5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100402/2021

Hearing Held in Glasgow by Cloud Video Platform (CVP) on 08, 09, 10 and 11
10 **June 2021**

Employment Judge B Beyzade

15 **Mr Kevin Banks** **Claimant**
In Person

Click Travel Limited **Respondent**
20 **Represented by:**
James McLane,
CEO/Director

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Tribunal is that:

30 1.1. the claimant was unfairly dismissed by the respondent, and the respondent shall pay the claimant the sum of FOUR HUNDRED AND FIFTY-FOUR POUNDS AND FIFTY-NINE PENCE (£454.59) by way of compensation, which includes a basic award of £0.00 and a compensatory award of £454.59.

35

1.2. The *Employment Protection (Recoupment of Jobseekers Allowance and Income Support and Universal Credit) Regulations 1996* apply to

this award. The prescribed element of the award is £454.59 (FOUR HUNDRED AND FIFTY-FOUR POUNDS AND FIFTY-NINE PENCE) and relates to the period from 12 December 2020 to 26 December 2020. The monetary award exceeds the prescribed element by £0.00.

5

1.3. The claimant's claim for less favourable treatment due to his status as a part-time worker is not well-founded and is dismissed.

1.4. The claimant's claim for a redundancy payment having been withdrawn by the claimant, is dismissed under Rule 52 of the Rules contained in Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*.

10

REASONS

Introduction

15

1. On 28 January 2021, the claimant presented a complaint of unfair dismissal, redundancy payment and less favourable treatment due to his part time worker status. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal. The respondent maintained that they acted fairly and reasonably in treating redundancy as sufficient reason for dismissal.

20

2. A final hearing was held on 08, 09, 10 and 11 June 2021. This was a hearing held by Cloud Video Platform (CVP) earing pursuant to Rule 46. The Tribunal was satisfied that the parties were content to proceed with a Cloud Video Platform (CVP) hearing, the parties did not raise any objections, that it was just and equitable in all the circumstances, and that the participants in the hearing (and the Tribunal itself) were able to see and hear the proceedings.

25

3. The parties filed an agreed Bundle of Productions consisting of 337 pages (initially 300 pages, and an additional 37 pages were filed on the first day of

30

the hearing). The Tribunal had in its possession a copy of the Tribunal file which included the claimant's Claim Form, the respondent's Response Form, Notice of Hearing and standard directions dated 15 March 2021. On 10 June 2021 both parties sent further emails to the Tribunal that they wanted to refer to during their evidence, the documents were copied to the other party and neither party raised any objections.

4. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, the parties being in agreement with these:

(1) It is agreed that the claimant was dismissed by the respondent.

(2) Was the claimant's dismissal for a potentially fair reason?

A. The respondent contends that the claimant was dismissed for the reason of redundancy. The claimant contended that his dismissal amounted to less favourable treatment as a result of his part time worker status. In the alternative the claimant stated that the redundancy procedure was incorrect and was drawn too narrowly and that in all the circumstances of the case the redundancy consultation and procedure were unfair.

(3) Did the respondent act reasonably in treating it as a sufficient reason for dismissing the claimant in all the circumstances?

a. Did the respondent act reasonably in identifying the pool of employees from which redundancies would be made?

b. Did the respondent consult adequately with the claimant, or alternatively would such consultation have been futile?

c. Was the selection criteria used to determine who would be made redundant fair and objective and/or the selection criteria applied fairly and reasonably?

d. Were there any suitable alternative employment available, and if so, did the respondent offer the claimant the opportunity to apply?

e. Was the claimant's dismissal within the range of reasonable responses?

5

f. Did the respondent follow a fair procedure in dismissing the claimant?

(4) Has the claimant suffered financial loss? If so what award for financial loss is just and equitable in the circumstances?

(5) Has the claimant acted reasonably to mitigate his loss?

10

(6) Should there be any reduction in compensation payable on the basis that the claimant would have been dismissed in any event in accordance with the *Polkey* case?

(7) Should there be any reduction in any compensation payable on the ground that the claimant by his actions caused or contributed to his dismissal?

15

(8) Was the claimant paid the correct statutory redundancy payment and if not, how much further is owed to him?

5. The claimant gave evidence on his own behalf.

6. Mr McLane, CEO/Director and Mr Thomas Davis, Director of Customer Support and Compliance gave evidence on behalf of the claimant.

20

7. At the outset of the hearing the parties agreed to work to a timetable to ensure that their evidence and submissions were completed within the four days allocated for the hearing.

8. The parties made closing submissions at the end of the proceedings.

25

Findings of Fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

5 10. The claimant was employed by the respondent from 30 January 2017 until 12 December 2020 as a Senior Business Travel Consultant. The claimant was employed by the respondent, Click Travel Limited, a private limited company with its registered office at Alpha Tower, Suffolk Street Queensway, Birmingham, West Midlands, B1 1TT. The nature of the respondent's 10 business was in the corporate travel sector. The respondent employed around 200 staff. The claimant was designated as a homeworker.

11. The claimant's basic pay was £11,456.13 per annum gross before he was placed on furlough leave. His normal working hours were 17.5 hours per week. His normal working hours were Mondays 17.30-21.00, Tuesdays 15 17.30-21.00, and Wednesdays 5.30pm-9.00pm, although he also worked additional shifts. By way of example the claimant and every member of his team worked one weekend shift every five weekends.

12. The claimant was issued with a contract of employment dated 23 December 2016, which both parties signed on 13 January 2017. He initially worked 22 20 hours per week. In addition to his salary the claimant was entitled to an on-call allowance of £50.00 per shift for shifts of 7 hours or more and it was stated that he may be required to work overtime. Following a flexible working request from the claimant on 01 April 2019, the respondent sent a letter to the claimant dated 05 April 2019 agreeing to increase his hours to 37.5 hours per week 25 from 01 April 2019 and agreed to proposed shifts Monday 09.00 – 13.30pm/17.00-23.00; Tuesday 09.00 – 13.00/17.00-23.00; Wednesday 09.00-13.00/17.00-23.00 and no change to the 3 on 2 weekend rotation and his salary was increased to £24,548.86 per annum gross.

13. The claimant's line manager was Mr. Mathew Richardson, Out of Hours Reservations Manager.

14. On 17 July 2019 Mathew Richardson sent an email to staff including staff on the claimant's team advertising the remaining overnight shift (which was at the time being filled by on-calls). This was to be a mixture of overnight weekend shifts and out of hours shifts during the week. The claimant did not apply for this role.

15. On 2 September 2019, the claimant's second flexible working request was approved. His new working pattern from 16 September 2019 was Monday 17.30-21.00; Tuesday 17.30-21.00; Wednesday 17.30-21.00 and he was to continue to work on the weekend on a rotation basis. His new salary was confirmed, £11,456.13 gross per annum.

16. Prior to being placed on furlough leave, the claimant's pay amounted to £954.68 per month before tax and national deductions were made. His net monthly salary was £928.05.

17. On 07 April 2020, the claimant received a letter from Jill Palmer, the then CEO of the respondent advising him that because of the outbreak of COVID-19 and with it the restrictions on travel and the company facing significant losses '…*over the next months and uncertainty in the months after that*' he will be placed on furlough leave from 14 April 2020. This meant that the claimant would not be required to work until further notice and the respondent agreed to keep the claimant's salary '…*topped up to 100%*' (80% would be claimed from UK Government's furlough scheme up to a maximum of £2500.00). The letter stated that if it were necessary to step back from this commitment, they would let the claimant know. The claimant agreed to be placed on furlough leave.

18. From 01 July 2020 the claimant was paid 80% of his salary. His salary was reduced from £11,456.13 per year to £9,165.00 per annum.

19. The respondent had a Redundancy Policy dated 01 September 2014.

20. On 5 October 2020 the respondent made an announcement to employees advising of the continued adverse effect of the restrictions on business travel, that it was anticipated the restrictions would continue for another six months, that there would be significantly reduced demand in business travel for the foreseeable future and with the ending of the furlough scheme at the end of October and its replacement with the Job Support Scheme (which was set up to support viable jobs). Redundancies were proposed in the areas of the business in which there was a continuing reduction in work. Revenue had been 80-90% down since April 2020. Employees who were not in an affected pool would be placed on the Job Support Scheme.

21. A letter was sent from Jill Palmer to the claimant dated 05 October 2020 warning him of possible redundancy. The letter explained that the business had suffered loss of revenue of over 80% and it set out the posts that were at risk. It was proposed that in the Unsocial Hours team the 5.5 posts would be reduced to 4.5 posts and the process was outlined.

22. By an email dated 05 October 2020 employees were invited to nominate themselves as employee representatives and guidance was provided. On 07 October 2020, the proposed nominees were sent to affected employees and each person was asked to choose 4 candidates. The claimant chose Scott Morrison, Lisa Eardley, Louise Wheeler and Juliana Barzey-Jones (all 4 of whom were duly elected).

23. A document titled redundancy proposal were sent to employee representatives confirming the posts to be made redundant, voluntary redundancy, proposed methods of dismissal, proposed payment calculation, and proposed selection criteria with descriptors.

24. On 13 October 2020, the claimant asked for a breakdown of what he would receive under the voluntary redundancy scheme. The claimant was advised he would receive a month's salary (notice pay), statutory redundancy pay, one week's pay, accrued annual leave and holiday purchase refund.

25. Representatives' Consultation and Sabbatical Proposal documents were prepared dated 19 October 2020. On the same day, an email containing voluntary redundancy scheme information were distributed to affected staff.

26. On 27 October 2020, the claimant was sent a letter from Jill Palmer advising that he was provisionally selected for redundancy. The claimant was provided a copy of his scores against the standard criteria which were dated 23 October 2020, and his total score was 80.

27. The claimant was ranked sixth (last) in his pool. The other employees in his pool scored 100, 95, 93, 85 and 83 points. A redundancy consultation meeting took place between Tom Davis and the claimant on 29 October 2020. The claimant's scores were discussed between him and Mr Davis, and it was noted that he reviewed these, that the claimant's absences had reduced his scores and 'work wise' his scores were 'really good.' By a letter dated 30 October 2020 from Jill Palmer, the claimant was advised that it was likely that his position would be made redundant.

28. A video consultation meeting was held on 05 November 2020.

29. Between 13 April 2020 and 27 October 2020 a number of WhatsApp messages were exchanged between the claimant and the respondent's employees. By way of example on 13 October 2020 the claimant enquired about why night shift workers were not included within his selection pool as they had the same skillset as he did, the only difference being the actual shifts that they worked. On the same day, the claimant asked what would happen if the Government extended the furlough scheme and performed a 'U Turn'.

30. The question relating to night shifts not being included were listed at number 149 of the consultation questions and answers schedule (page 179). The respondent advised it would provide further details at the meeting on 19 October 2020. In the 19 October 2020 consultation the respondent stated that night shift roles were distinct and not interchangeable with those who worked unsocial hours shifts. No further information was provided about the Job Support Scheme. In question 205 (page 188) further details were requested

about night shift workers and the Job Support Scheme. The respondent replied that night shift workers were different due to the hours worked i.e. between 23.00 – 7.00. Night shift workers' roles were described by the respondent as not being interchangeable and night shift vacancies were advertised differently. There was not a reduction of work on the night shift. In relation to the Job Support Scheme specific details could not be provided.

31. Between 05 and 06 November 2020 the claimant put a number of queries to the respondent through the employee representative. There was a document prepared showing the questions the answers.

32. On 12 November 2020, the claimant received by email notice of termination of his employment by reason of redundancy and he was advised that his notice period would expire on 12 December 2020. He would remain on furlough, and he would receive statutory redundancy pay £660.93 (£220.31 gross weekly pay, 3 complete years' service therefore 3 weeks' pay and 36 years of age), accrued holiday pay and a refund for purchased leave.

33. The claimant started his job search on 29 January 2021. He had set up an employment law company. As of 11 June 2021 the claimant did not obtain employment or any income from employment. After he left his employment with the respondent, he received Universal Credit.

Observations

34. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

35. Mr McLane's evidence focussed upon background information in relation to the business, the impact of COVID-19, the reason why the company had to reduce its staffing levels and costs, and he also gave evidence in relation to the redundancy process followed and the difference between night shifts, on

call and day shifts. A number of the correspondences relating to the claimant's redundancy were sent to the claimant by the former CEO.

36. Mr Davis chaired the claimant's consultation meeting on 29 October 2020. A video consultation meeting took place on 05 November 2020. However, he was not the claimant's line manager, he was unable to confirm a few details in relation to the claimant's employment, and he did not produce the claimant's scores.

37. There was also a detailed document setting out the questions asked by the claimant and the respondent's answers and consultation documents, albeit the level of detail provided in relation to the respondent's consideration of the selection pools and its decision to not include night shift workers in the same pool as the claimant, and its consideration of the Job Support Scheme was not substantial. Mr Davis provided further details during his evidence that confirmed the respondent's rationale.

38. Some of the evidence provided by the parties was somewhat confused in places. Both Mr Davis and the claimant asserted the claimant's incorrect start state, albeit this was not material considering the circumstances.

39. The claimant could not provide an adequate explanation as to why he did not start his job search until late January 2021. Although there were job adverts in the Bundle, there were few examples of his job applications and application outcome correspondences. The respondent's observations dated 23 March 2021 noted that the claimant's application rate between 13 November 2020 17 March 2021 was rather low. The respondent noted that there were 105 part time roles available in the Glasgow area on 19 March 2021 that the claimant could have applied for.

Relevant law

40. To those facts, the Tribunal applied the law –

41. Section 94 of the Employment Rights Act 1996 ('ERA 1996') provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA 1996). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA 1996). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

42. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish (s139(1) ERA 1996).

43. In *Safeway Stores plc v Burrell [1997] IRLR 200* the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide:

    a. Whether the employee was dismissed?

    b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

    c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

44. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the

case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA 1996).

45. In applying s98(4) ERA 1996 the Tribunal must not substitute its own view for the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

46. The Tribunal considered the EAT's decisions in *Eaton Ltd v King & Others [1995] IRLR 75* and *E-Zec Medical Transport Service Ltd v Gregory [2008] UKEAT/0192/08,* and *British Aerospace v Green [1995] IRLR 433 in the Court of Appeal*. When considering whether the circumstances of the claimant's dismissal fell within the range of reasonable responses open to a reasonable employer the Tribunal should consider whether the respondent's choice of any selection criteria fell within a range of reasonable responses available to a reasonable employer in all the circumstances and whether based on the evidence before the Tribunal the scoring was applied in a fair and objective manner. The Tribunal's task, however, was not to subject any marking system to a microscopic analysis or to check that the system had been properly operated but it did have to satisfy itself that a fair system was in operation.

47. 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*).

48. 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*).

49. The House of Lords in *Polkey v A E Dayton Services Ltd 1988 ICR 142* held that "*in the case of redundancy, the employer will not normally have acted 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 redeployment within its own organisation.*" The House of Lords' ruling firmly established 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'.

50. 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*). "*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).

51. Section 123 of the 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*". 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*).

52. Regulation 5 of *The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000* states:

5.—(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker— 25 (a) as regards the terms of his contract; or (b) by being subjected to any other detriment by any act or deliberate failure to act of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less 5 favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

53. *The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000* Explanatory Note states:

"Redundancy

In a redundancy situation, part-timers should be treated no less favourably than their full-time equivalents. Different treatment of full-timers and part-timers will only be lawful if it can be justified on objective grounds.

5 *To comply with the law:*

The criteria used to select jobs for redundancy should be objectively justified, and part-timers must not be treated less favourably than comparable full-timers.

Objective Justification

10 *The right of part-timers not to be treated less favourably than a comparable full-timer applies only if the treatment is not justified on objective grounds.*

Less favourable treatment will only be justified on objective grounds if it can be shown that the less favourable treatment:

(1) is to achieve a legitimate objective, for example, a genuine business
15 *objective;*

(2) is necessary to achieve that objective; and

(3) is an appropriate way to achieve the objective.

54. Parties referred the Tribunal to previous cases that have been decided which the Tribunal found to be informative including the following:

20

(i) Capita Hartshed Limited v Bayard [2012] ICR 1256 paras 31 – 34

(ii) McFisheries Limited v Finley and Others 1985 ICR 160

(iii) Williams v Compair Maxim Ltd [1982] IRLR 83

(iv) *Mr K Edohen v Q-Park Limited [2019] London Central Employment Tribunal, per Employment Judge Burns (it was noted that this was not binding authority)*

Discussion and decision

5 55. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Redundancy pay claim

56. The claimant withdrew his redundancy pay claim. He had accordingly received the correct statutory redundancy payment (set out above). The 10 Tribunal dismissed the redundancy pay claim pursuant to rule 52, following the claimant's withdrawal.

Unfair dismissal

57. The Tribunal referred to s98 ERA 1996, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: 15 firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) of the ERA 1996. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the 20 reason given.

58. The Tribunal referred to the definition of redundancy in s139(1) of the ERA 1996. That states that an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on that business in the place where the 25 employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

59. The Tribunal considered the matters set out in *Safeway Stores plc v Burrell (above)*. The claimant was dismissed by the respondent, so the first element was satisfied.

60. It is also clear that the respondent had determined that it required to cut costs and that this would done by reducing wage costs. A conclusion was reached that the claimant's team could operate with one less member of staff. The requirement for employees to carry out work of a particular kind had accordingly diminished. The second test was, therefore, also satisfied. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly caused by the fact that the respondent determined that, to reduce costs, the number of staff carrying out work as a Senior Business Travel Consultant on the claimant's team would require to be reduced. The Tribunal were accordingly satisfied that the claimant's dismissal occurred because of a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely due to redundancy.

61. The Tribunal then considered s98(4) of the ERA 1996. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee.

62. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as *Iceland Frozen Foods Limited v Jones [1982] IRLR 439* that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent.

63. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in *Polkey* in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason

for dismissal. Taking each factor in turn, the following conclusions were reached.

Pool of employees

64. The respondent chose to include 5.5 staff in the claimant's team (unsocial hours) in one pool and it was proposed to reduce the team to 4.5 employees.

65. It was the respondent's decision to exclude night shift workers from the claimant's pool. The roles being carried out by night shift workers and on call workers were similar. There was a paucity of reasoning in terms of the documentation showing the respondent's rationale for this. The impact on the consultation process is considered further below.

66. According to Mr Davis's evidence, in terms of working arrangements the respondent had contractual, flexible working, with employees and they had established working patterns for the respondent over a period (which he considered could not lawfully changed). The respondent needed to facilitate pooling over working hours as well as skills and responsibilities. The unsocial hours group were placed in a separate pool to maintain 24 hours a day operation after furlough had ended, and he commented that the respondent would not have enough staff to work night shifts, weekends and out of hours roles without substantially changing individual contracts. The pools were grouped to ensure the respondent could cover all required shifts and rotations. The respondent was advised that changing individual shifts could be constructive dismissal. The respondent decided that was unreasonable to do so and that it could also have been unlawful.

67. Mr McLane indicated that the night shift was there to provide coverage and continuity of service to the respondent's customers. A night shift employee's role was not so much concerned with the processing of reservations, and he referred to the fact that the respondent contracted with customers to be available throughout the night. In his evidence he stated that the requirement for work on the night shift did not diminish.

68. The Tribunal noted that the documentary evidence did not reflect whether the respondent had regard to all the relevant factors that were outlined in the oral evidence at the hearing. The Tribunal considered that night shift work did not have an inherent particularity, simply because it is done by night — irrespective of whether there is anything to distinguish the actual working functions involved from the equivalent functions carried out by a different shift during the day.

69. The respondent could have shown in its documentary evidence that such matters as the nature of the particular work being done by each of the night shift workers and compared this to the work of the day shift and out of hours employees and that it properly appraised singly or judged all the factors together. However, the Tribunal did not find that the respondent had proceeded upon the mistaken basis that work done by night qualified automatically meant that the work was different from the on-call shift — for the sole reason that it was done by night and without regard to any other attributes of such work.

70. The Tribunal were satisfied that the night shift role is substantially different to that of the claimant. Therefore, whilst there was no evidence to show it was outside the range of reasonable responses for the respondent not to pool the night shift together with the Claimant for the purposes of the redundancy selection exercise, the consultation was not fair and reasonable.

Consultation

71. The respondent held consultation meetings with employee representatives including on 19 October 2020, with the claimant on 29 October 2020 and a video consultation meeting on 05 November 2020.

72. The respondent carried out some consultation with employees and employee representatives and consultation documents were prepared and shared with employee representatives and a table was compiled with questions posed by employees and answers provided by the respondent. Given the respondent was operating in a difficult climate during the COVID-19 pandemic this

document clearly took time, care, and attention to prepare. There was evidence to suggest that the claimant was afforded some opportunity to challenge the basis for his selection for redundancy or to put forward suggestions for ways to avoid redundancy.

5 73. However the consultation in relation to night shift workers not being included in the selection pool was plainly not proper or reasonable. In particular the information provided in relation to the factors considered by the respondent in determining that the night shift workers should not be placed in the same pool as the claimant's team was manifestly inadequate, and thereby the claimant 10 was not afforded a reasonable opportunity to challenge the respondent's approach in respect thereof.

74. There was little consultation on the use of the Job Support Scheme. However the claimant's question in relation to the Job Support Scheme was not addressed and the respondent did not furnish the claimant with details of the 15 same to enable consultation to take place and his views to be considered.

75. The claimant's redundancy was confirmed by a letter sent on 12 November 2020. In view of the claimant's unanswered enquiries, the respondent should have granted a short extension of the consultation period to enable a proper and reasonable consultation to take place in relation to night shift workers and 20 their inclusion in the claimant's pool and the issue of the Job Support Scheme. The respondent's approach was therefore outside the band of reasonable responses.

Selection criteria and its application

76. In relation to the method of selection and the selection criteria used, the 25 Tribunal found that this was objective and based on descriptors that were defined and set out in the written documents.

77. There was evidence of consultation in relation to the selection criteria. These were provided to employee representatives.

78. Each member of the pool was scored against the same criteria including performance in role, versatility, customer satisfaction, quality, attendance, and timekeeping.

79. There was no clarity in terms of who determined the claimant's scores. It was also not clear whether the claimant received any or any adequate feedback from the person who carried out his scoring. However, Mr Davis discussed the claimant's scores with him on 29 October 2020, he noted that the claimant's absences had lowered his overall score and overall his performance was 'really good.' There was no evidence that the claimant challenged his scores at the consultation meeting, and he accepted that his absences had reduced his overall score.

80. During the hearing, the claimant challenged his score in relation to versatility. There was no evidence before me to suggest that a fair system of scoring was not operated by the respondent. Mr McLane suggested that even if this criteria were applied wrongly, the individual criterion could be deleted, or everyone's scores in the same pool could have been lowered to 25. The outcome would not be different.

81. The Tribunal accepted that the scoring criteria was objective and that the process put into place was fair and reasonable and it was open to a reasonable employer to use and apply the respondent's selection criteria in this manner.

82. Thus, the Tribunal found that the scoring process was within the band of reasonable responses. The Tribunal's task is not to subject the marking system to microscopic analysis or to check that the system properly operated but the Tribunal must satisfy itself that a fair system was in operation (paragraph 25 of *E-Zec Medical Transport*). The Tribunal was satisfied that a fair system was operated in the circumstances.

Availability of any suitable alternative employment

83. There were no redeployment opportunities for the claimant within the respondent's organisation. The Tribunal considered that the HR role that was available was materially different from the claimant's role, and it required specific qualifications and expertise. The Tribunal were not satisfied based on the evidence before it that the claimant possessed the required qualifications and expertise for the HR vacancy. This was therefore not suitable alternative employment, and the respondent did not offer this role to the claimant. Furthermore there was no evidence that the claimant had in fact applied for the role. Although the respondent's policy stated that it was required to inform employees of vacancies, this would have made no material difference given the circumstances.

84. There were accordingly no steps which the respondent ought reasonably to have taken to avoid or minimise redundancy by redeployment within its own organisation.

Consideration of range of reasonable responses and fair procedure

85. The Tribunal did not conclude that the respondent's situation was that "exceptional case" (*Polkey v AE Dayton Services Limited [above]* considered) for the respondent to have reasonably concluded that fulfilling its consultation obligations fully 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 the Tribunal's judgment, on 12 November 2020, it cannot be said that carrying out a fair and reasonable consultation process in relation to its employees and impending redundancies would have been utterly useless and futile.

86. Based on the oral evidence from Mr Davis and Mr McLane, the Tribunal found that the respondent did not even apply its mind to the question of carrying out consultation that was reasonably required. The respondent did not produce any contemporaneous documents or other evidence to show that it had considered consulting its staff in relation to the claimant's pool and Job

Support Scheme reasonably and properly but had decided against that, because it had concluded that it would be a futile exercise. Therefore, the Tribunal concluded that the respondent could not have reasonably concluded that consultation would be futile.

87. The Tribunal was mindful of not falling into the error of substitution, and it did not matter how the Tribunal, or another hypothetical reasonable employer would have conducted itself in that situation. The test was whether in the circumstances the respondent's decision to dismiss the claimant without full and reasonable consultation 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. In those circumstances it did fall outside the range of reasonable responses because, although the respondent was mindful of the significantly reduced demand for its services and that government restrictions and the effects of the pandemic were ongoing, it still had to reasonably consider the impact that dismissal would have on its staff. Even if the consultation process would have been unlikely to have changed the ultimate outcome, it was outside the range of reasonable responses to dismiss the claimant without giving him a reasonable opportunity to be consulted and to express his views and make suggestions. The respondent did not give reasonable or proper consideration to the impact of its decision on the claimant and his employment and the claimant's dismissal was accordingly unfair.

Financial loss and mitigation

88. Considering the circumstances as existed on 12 November 2020 and the continuing Coronavirus restrictions and the effects of the pandemic, the Tribunal finds 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 and reasonable consultation process. I find that a fair process would have been followed and the matters identified above would have been addressed with the claimant in that time. The Tribunal concluded 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.

89. To put it simply, the claimant's post had been deleted and his job were no longer viable, there was no reasonable prospect of the business fully functioning and the pre-pandemic demand resurging any time in the immediate future and there were no suitable alternative roles the respondent could have offered to the claimant. The Tribunal was satisfied that the night shift roles are substantially different jobs 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.

90. Finally, if a reasonable further period of two weeks' consultation had been carried out by the respondent, by the end of it the rules relating to the government's coronavirus job retention scheme would have been investigated by the respondent and discussed with the claimant as part of the respondent's consultation. 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. 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. 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 continued to place him on furlough. The Tribunal accepted that the respondent placed the claimant on furlough leave for several months. However, that was done earlier in April 2020 and in anticipation of the business and demand resurging later in 2020, and therefore needing the claimant to perform his role. There was no such need for the claimant's role due to the ongoing restrictions and supressed demand. Additionally the Tribunal were satisfied that the night shift

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. In any event the Tribunal noted that the claimant did not previously apply for the respondent's night shift vacancy in 2019 (or on any other occasions) and this was a difficult area in which the respondent could recruit internally.

91. Therefore, if a fair consultation had been followed, by the end of it, which would have been around two weeks after the claimant's dismissal, the Tribunal determined that it would not have been outside the range of reasonable responses for the respondent to decide to dismiss the claimant and not to allow him to remain on furlough. The Tribunal did not accept the claimant's assertion that he was entitled to 12 months' loss of earnings as this would suggest that there was a reasonable chance that the claimant's employment would have continued if he had been fairly and properly consulted. It would not have continued beyond a further period of 2 weeks of consultation.

92. 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 claimant as a result of unfair dismissal but not to punish the respondent or to award the claimant a bonus. Therefore, the Tribunal did not accept that the absence of further consultation should be taken as allowing the Tribunal to award a greater compensation than the claimant's financial losses flowing from his dismissal, assessed using the above principles.

93. Turning to the calculation of the award, the claimant was paid his statutory redundancy. The function of the basic award is to compensate the claimant for loss of his statutory redundancy right. In the claimant's case there is no such loss, as he has, received his redundancy pay. Therefore, no basic award can be made.

94. With regards 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 the Tribunal's judgment, his compensatory award must be assessed as his loss of wages and the employer's pension contributions for that period. His weekly pay was £220.31. Therefore, his total loss of wages was £440.62. Based on the claimant's schedule of loss I calculated that the employer's pension contribution for that period would have been £13.97 ([£363.20/52] x 2). On the basis that the Tribunal determined that the claimant would have been fairly dismissed two weeks later and thus would have lost his statutory rights, given the proximity of that to his actual dismissal date, the Tribunal did not find it would be just and equitable to award a compensation for loss of statutory rights. The Tribunal was satisfied that between his dismissal on 12 December 2020 and the end of the two weeks' period for which his losses are awarded, considering the then prevailing circumstances of the ensuing pandemic there was little that the claimant could have done to secure an alternative employment within a period of 2 weeks especially in the sector he was working in. Therefore, the Tribunal were satisfied that there was no unreasonable failure by the claimant to mitigate his losses in the two-week period following termination of his employment.

95. Even if the Tribunal were wrong to find that 2 weeks' pay was the appropriate compensatory award, the claimant did not apply for any work up to the end of January 2021. The Tribunal considered the respondent's submission that this was not reasonable in all the circumstances. The respondent referred to over 100 part-time jobs that the claimant could have applied for in the Glasgow area on 19 March 2021. The respondent estimated that 50 new part time roles were added daily over the course of 18 weeks. There was insufficient evidence provided by the claimant that he applied for employed positions (other than few instances referred to in the Bundle). The claimant has not referred to any income he has earned since his dismissal. As such, the evidence indicated that the claimant did not take sufficient and reasonable steps mitigate his losses. Having regard to the claimant's failure to mitigate his losses fully and reasonably, if the Tribunal were wrong to award 2 weeks'

pay (reflecting the consultation period), the Tribunal would have awarded compensation for a period of 20 weeks representing 20 weeks of the Claimant's inability to find work, and the receipt of the Redundancy Payment of £660.93.

5 *Polkey reduction*

96. In determining what sum would be just and equitable in the circumstances under section 123(1) the Tribunal have considered the likelihood that the claimant might have been fairly dismissed in any event per *Polkey v A E Dayton Services Ltd 1988 ICR 142 HL*. It was not appropriate in the
10 circumstances and based on the evidence before the Tribunal to make an additional reduction.

97. Furthermore, the Tribunal considered that under section 123(1) of the ERA 1996 an award of compensation must be just and equitable in all the circumstances and based on its findings were satisfied that two weeks' pay in
15 respect of the compensatory award is just and equitable.

Whether claimant caused or contributed to his dismissal

98. In terms of the issue of contribution, the Tribunal concluded that the claimant was not guilty of any culpable or blameworthy conduct. Consequently his compensatory award should not be reduced under section 123(6) of the 1996
20 Act. No basic award was due for the reason stated earlier.

Recoupment regulations

99. The claimant was in receipt of benefits by way of Universal Credit after he was dismissed on 12 December 2020 and so the *Employment Protection (Recoupment of Benefits) Regulations 1996* ('recoupment regulations') as
25 amended apply. The prescribed period is the period between 12 December 2020 and 26 December 2020. The judgment contains information as regards recoupment and advises of the amount by which the monetary award exceeds the prescribed element in terms of the appropriate regulations.

100. As the claimant has been in receipt of Universal Credit, the relevant department will serve a notice on the respondent stating how much is due to be repaid to it. In the meantime, the respondent should only pay to the claimant the amount by which the monetary award exceeds, if any, the prescribed element. The balance, if any, falls to be paid once the respondent has received the notice from the Department for Work and Pensions.

The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 claim

101. As the Tribunal were satisfied that the claimant's dismissal was due to a genuine redundancy situation, the claimant's claim for less favourable treatment on grounds of his part-time worker status under Regulation 5 of *The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000* must fail. The Tribunal referred to the Explanatory Note relating to the same, and there was no evidence before the Tribunal that the claimant was treated differently from full time equivalent workers during the redundancy process, and the criteria used in relation to the scoring process was reasonably and objectively determined. If the Tribunal is wrong and there was less favourable treatment, the Tribunal would have found that any such treatment took place with the aim to achieve a genuine business objective, and that it was both necessary and appropriate for the respondent to attain that objective. The Tribunal considered that under Regulation 8(6) that the burden of proof of showing the ground for the less favourable treatment or the detriment was on the respondent and the Tribunal accepted the respondent's business rationale for redundancy in this regard.

Conclusion

102. The claimant's claim that the respondent has unfairly dismissed the claimant succeeds and the claimant is awarded the sum of £454.59 for the reasons set out above (such award being subject to the recoupment regulations). The claimant's claim for a redundancy payment is dismissed following the claimant's withdrawal under Rule 52. The claimant's claim made pursuant to

The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is dismissed.

5

Employment Judge: Beyzade Beyzade
Date of Judgment: 09 July 2021
Entered in register: 19 July 2021
and copied to parties

10

I confirm that this is my judgment in the case of Mr Kevin Banks -v- Click Travel Limited 4100402/2021 and that I have signed the order by electronic signature.

15