of the queries and concerns raised Mr Cunningham decided to send a further letter to employees dated 1 April 2020 giving clarification (the 1 April Letter).

40. In the 1 April Letter Mr Cunningham said that he considered that the respondent provided essential services given that maintaining aircraft was essential. CJRS did not include payment for those who continued to work and provide essential services. The respondent's response to the crisis was to cut costs by reducing everyone's pay for April and May. The respondent was also reviewing fixed term contracts, third party contracts and those on probation. Mr Cunningham also referred to need to work together to maintain social distancing.

41. On 2 April 2020 Mr Avery wrote to Mr Cunningham noting that the respondent had written to staff imposing a 50 percent pay cut despite their objections (the 2 April Letter). Mr Avery expressed his disappointment at the failure to take up the offer of a productive dialogue to resolve the problem.

42. Around 2 April 2020 Mr Cunningham wrote to the employees who had objected to change in pay advising that Ryanair had grounded all its flights bar a skeleton/rescue flights and had implemented a 50 percent pay cut for all its employees including engineers (the undated April Letter) Mr Cunningham said that the respondent had no option but to reluctantly implement the pay cuts to all employees in April and May with effect from the April payroll. As regards, "safe and fair working" Mr Cunningham said that the respondent had implemented social distancing, purchased and provided additional PPE to all its people and would continue to monitor government and WHO advice. He said that health and safety of the respondent's people is paramount and the respondent would ensure continued operation at the highest standards. Mr Cunningham expressed his disappointment in the unprecedented time at the claims relating to the necessity to cut pay.

43. On 2 April 2020, members of the Prospect Union (Jamie Davidson, Ross Whiteside, Aaronveer Gill, James Laird, Michael Vosterman, Jordan McGuire and Jake Adams) wrote to Mr Cunningham referring to him unilaterally

changing the contract of employment (the Second Objection Letter). The Second Objection Letter referred to the 26 March Letter in respect of contractual pay to which the first Objection Letter had been sent and the 1 April Letter. The Second Objection Letter stated,

"Following your letter I am reasserting in writing that I do not accept your unilateral changes to my contractual terms and my continued attendance at work should not be taken as my acceptance to those changes, which I consider to be a breach of contract.

I do not accept that the excess hours capacity clause gives you the ability or the authority to amend my pay while still requiring my attendance in the workplace. This clause allows in the absence of work for you to place me on unpaid leave only.

Moreover in the light of current Government information relating to safe working practices attendance at work for essential purposes and fair work principles I hold you as employer to be in breach of all current guidelines about safe and fair working. The Scottish Government has clarified that you are not providing essential or critical services and therefore should not remain open.

I remain working under protest.

As a result, I reserve the right to take legal action against you for but not limited to breach of contract, unlawful deduction of wages, and personal injury."

44. On 3 April 2020 the first claimant, Kyle Hood and Callum McLaughlin sent the Second Objection Letter to Mr Cunningham.

45. Craig Walker, Graeme Green and James Anderson sent the Second Objection Letter to Mr Cunningham on 4 April 2020. The second claimant sent the Second Objection Letter to Mr Cunningham on 5 April 2020. Paul Gilmour sent a Second Objection Letter by email at 2:36 on 7 April 2020.

46. Mr Cunningham had to decide how to steer the business forward. Wages were not due to be paid until the 28th day of the month. Most but not all

employees had agreed to the reduction in pay. In addition to the contracts mentioned in the 1 April Letter the respondent decided to review all groups where quick action could be taken to ameliorate the financial situation which included the contracts of employees with less than two years-service and those on training contracts.

47. While over the years the respondent had invested in training Mr Cunningham considered that trainees take years to work independently and productively. Also at this time as a group the respondent had less need for them. As the respondent already had in place a process for assessing trainees Mr Cunningham spoke to Mr Marshall and the senior supervisors about who were the strongest performing trainees.

48. On 7 April 2020 the first claimant, the second claimant and a colleague, Jake Adams were called to a meeting with David Baines and Paul Nix, Supervisors and were handed letters from Mr Cunningham dated 7 April 2020 (the Termination Letters) which referred to the Second Objection Letter which was attached and continued,

"The COVID 19 crisis continues to devastate our industry. Government flight bans and restrictions have grounded almost all airlines from mid-March at least until the end of May. Our client airline (and only customer) has grounded all bar a skeleton schedule/rescue flights and has implemented 50% pay cuts for all its employees including engineers.

In the face of this crisis, we have no option but to seek to preserve the long-term viability of PAML and have reluctantly implemented pay cuts for April and May. The vast majority of your colleagues at PAML recognise the perilous situation and have agreed these temporary measures.

I am disappointed by your claims relating to the necessary pay cut when millions of UK citizens have lost their jobs in recent weeks, including today with British Airways announcing 38,000 staff because of this crisis, while PAML is still in the fortunate position of providing employment in an essential

service. The pay cut of 50% is a fair, proportionate and equitable response to unprecedented circumstances.

I am disappointed by the content of your letter in the middle of this unprecedented crisis. I therefore wish to advise you that your contract for employment is terminated.

As you have not been employed for more than two years, there is no entitlement to redundancy pay. As per your contract, you are entitled to one weeks' notice pay. You will also be paid any accrued but untaken holiday pay. You will not be required to work your notice and instead per the contract of employment this will be paid in lieu. As a result, your termination date will be today 7 April 2020.

If you have any queries regarding the above, please let me know."

49. Similar termination letters were sent to other employees who had training contracts, less than two years' service and had sent Second Objection Letters. Of this group Jordan McGuire, Aaronveer Gill and Craig Walker were still on probation. Their termination letters referred to the disappointment of the content of the Second Objection Letter in the middle of the unprecedented crisis and to their probation being unsuccessful.

50. 15 employees were dismissed on 7 April 2020. All the dismissed employees had training contracts, less than two years' service and had sent the Second Objection Letter.

51. There were other employees who objected to the change in contractual terms who were not dismissed.

Observations on the evidence

52. The Tribunal considered that the first claimant and the second claimant gave their evidence honestly based in their recollection of events. They accepted that the First Objection Letter objected to the proposed changes to their contractual rate of pay. They also accepted that the Second Objection Letter did not state that there had been a deduction from their wages; it reserved the

right to bring an unlawful deduction claim if required in the future. Their evidence was candid: they knew that there had been no deduction and that any deduction would not take place until 28 April 2020 (the April payroll date).

53. The first claimant referred in his statement to he and "several colleagues" sending an email to Mr Cunningham on 24 March 2020 "basically raising H&S concerns about the virus on specific surfaces that we worked with, sanitising of equipment from stores and whether we were indeed essential workers". The email was not answered. The first claimant said he did not believe that the respondent was undertaking essential work that supported critical national infrastructure and therefore should not be open. He raised this with Mr Cunningham because there was no safety representative of safety committee. In cross examination the first claimant said that the email was mostly about the pay cut. He accepted that the email was not produced but said that it was passed to his union. Mr Cunningham said that he was inundated with correspondence at the time.

54. In the Tribunal's view it was highly likely that the first claimant sent an email on 24 March 2020 although it was not in the circumstances remarkable that Mr Cunningham did not reply. The Tribunal had no reason to doubt that the first claimant provided a copy to his union. As it was not produced the Tribunal considered that it was likely that the content of the first claimant's email was covered by the 27 March Letter.

55. The Tribunal also considered that the second claimant was straightforward in his evidence when he accepted that while his witness statement referred to health and safety issues, he did not raise any of these issues with the respondent. While he said that he raised these issues with his union the second claimant accepted that the letters sent by his union (the 27 March Letter and the 2 April Letter) focussed on the definition of critical workers and whether employees should attend work.

56. Mr Avery was a reliable and credible witness who mostly confined his evidence to matters within his knowledge. He said that the claimants had a right to object to a unilateral and significant cut in pay. Mr Avery referred in

his witness statement to feedback from members about social distancing not being observed and failure to obtain and supply PPE. However, he accepted in cross examination that the 27 March Letter and the 2 April Letter addressed whether employees required to attend work and did not raise issues about social distancing or PPE.

57. The Tribunal considered that Mr Cunningham gave his evidence honestly from his perspective and recollection of events. The Tribunal was mindful that in late March/early April 2020 there was uncertainty about who were critical workers; how long the lockdown would last; and what financial support (if any) was available. The Tribunal had no doubt that Mr Cunningham was under considerable pressure to ensure that the business could survive and be viable given the number of employees that it employed in Scotland and mainland Europe. His priority was to maintain and protect as many jobs as possible. The Tribunal's impression was that Prospect was one of numerous organisations that Mr Cunningham was dealing with at this time.

58. In the Tribunal's view Mr Cunningham's evidence was credible that while the respondent had a training programme, trainees were assessed and only some were retained.

59. Mr Cunningham's evidence was also credible that in March 2020 the respondent had to adapt and make significant financial savings and he feared that job losses would be required. The Tribunal also believed Mr Cunningham's evidence that he believed that agreeing an amendment to contracts of employment to reduce staff costs would enable the respondent to survive to the summer shut down.

60. The Tribunal considered that Mr Cunningham was candid when he said that he was disappointed that some employees did not agree to the change in their contracts. The Tribunal's impression was that the disappointment was in relation to the inference that this decision was not a necessity.

61. While Mr Cunningham was aware that some employees considered that they were not critical workers, Mr Cunningham had taken this into account and

had reasoned why this was not a view that he shared. The Tribunal found convincing Mr Cunningham's evidence about the importance he placed in health and safety measures for employees who were working and the gratitude he had for the advice that he received during health and safety audits and from the Scottish Health and Safety Executive.

62. By 1 April 2020 Mr Cunningham knew that to survive until May 2020 more had to be done. The Tribunal noted that the 1 April Letter referred to Mr Cunningham reviewing fixed term contracts, third party contracts and those currently on probation. The Tribunal thought it was highly plausible that when looking at ways to cut costs the respondent would focus on those workers' contracts who could be terminated quickly with minimum cost.

63. While Mr Cunningham referred to advice from ACAS about the redundancy process the Tribunal considered given the number of issues Mr Cunningham was dealing with it highly likely that any advice would have been filtered through the HR Manger to Mr Cunningham. It seemed to the Tribunal that what Mr Cunningham understood was that employees with less than two years' service had no right to a redundancy payment or to bring an unfair dismissal claim. The Tribunal therefore considered Mr Cunningham's evidence was credible when he said that he reviewed all employee who had less than two years' service when deciding how to proceed. The Tribunal also considered that it was likely that Mr Cunningham would seek input from the managers who were best placed to assess the overall performance of the trainees. The Tribunal also felt that it was likely that Mr Cunningham would be focussing more on numbers rather than names.

64. What was less convincing to the Tribunal was Mr Cunningham's evidence about the "redundancy process" which was vague. The Tribunal appreciated that Mr Cunningham's evidence was that Mr Marshall, who had sadly died, was involved in assessing which trainees' contracts and was primarily involved in making a list of employees. Mr Cunningham referred to meeting Mr Marshall daily and to a list with probably more than 15 names on it. In the supplementary productions there were Lists of selection pools and

Correspondence. The lists contained employees' names, roles and length of service (in years and months rather than date). It was not clear to the Tribunal if these lists were prepared at the time by Mr Marshall. In any event the lists did not contain notes about employee assessments.

65. Mr Cunningham's evidence was that the HR Manager had the written consents and any objection letters. He knew that the objection letters were in identical terms. Mr Cunningham said that he was looking at the bigger picture, focussing on the numbers rather than the names. It was Mr Cunningham who decided that 15 employees were to be dismissed on 7 April 2020. The Tribunal felt that Mr Cunningham's evidence about when that decision was taken was equivocal.

66. In the absence of any documentation or evidence from the HR Manager about when she was instructed to prepare the Termination Letters the Tribunal considered that it was doubtful that the first 15 employees on the list of employees with less than two years' service whose employment was to be terminated were the 15 employees who had sent the Second Objection Letters. Indeed, as Mr Cunningham conceded in cross examination the sending of the Second Objection Letters was "probably a small part" of his decision making.

67. In the productions was a spreadsheet prepared retrospectively in March 2021 to show the redundancy process (the Spreadsheet). It demonstrated the names of the employees who were consulted on the contractual change; their start date; their length of service at 31 March 2020; whether they accepted or rejected the contractual change, and whether they were dismissed on 7 April 2020. It was not clear if all the employees who rejected the changes had sent the First Objection Letter as not all employees were members of Prospect Union. Not all employees who rejected the changes were dismissed on 7 April 2020. Mr Gilmour's sent his Second Objection Letter by email on 7 April 2020 at 2.36pm. While it is recorded that his employment was terminated on 7 April 2020 the Tribunal had no evidence about the timing of that decision and when he received the Termination Letter. Mr Rutley sent the Second Objection

Letter on 3 April 2020 and was not dismissed. According to the Spreadsheet he had 1 year 11 months service, but his start date was 2 April 2018. He was not dismissed.

68. When Mr Cunningham was cross-examined about the selection pools and Mr Rutley's Second Objection Letter, Mr Cunningham said that Mr Rutley was more than likely doing better in the process of assessment. He seemed surprised when referred to the Spreadsheet that Mr Rutley had just acquired two years' service. In fairness the Spreadsheet was produced for the hearing. The Tribunal's considered that it was more probable that Mr Cunningham had limited information before him in early April 2020: the number of people who had less than two years' service and the number of people who had sent the Second Objection Letter.

Claimant's submissions

69. The claimants submit that they have established that the reason, or principal reason, for their dismissal was that they had asserted a statutory right and/or raised health and safety issues and thus their dismissals were automatically unfair.

70. They say that the reason for the dismissal is '*hiding in plain sight'* and that it is obvious from the Termination Letters read together with the First and Second Objection Letters that Mr Cunningham dismissed the claimants because they had asserted their statutory rights and/or had raised health and safety issues.

71. As regards the second claimant the Termination Letter it explicitly refers in the opening paragraph to the Second Objection Letter. On any plain reading of this sentence Mr Cunningham was stating that what follows was in response to that email. In the Second Objection Letter the second claimant stated in terms that he was asserting his statutory right to object to the unilateral change to his contractual terms and that he considered that the respondent was in breach of all of the guidance about safe and fair working. The Second Objection Letter either expressly or impliedly asserted that the

relevant statutory right was the right not to suffer a deduction from wages. The second claimant stated that he was working under protest and that he reserved the right to take legal action against the respondent for, but not limited to, breach of contract, unlawful deductions from wages and personal injury.

72. From the last two sentences of the Termination Letter, it is clear that (1) Mr Cunningham was disappointed that the second claimant had raised his objections and that (2) he was dismissing him as a result of those objections. The use of the adverb "*therefore"* is crucial to the understanding of the sentence. The Oxford language dictionary defines the word "*therefore*" as "*For that reason, consequently".* The same point was made in relation to the first claimant.

73. The Tribunal need look no further than the Termination Letters and the First and Second Objection Letters to conclude that the claimants' dismissals were automatically unfair.

74. Also, Mr Cunningham conceded in cross-examination that in dismissing the claimants that the Second Objection Letter was "*Probably it was a small part of it*".

75. Accordingly, the claimants were dismissed because they sent the Second Objection Letters and for the reasons set out in the Second Objection Letter, namely the assertion of their statutory rights and the issues raised in relation to health and safety.

76. The Tribunal was referred to *Mennell* (above). It is submitted that an employer's *threat* to make an unauthorised may amount to an actual infringement of section 13 of the ERA. The right is not to have deductions made from the wages without written consent.

77. Even if the Tribunal finds that there were other reasons for the dismissal such as financial imperatives/redundancy it is submitted the claim should still succeed on the basis that the *principal* reason for the dismissal was the assertion of the statutory right/ the raising of health and safety issues.

78. Alternatively, if the Tribunal finds that there was a genuine redundancy situation the claimants contend that they were selected for redundancy because they had asserted a statutory right and/or raised health and safety issues.

79. It is clear from Mr Cunningham's witness statement that he *deliberately* selected *only* those employees who had objected to the contract variation to be included in the group from which employees were to be made redundant. He did not include *all* relevant employees in the selection pool (those employees who had objected and those that had not). The respondent acted unlawfully in terms of section 105.

80. Further, the failure of the respondent to follow *any* procedure at all before dismissing the claimants, to include offering an appeal, strongly suggests that the decision to dismiss the claimants was a foregone conclusion because the claimants had exercised their statutory rights and/or raised issues in relation to health and safety and had evinced an intention that they would stand on those rights.

81. Further, the fact that both of the claimants were dismissed within a matter of a few days of the letters of objection strongly suggests that the content of the letter was the sole or principal reason for the dismissal.

82. It is submitted that in relation to the issues to be determined by the Tribunal: (1) The reason for the dismissal was that they had asserted a statutory right: the right not to suffer an unauthorised deduction from wages without their written consent and because they had brought to the respondent's attention circumstances connected to their work which they reasonably believed were harmful or potentially harmful to health and safety. The claimant's dismissals of were automatically unfair in terms of section 104(1)(b) of the ERA and section 100(1)(c) of the ERA.

83. If the Tribunal does not make the above findings, then it is submitted that the appropriate alternative finding should be that the claimant's dismissals were automatically unfair in terms of section 105(1) of the ERA.

Respondent's submissions

84. The onus is on the claimants to show the reason for dismissal. Their evidence was that they were dismissed because they wrote to the respondent in April 2010 objecting to a contractual change to the rate of pay in their contracts of employment. They stated that there had been a unilateral change to their contracts which they did not accept. Their attendance at work should not be taken as acceptance of contractual changes which they considered this to be a breach of contract and they were working under protest.

85. The respondent submitted that Objection Letters do not assert an infringement of a statutory right. They reserved the right to bring a claim of unlawful deduction of wages should this be required in the future. At the time of dismissal there was no deduction nor did the claimants believe there to have been a deduction from wages. No deduction could be made until 28 April 2020 at the earliest.

86. The essence of any claim under section 104 (and section 105 in the alternative) is that the claimant can establish that he asserted that a relevant statutory right had been breached and that he was dismissed (or selected for redundancy) because he raised this infringement. The breach of the statutory right must be causally linked to the dismissal (or selection for redundancy).

87. The claimants have failed to assert both an infringement and a relevant statutory right and failed to establish a link between this and their dismissal.

88. Section 104(1)(b) requires that an assertion of an actual infringement of a relevant statutory right (rather than a mere intention or threat of an infringement). This assertion must in this case have been that in good faith the claimants believed that they had suffered a breach of a statutory right.

89. In *Spaceman* (above) it was made clear that assertion of a statutory right not to suffer a deduction can only be made *after a deduction has been made* or the employee believes in good faith that a deduction has been made. In this case neither of these things apply. The claimants' evidence was that there was that there had been no unlawful deduction from their wages, nor did they

believe in good faith that there had been a deduction. Their evidence was that it was the right not to refuse a change of contract by reducing their pay.

90. Contractual and statutory rights are distinct. A decision could not be taken that a breach of a contractual right could give rise to a successful claim under sections 104 or 105 of the ERA. There is no statutory right to resist a detrimental change to a contract of employment. Where employees object to contractual changes and are dismissed they have rights under ordinary unfair dismissal law. There is no right to bring an automatically unfair dismissal claim where an employee has less than two years' service because an employee has objected to a contractual change and has been dismissed as a result.

91. In any event the respondent contends that the claimants' dismissals had nothing to do with their objections to the contractual changes. Other employees in the same position as the claimants and from within the wider employee population had objected to the contractual changes and had kept their jobs. The claimants were in different position as they fulfilled Trainee or Mechanic 2 roles. The respondent did not retain all of their trainees choosing to assess them before they achieve two years' service. When a reduction in headcount had to be made due to Covid-19 the same assessment process was used to decide upon the 15 employees to dismiss and was brought forward due to the necessity to reduce headcount.

92. To find in favour of the claimants in terms of their section 104 and section 105 claims (in so far as the claimants argue they were dismissed or selected for redundancy for asserting an infringement of a statutory right) would fundamentally change the essential principles of employment law.

93. A key legal flaw within the claimants' cases is that not only have they asserted a statutory right that is actually a contractual right but also that even if they had given in evidence that the right was of unlawful deductions what they faced during the consultation seeking their agreement to a contractual change to their terms and condition was a threatened deduction from wages if and only if a change to their terms and conditions was imposed. As a matter of law only an actual deduction can be the subject of a complaint for unlawful

deduction and to assert their statutory right not to suffer an unlawful deduction had been breached the claimants would have to believe there had been a breach when they made their assertion. It is submitted that the evidence simply does not support this.

94. Section 104(1)(b) requires an employee to allege, in good faith, that an infringement has already occurred. The claimants have been unable to do so.

95. Section 100(1)(c) of the ERA 1996 protects employees who use reasonable means to bring their employer's attention to circumstances connected with their work that they reasonably believe are harmful or potentially harmful to health and safety. This is where either there is no health and safety representative or safety committee (section 100(1)(c)(i)) or it was not reasonably practicable to raise the matter through a representative or committee (section 100(1)(c)(ii)).

96. The second claimant did not raise issues health and safety issues with the respondent. While the first claimant said that he sent an email this was not produced. The Objection Letters had vague and general reference to health and safety which the claimants said was in reference to critical working.

97. The claimants have also failed to establish that they were dismissed or selected for redundancy under sections 100(1)(c).

98. The section 105 claims can only succeed if the claimants can establish that the *reason they were selected for redundancy* was a health and safety reason or that they had asserted to their employer that a statutory right has been breached. It is submitted that the claimants cannot do so.

99. There is no basis upon which it can be argued that the claimant's selection for redundancy was for an automatically unfair reason. It is significant to note that the claimants did not assert any statutory right themselves and simply signed a letter drafted by their union. In some cases, the alleged assertion took place after the dismissal. There were others who raised the same issues as the claimants and who were retained by the organisation which flies in the face of the argument that the was any causal connection between the alleged

assertion of a statutory right or circumstances related to health and safety and the dismissals.

100. The claimants did not assert any infringement of a relevant statutory right under the ERA given that they asserted that they objected to a breach of contract. Alternatively, if the relevant statutory right was the right not to suffer an unlawful deduction (which is denied) it is clear that as the claimants have not suffered any unlawful deduction from wages in respect of their pay no claim under sections 104 or section 105 can be successfully brought relative to an assertion of statutory right.

101. The respondent did not take the decision to terminate the claimants' employment as a result of anything to do with health and safety and there was no compelling evidence of this before the Tribunal at all. The respondent's evidence was that the claimants were not dismissed as a result of having raised health and safety concerns. The primary and only reason for the claimants' dismissal was due to severe financial restrictions placed on the respondents as a result of COVID-19. All employees were paid their notice.

102. The Tribunal is invited to dismiss the claims.

Decision

103. The Tribunal started by considering what was the reason (or principal reason) for Mr Cunningham for the dismissing the first claimant and second claimant.

104. Answering this question involved asking what set of facts operated on Mr Cunningham's mind when dismissing them. From the findings the Tribunal considered that the facts operating on Mr Cunningham's mind were the aircraft industry was severely affected by the COVID-19 pandemic. The respondent's survival depended on the survival of Ryanair who after repatriation/rescue flights would fly aircraft one to two hours per week to ensure that the aircraft remained serviceable and had implemented a 50 percent pay cut for all employees. Maintaining aircraft and the safety of them for passengers was work that was critical and essential. As employees needed to be at work measures were put in place to mitigate the transmission

of the virus which were audited by the Scottish Health and Safety Executive and discussed during visits by MSPs and the Police. The respondent was under severe financial restrictions. Its short-term survival depended on a sufficient number of employees agreeing to work the months of April and May on a reduced salary of 50 percent. This would mitigate the need for redundancies, but some job losses would be inevitable. Not all employees agreed to the contractual changes. Mr Cunningham was disappointed about this. Mr Cunningham had to act quickly. Pay cuts were to be implemented to all employees in April and May with effect from the April payroll. He reviewed all groups of employees/workers where quick action could be taken to ameliorate the financial situation which included the contracts of employees with less than two years-service and those on training contracts. The 15 employees who were dismissed had less than two years' service and sent the Second Objection Letter.

105. The claimants asserted that the reason for their dismissals was that they had asserted a statutory right (not to have unlawful deductions from wages) and raised health and safety issues (they were not critical workers).

106. In the Tribunal's view the Second Objection Letters were in Mr Cunningham's mind when he prepared the Termination Letters. He specifically refers to them and expresses his disappointment. He candidly accepted that the Second Objection Letters was probably a small part of reason for terminating the claimants' employment.

107. Given that the Second Objection Letters were in Mr Cunningham's mind the Tribunal considered them in further detail.

108. The claimants' position was that the Second Objection Letters allege that the respondent has infringed a relevant statutory right: not to have deduction from wages without written consent. They say that the allegation need not be specific provided that it has been made reasonably clear what right is claimed to have been infringed. Also, the allegation need not be correct either to the entitlement to the right or as to its infringement provided the claim was made in good faith.

109. The Tribunal considered that the Second Objection Letters reassert the claimants' objections to respondent's intention to vary the contracts of employment in respect of contractual pay. They were not asserting that the respondent had infringed the statutory right not to suffer unlawful deduction. The claimants did not believe that the respondent had made a deduction. They were aware that wages were not due until 28 April 2020. The claimants reserved the right to bring an unauthorised deduction claim. Such a claim could only be made when the respondent made the deduction.

110. The Tribunal was not satisfied that the claimants raised any issues about social distancing or PPE with the respondent. While the claimants referenced the issue of whether they were critical workers in the Second Objection Letters Mr Cunningham considered that they were, and the relevant bodies were content with the health and safety measures that were in place. The Tribunal did not consider that the claimants' raising of health and safety issues was in Mr Cunningham's mind when he dismissed them.

111. The Tribunal was not satisfied that was the reason or principal reason for their dismissals was that they had asserted a statutory right (not to have unlawful deductions from wages) and/or raised health and safety issues (they were not critical workers). In the Tribunal's view the principal reason for the claimants' dismissal was to make financial savings to allow the respondent to continue to operate in the short term. By early April 2020 Mr Cunningham had decided that all employees' wages (regardless of whether they consented) were to be cut on 28 April 2020 and that there would be job losses. He wanted to act quicky and mitigate the need to make redundancy payments. The job losses were therefore focussed on those employees who has less than two years' service.

112. The Tribunal therefore concluded the dismissals of the first claimant and the second claimant were not automatically unfair in terms of section 104(1)(b) and section 100(1)(c) the ERA.

113. In relation to the alternative claims that the dismissals of the first claimant and the second claimant were automatically unfair in terms of section 105(1) the

ERA, the Tribunal considered that the claimants' selection for redundancy was primarily due to their length of service. In the absence of evidence relating to the assessment of their performance during their training the Tribunal considered that withholding consent to reducing their wages in April and May was a factor in their selection but for the reasons previously stated the Tribunal did not consider that the claimants had asserted an infringement of statutory right or that the decision was as a result of having raised health and safety concerns.

114. The claims are therefore dismissed.

Employment Judge: Shona Maclean
Date of Judgment: 08 July 2021
Entered in register: 13 July 2021
and copied to parties