RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr N Hopgood**

Respondent: **S Walsh & Sons Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **5, 6 August 2020 & 20 August 2020 (in chambers)**

Before: **Employment Judge Scott**
Members: **Ms T Jansen**
Mr M Rowe

Appearances:
Claimant: Ms S Crawshay-Williams (Counsel)
Respondent: Mr A Ross (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim that the claimant was unfairly dismissed pursuant to sections 94–98 of the Employment Rights Act 1996 ('ERA 1996') is well founded and succeeds.

2. The claim that the claimant was unfairly dismissed by reason of making a protected disclosure pursuant to section 103A ERA 1996 is not well founded and is dismissed**.**

3. The claim that the respondent subjected the claimant to protected disclosure detriment pursuant to section 47B ERA 1996 is not well founded and is dismissed.

4. If the remedy is compensation only, the compensatory award will be reduced by 75%, pursuant to the '*Polkey* principle' (see: *Polkey v AE Dayton Services Ltd* [1987] UKHL 8).

ORDER

The parties must, within 14 days of the date this Judgment and reasons are sent to them, provide dates of unavailability for the period 1 November 2021 to 4 March 2022 for a 1-day remedy hearing to be listed by the Tribunal.

REASONS

Background

1. The Tribunal convened on 5 & 6 August 2021 via Cloud Video Platform (CVP) (all parties were remote) to hear the Claimant's claim of unfair dismissal (automatic and ordinary) and detriment because of protected disclosures. The Respondent resists the claims. It argues that the Claimant did not make protected disclosures as defined in s43A ERA 1996. If they are wrong on that, they deny that the main or principal reason for his dismissal was a protected disclosure, nor was the claimant subjected to any detriment for making a disclosure. Rather, the respondent says that the Claimant was fairly dismissed by way of redundancy. The Tribunal agreed with the parties that it would determine liability (including *Polkey*) first and determine remedy later, if appropriate.

2. There was an agreed list of legal issues at the outset of the hearing, which was amended by agreement on Day 1. There is no dispute that the Claimant was an employee and had the necessary 2 year's continuous service with which to bring an ordinary unfair dismissal claim and that he was dismissed.

3. The following legal and factual issues fell to be determined by this Tribunal:

3.1 **Time limits**

3.1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 May 2020 may not have been brought in time.

3.1.2. Was the detriment complaint (see below) made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

ii. If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

iv. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3.2 **Unfair dismissal**

3.2.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy. The Claimant says it was because he had made protected disclosures.

3.2.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

3.2.2.1 The Respondent adequately warned and consulted the Claimant. The Claimant will say he was told of the redundancy without warning or consultation. The Respondent denies this;

3.2.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool. The Claimant will say the pool should reasonably have included all 4 Transport Managers. The Respondent will say, as senior transport manager, the Claimant was reasonably in a pool of one;

3.2.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment. The Claimant will argue that he could have continued to be furloughed. The Respondent will say it needed to cut costs;

3.2.2.4 Dismissal was within the range of reasonable responses?

3.2.3 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.2.4. If so, should the Claimant's compensation be reduced? By how much?

3.2.5 If the reason or principal reason for dismissal was that the Claimant made the protected disclosure/s alleged below, then the Claimant will be regarded as unfairly dismissed.

3.3 **Protected disclosure**

3.3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.3.1.1 Did the claimant disclose information on:

i. 10 March 2020;
ii. 20 April 2020

The respondent admits that the claimant disclosed information on those dates [the information disclosed is set out in the finding of facts below].

3.3.1.2 Did the claimant reasonably believe the disclosure of information was made in the public interest?

3.3.1.3 Did the claimant believe it tended to show that:

i. a criminal offence had been, was being or was likely to be committed, by knowingly sending out overweight vehicles and not operating lorries under the direction of the named person on the Operating Licence;

ii. a person had failed, was failing or was likely to fail to comply with any legal obligation, namely complying with DVSA requirements;

iii. the health or safety of any individual had been, was being or was likely to be endangered by the insufficient testing of vehicles; the risks of driving an overweight vehicle; and the absence of an airbag.

3.3.1.4 Was that belief reasonable?

If so, then there is no dispute that the disclosures were qualifying protected disclosures because they were made to the employer.

3.4 **Detriment**

3.4.1 Did the Respondent do one or more of the following things:

3.4.1.1 Exclude the claimant from meetings (for example, with FBB)

3.4.1.2 Not ask the claimant to return to work to oversee lorries/drivers

3.4.1.3 Select the claimant for redundancy?

3.4.2 By doing so, did it subject the Claimant to detriment? The Respondent will say that selection for redundancy is excluded as a detriment by section 47B(2) ERA [dismissal as a detriment was withdrawn on day 1].

3.4.3 If so, was it done on the ground that he made a protected disclosure?

3.4.4 Time issue (above).

Evidence

4. The Tribunal had one agreed bundle of documents (references [x] are to documents to the Bundle). Several additional documents were added to the bundle during the Hearing [270-304 & 305-314]. We read the documents that the parties referred us to. On completion of the evidence, we received written and oral

submissions from Mr Ross and oral submissions from Ms Crawshay-Williams. We do not set out the parties' submissions, but we considered the points made and the authorities relied upon in our deliberations.

5. The Tribunal heard evidence under affirmation from the claimant and from two witnesses on behalf of the Respondent: Mr. Robinson (Commercial & Operations Director) and Mr Gifford (Managing Director). We read the witness statements prepared on behalf of the claimant and the two witnesses for the respondent. Paragraphs 5-7 of the claimant's witness statement (and paragraphs 2-3 of the further information provided by the claimant [46]) were deleted by agreement. Mr. Gifford made three amendments to his witness statement. At paragraphs 26 & 47.3, he amended the words 'I am not aware of' to 'I do not recall', and at paragraph 21, he amended *28* March 2020 to *30* March 2020. We have anonymised the identity of those mentioned who did not appear before the Tribunal or provide a witness statement.

The Law

6. Counsel drew our attention to relevant authorities, which we refer to below.

Protected Disclosures

7. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, by reason of having made such a protected disclosure. Section 43A ERA 1996 provides:

> "*In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of the sections 43C to 43H."* A disclosure is made in accordance with Section 43C if, among other things, it is made to the employer. That is not in dispute.

8. Section 43B (which sets out the disclosures that qualify for protection) provides, in so far as material:

> *"(1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following -*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) …*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered,*
>
> *…."*

9. The Claimant bears the burden of showing on the balance of probabilities that the disclosure(s) amounted to a qualifying protected disclosure. It is only if the disclosure is protected that a Tribunal will then go on to consider causation in relation to detriment and dismissal.

10. At paragraph 9 of his Judgment in *Williams v Michelle Brown AM* UKEAT/0044/19/OO, His Honour Judge Auerbach identified five potential issues which a Tribunal is required to decide:

> "*It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information* [the respondent admits that in the 10 March email and the 20 April telephone call the claimant disclosed information]*. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*"

11. In *Chesterton Global Limited v. Nurmohamed* [2015] ICR 920 the EAT found that the words "in the public interest" were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. We must consider:

> -what the worker considered to be in the public interest
>
> -whether the worker believed that the disclosure served that interest, and
>
> -whether that belief was held reasonably.

Provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable, the test will be satisfied. Tribunals are encouraged to adopt a broad and purposive approach to the question of whether a disclosure passes the 'public interest' hurdle. If the worker makes the disclosure purely out of self-interest, then, even if it might otherwise have passed the 'public interest' hurdle, the disclosure may fail for want of 'reasonable belief'. The Court of Appeal set out a four-stage test that might usefully be applied where a disclosure relates to a breach of the worker's contract or where the interest is personal in character.

12. The Honourable Mr Justice Linden stated in *Twist DX Limited & others v Dr Niall Armes & another* (UKEAT/0030/20) that:

> "*it is important for the ET to identify which limb, or limbs, of the definition (i.e. subsections (a)-(f)) are relevant, as this will affect the next, 'reasonableness', question. If the claimant says that they believed that the disclosed information tended to show that criminal offences were being, or were likely to be, committed, it is the reasonableness of that belief which must be considered. Likewise, if they say they believed that it tended to show that a legal obligation had been, or was likely to be, breached, the information should also be*

examined in context with a view to deciding whether such a belief was reasonable."

13. The disclosure does not need to spell out the source of the wrong relied upon in strict legal language, nor to spell it out at all in a case where it is, from the context, obvious that a breach of some legal obligation/a criminal offence would be involved. (*Bolton School v Evans* [2006] IRLR 500; *Blackbay Ventures Limited v Gahir* [2014] ICR 747; *Eiger Securities LLP v Korshunova* [2017] IRLR 115). In *Bolton* the general nature of the obligation and that it had a legal basis was readily apparent. The Court of Appeal made it clear in *Babula v Waltham Forest College* [2007] ICR 1026 that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not, although whether it does or not may be relevant to the reasonableness of the claimant's belief that the information disclosed tends to show a relevant breach (*Twist* above). What must be established is that the claimant (considering the claimant's personal circumstances/professional knowledge (*Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4)) had a reasonable belief that the information disclosed 'tended to show' that someone had failed, was failing or was likely to fail to comply with one of the matters set out in s43B. Reasonableness has both a subjective and objective element.

14. 'Tends to show' is a lower hurdle than having to believe that the information 'does' show the relevant breach or likely breach (*Twist)*. The word "likely" appears in the section in connection with future failures only, not past or current failings where what is required is that the worker reasonably believe that the information disclosed 'tends to show' actual failures. Where what is in issue is a likely future failure, the EAT in *Kraus v Penna Plc* [2004] IRLR 260 held that "likely" in this context means "*probable or more probable than not*". On that point, *Kraus* was not over-ruled by *Babula* and remains good law.

Detriment

Section 47B ERA 1996 provides:

"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the grounds that the worker has made a protected disclosure.
….

(2) This section does not apply where:
(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal."

15. Under s.48(2) ERA 1996 where a claim under s.47B is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done".

16. In *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*, it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough. The correct test is whether a reasonable worker would or might take the view that the action of the

employer was in all the circumstances to his disadvantage. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. The Court of Appeal has confirmed that the same approach to 'detriment' is to be applied in whistle-blowing cases as in discrimination cases (*Tiplady v City of Bradford Metropolitan Council* [2020] ICR 965).

17. In whistleblowing detriment claims, "*s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*" (*Fecitt v NHS Manchester* [2011] EWCA Civ 1190).

Burden of proof

18. In a claim for detriment under section 47B, the employee must prove that they made a protected disclosure and that there was detrimental treatment (following the general rule that it is for a claimant to prove their case on the balance of probabilities). It will not always follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, that burden shifts under Section 48(2). The Tribunal needs to be satisfied that there is a sufficient *prima facie* case as to causation, such that the conduct calls for an explanation (*Dahou v Serco Ltd* [2016] EWCA Civ 832). By s.48(2) ERA 1996 it is then for the employer to show the ground on which the detrimental act was done. The test of whether the Claimant has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "*the protected disclosure materially influenced (in the sense of being more than a trivial influence*)" the treatment of him. The Tribunal must consider what, consciously or unconsciously, was the employer's motivation for the detrimental treatment. There will be a sufficient causal connection if a protected disclosure was one of several reasons for the detriment, even if it was not the predominant reason. If the employer fails to establish a satisfactory reason for the treatment, then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment (*International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16).

Time limits

19. In respect of the claimant's complaint that he suffered a detriment because of a protected disclosure contrary to section 47B of the Employment Rights Act 1996, section 48 provides that (subject to the rules on early conciliation) an Employment Tribunal shall not consider such a complaint unless:

> "(*a) it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them; or (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months*."

20. The parties agree that the relevant limitation date is 5 May 2020. Where the claim is for detriment arising from an omission (a failure to act), time runs from the date of the deliberate decision not to do the act. Earlier acts or deliberate failures to act are still in time if they are part of an act extending over a period, where the last date of the period is within three months; or where they are part of series of similar acts or failures and the last of them is in time. For alleged acts of detriment to form part of "a series of similar acts", there must be "some relevant connection between the acts" (*Arthur v London Eastern Railway [2006] EWCA Civ 1358*, per Mummery LJ). It is possible that a series of apparently unconnected acts could be shown to be part of a series or to be similar in a relevant way by reason of them all being done to the claimant on the ground that he had made a protected disclosure (paras 39, 41). In *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably (see too *Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548*; and *Pugh v National Assembly for Wales UKEAT/0251/06*; In *Pugh*, the EAT held that a tribunal should consider the allegations "in the round", asking whether the employer was responsible for an ongoing state of affairs). In *Royal Mail Limited v Jhuti* (UKEAT/0020/16), Simler J said that whether or not there is a relevant connection is a question of fact. All the circumstances surrounding the acts will have to be considered. If the claim is out of time, the burden of proof is upon the claimant to establish that it was not reasonably practicable for him to submit his claim within the time limit and, if so, that the claim was brought within a reasonable time thereafter. If a claimant engages solicitors to act for him in presenting a claim, it will normally be presumed that it was reasonably practicable to present the claim in time and no extension will be granted. The scope of the Dedman principle was revisited and confirmed by the EAT in *Northamptonshire County Council v Entwhistle* [2010] IRLR 740.

Automatic Unfair dismissal

21. Section 103A ERA provides **'***An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure*.' The effect of section 103A is that where the reason (or principal reason) for a dismissal is the making of a protected disclosure the dismissal is automatically unfair.

Burden of proof

22. The Court of Appeal gave guidance in relation to the issue of competing reasons for dismissal, such as protected disclosure and redundancy, in *Kuzel v Roche Products L*td [2008] IRLR 530. The Court of Appeal confirmed that the burden of showing the reason for the dismissal is always on the employer in an unfair dismissal case, whatever the species of unfair dismissal.

23. The employee can put forward an alternative reason for dismissal, such as the making of a protected disclosure, provided there is some evidence to support it, but that does not mean that the employee has the burden of proof in that regard. It will

be for the tribunal to decide on the evidence which, if any, reason to accept. In other words, if the respondent does not succeed in proving that the dismissal was for a potentially fair reason, the Tribunal will consider whether the claimant has produced some evidence to show that it was for an automatically unfair reason (in this case, the protected disclosure(s)). If he has, then the burden will shift back onto the respondent to demonstrate that the automatically unfair reason was not the principal reason. Therefore, as Mummery states, it does not automatically follow that a Tribunal which rejects the respondent's reason must accept the claimant's reason (*Kuzel v Roche Products Ltd* [2008] ICR 799). Mummery LJ said:

> *"56 I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.*
>
> *57 I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*
>
> *58 Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*
>
> *59 The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.*
>
> *60 As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular*

> *case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."*

Mummery LJ envisages that the tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure.

24. The Tribunal can draw such inferences from the primary facts as they deem appropriate. The process of drawing inferences involves a consideration of all the facts of the case and will include the assessment of the parties and their witnesses when they give their evidence (*Qureshi v Victoria University of Manchester* [2001] ICR 863).

'Ordinary' Unfair dismissal

25. Under Part X Chapter 1 ERA 1996 s94 the Claimant has the right not to be unfairly dismissed.

26. An employer has to prove that the reason for the dismissal falls within one of the prescribed potentially fair reasons listed in s 98(2) ERA 1996. Redundancy is a potentially fair reason for dismissal. To establish that redundancy is the true reason for dismissal the Respondent must show that a redundancy situation existed. This is defined in s139(1) ERA 1996 as:

> *"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
> *…*
>
> *(b) the fact that the requirements of that business –*
>
> *i. for employees to carry out work of a particular kind, or*
>
> *ii. for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished."*

27. The reason is the set of facts known or beliefs held in the mind of the decision-maker at the time of the dismissal which causes him to dismiss the employee (*Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA). In *Beatt v Croydon Health Services NHS Trust* [2017] IRLR 748, Lord Justice Underhill reiterated that the "reason" for a dismissal is the factor or factors operating on the mind of the decision-maker which causes them to take the decision to dismiss or, as it is sometimes put, what "motivates" them to dismiss.

28. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell* [1997] ICR 523 and held that s.139 ERA asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs. It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation (*McCrea v Cullen and Davison Ltd* [1988] IRLR 30). Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

Reasonableness under s98(4) ERA 1996

29. If the Respondent establishes that the reason for the employee's dismissal was redundancy, it is for the Tribunal to decide whether it was, in fact, fair to dismiss for that reason. In doing so the Tribunal must apply the test in s98(4) ERA 1996. The tribunal must decide whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal. The material statutory provisions are set out in Section 98(4) Employment Rights Act 1996, which, so far as relevant, are as follows:

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

The burden of proof in establishing the reasonableness of the dismissal is neutral and the test is an objective one.

30. The test does not mean that the Tribunal can simply decide what it would have done in the circumstances. On the contrary, it must look at whether the Respondent's decision to dismiss and the manner in which it was reached fell within the band of reasonable responses open to the employer on the facts known to it at the time. This is what is sometimes referred to as the range (or band) of reasonable responses test. It is well established that the tribunal must be careful not to substitute its own standards for that of the reasonable employer. In the context of a redundancy dismissal some basic questions arise which we are obliged to consider. The ACAS Code of Practice does not apply to dismissals by reason of redundancy.

31. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be

drawn. In considering the employer's decision over the choice of a pool for selection, the Tribunal will consider the following factors: whether other employees are doing similar work to those from which the selection for redundancy was made; whether the employees' jobs are interchangeable. As a result, the pool is usually composed of employees doing the same or similar work, and an employer risks a finding of unfair dismissal if they include in the pool a range of different job functions or exclude employees who should properly be in the pool. The employer's conduct must be judged against the standard of the reasonable employer and there should be a justifiable reason for excluding a particular group of employees from the selection pool where those in the excluded category do the same or similar work to those who are liable for selection. In this case, of course, the respondent devised a pool of one. Only the claimant was liable to be selected for redundancy. The question for the Tribunal is whether it was unfair for the respondent to use a pool of one in all the circumstances of the case. It is open to the Tribunal to determine that it is outside the range of reasonable responses to define the pool in a particular way in order to ensure the dismissal of a particular individual. The Tribunal must be careful, of course, not to substitute its view for that of the employer as to the right course.

32. In Taymech v Ryan (UKEAT/663/94), Mummery P said,

> "*There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily* a matter for the employer to determine*. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem*."

> Mummery P also said,

> "…*As the employers had never applied their mind to anything, except Mrs Ryan's actual job of telephonist/receptionist, they had not applied their mind to a pool and therefore there was no meaningful consultation as to who was in the pool, with whom comparisons should be made with Mrs Ryan's position, and as to who should be selected. In a sentence, there was no process of selection from a pool. Mrs Ryan was told she was redundant because she was the only person who occupied the position as telephonist/receptionist. The evidence accepted by the Tribunal was to the effect that she was doing more than that job and was in a position where there could be a meaningful comparison between her skill and those of four or five other administrative workers in the office. […] the employers should have applied their minds to the creation of a pool for the purpose of deciding who to select for redundancy. As they did not go through that process, they had not made a fair selection.*"

33. In *Capita Hartshead Ltd v Byard* 2012 ICR 1256, the EAT rejected an argument that a statement in *Taymech Ltd v Ryan* that "*how the pool should be defined is primarily a matter for the employer to determine*" necessarily meant that tribunals are precluded from holding that the choice of pool for selection by the employer is so flawed that the employee selected has been unfairly dismissed. That statement only applies where the employer has "*genuinely applied his mind to the problem*" of selecting the pool. Even then, the EAT thought that an employer's decision will not be impossible to challenge. The EAT said:

"31. Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83);

(b) "…(9) the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

(c) "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J in Taymech v Ryan EAT/663/94);

(d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

Nonetheless, as the Court of Appeal held in *Thomas and Betts Manufacturing Co v Harding* [1980] IRLR 255, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal.

34. In *Wrexham Gold v Ingham* (UKEAT/0190/12), the EAT held that the Tribunal erred because it did not stop and ask: given the nature of the job of Club Steward, was it reasonable for the Respondent not to consider developing a wider pool of employees? Section 98(4) requires this question to be addressed and answered. On its face, it would, the EAT said, seem to be within the range of reasonable responses to focus upon the holder of the role of Club Steward without also considering the other bar staff. The Tribunal did not say why it was unreasonable to do so. This may have been because the Tribunal had in mind the words of Mummery J in *Taymech* but the EAT made it clear that no judgment should be read as a statute. There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool. That question must be addressed. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. It is not for the Tribunal to substitute its view for that of the Respondent. As the EAT put it in *Kvaerner Oil and Gas Ltd v Parker and ors* (EAT/0444/02), "*different people can*

quite legitimately have different views about what is or is not a fair response to a particular situation […] In most situations there will be a band of potential responses to the particular problem, and it may be that both of solutions X and Y will be well within that band." It is not for the Tribunal to substitute its view for that of the Respondent.

35. We were referred to a number of other 'pool' cases: *Dial-A-Phone v Butt* (EAT/0286/03); *Fulcrum Pharma v Bonasserra and anor* (EAT/0198/10); *Lionel Leventhal Limited v North* (EAT/0265/04) and we have had regard to those cases.

36. Consultation is fundamental to the fairness of a dismissal by reason of redundancy (see *Polkey v AE Dayton Services* [1988] ICR 142, HL). For an employer to consult properly it must have an open mind. The key components of fair consultation were identified in *R v British Coal Corporation* and *Secretary of State for Secretary of State for Trade & Industry* [1994] IRLR 72 as:

a. Consultation when the proposals are still at a formative stage
b. Adequate information on which to respond
c. Adequate time in which to respond
d. Conscientious consideration by the Employer of the response to the consultation.

37. There is a requirement on an employer to make efforts to find alternative employment for a redundant employee (Vokes Ltd v Bear [1973] IRLR 363). However, the duty is only to take reasonable steps and not every conceivable step to find alternative employment (*Quinton Hazell Ltd v Earl* [1976] IRLR 296) based on what the employer knows at the point of dismissal (Maguire v London Borough of Brent [(EAT/0094/13)).

Polkey

38. In *Polkey v AE Dayton Services Ltd [1987] IRLR 503,* the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant could and would have been dismissed in any event. A deduction can be made in procedurally and substantively unfair cases. In *Software 2000 Ltd v Andrews and others UKEAT/0533/06* the EAT said:

> *"54. The following principles emerge from these cases:*
>
> *(1) 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.*
>
> *(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the*

evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. 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.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) …
(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.
(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

39. The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT noted that a Polkey reduction has the following features:

> *"First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand"*

Findings of fact

Background

40. The Respondent is a provider of river, road and freight solutions in London serving the construction, quarrying and waste sectors. At the date of the claimant's dismissal the respondent employed 170 employees, by October 2020 it employed 131 employees. The respondent operated at about a 25 to 1 driver to manager ratio. Prior to the pandemic the respondent had about 104 vehicles on the road. The respondent is regulated by the Office of the Traffic Commissioner under the Goods Vehicles (Licensing of Operators) Act 1995 [66-69 & 206-241 (Guidance)]. The respondent's most recent licence is at [66-70]. The Traffic Commissioner can discipline TMs for failing to comply with relevant conditions. The rules provide that the Traffic Commissioner must be notified of changes regarding the professional competence of TMs or of any event which affects the requirements within 28 days [207].

41. The claimant's employment with the respondent began on 7 January 2013 [71-77]. The claimant began his employment as a Transport Manager ('TM'). He was promoted to Senior Transport Manager ('STM') in April 2014. His contract refers to him as a STM [72].

42. At the time of the claimant's dismissal on the 18 May 2020, the Respondent employed the claimant and 3 TMs (SP, LG, DB). The respondent's 2016 Operator's Licence (including the General Conditions) names five 'Transport Managers' but TG resigned from his employment with the respondent prior to the events in question in this matter [66-70]. The claimant was paid approximately 9k pa more than the TMs, as the STM.

43. The claimant's line manager was Mr Robinson who joined the company as its Commercial and Operations Director in November 2019. Mr Robinson is leaving the respondent company soon. Between April 2019 and November 2019, Mr Gifford line managed the claimant. Mr Gifford is the Managing Director. He has known the claimant since April 2019.

44. Paragraphs 5-8 of Mr Gifford's witness statement set out the TMs' roles. His witness statement refers to MO being a TM but doesn't name DB as a TM. MO was not a TM. He is not listed on the respondent's licence [68], nor referenced on the 'current' structure organogram at [279], nor the July 2021 organogram [301]. DB is named as a TM on the respondent's licence and referenced at [279], although not at [301] (July 2021). We understand that MO assisted LG in his role as the logistics coordinator. MO also drove and was a foreman driver. SP was and is responsible for compliance, managing drivers and lorries on a day-to-day basis, including driver training, wages, sickness, time sheets, holidays, repairs, and vehicle maintenance, scheduling MOTs, ordering fuel and tires and compliance. LG was and is the logistics coordinator. He was responsible for driver work allocation and carried out routing. He also drove occasionally. We understand that DB assisted with logistics; drove and covered for LG. Two of the TMs contracts are at [78-92]. One began his employment on 7.1.12 [79] (just before the claimant); one began on 25.3.13 [86] (just after the claimant). We did not see the third TMs contract. The contracts, including the claimant's contract are identical save for pay rates and start dates.

45. The claimant, LG, SP and DB were named on the respondent's licence as TMs [68]. The claimant line managed the other TMs (LG, SP, DB) and oversaw their work (and MO's work when he was assisting LG in the office). The claimant resolved issues and made decisions in relation to the transport manager functions.

46. The claimant's qualifications are at [262-269]. The claimant is a qualified HGV driver. He also has experience of compliance (4.5 years' experience with the respondent) and routing (20+ years). The claimant had previously been a TM with the respondent. He could do all the duties of a transport manager [206-241] – he was named on the respondent's licence as a TM - and he also carried out the additional duties that he was responsible for as a senior transport manager. The claimant oversaw the TMs and dealt with issues arising. The claimant had an HGV licence and had driven whilst working for the respondent for MOT and servicing reasons (not client jobs). The claimant did not undertake compliance, routing, planning on a day-to-day basis but he worked with the other TMs and, if they were on holiday, he would 'mingle in and fill in'. All the TMs and the claimant could carry out the TM role.

47. The respondent's business was sold to the GRS group in 2017. The respondent's sister company, GRSBP also undertakes road haulage. IU is one of their transport managers [246]. IU is not on the respondent's operating licence [66-70]. GRSBPs operating licence is at [245-8].

Whistleblowing

48. In or about August 2018 the respondent took delivery of 15 lorries from DE Limited. The lorries were used until they were taken off the road in December 2018 when drivers highlighted that there was a problem with the lorries. When fully laden,

the weight of the second axel exceeded the specified load and lawful limit. In addition, some of the lorries did not have an airbag fitted. The lorries were not used after they were taken off the road in December 2018, whilst a solution was sought between the respondent, DE Limited and F Ltd (the manufacturer of the vehicle body). In early 2020 the parties agreed that the vehicle body of one of the lorries would be replaced to see whether that resolved the issue. Tests were carried out, but the issue was not resolved. The claimant was present at a test carried out on 12 February 2020. The claimant discussed the issue with Mr Gifford and Mr Robinson in February/March 2020. He was told that the lorries would not be used until the issue was resolved and he accepted that was the case.

49. On 10 March 2020, the claimant sent an email on behalf of himself and the 3 transport managers referencing their concerns [142-5]. Whilst the vehicles had been off the road since December 2018, Mr Gifford and Mr Robinson had joined the respondent since that date. The claimant's email of 10 March 2020 referenced the future, not the past. The email set out the weight issue, the implications of running overweight vehicles and the drivers concerns. The claimant stated that *'I had a conversation with a representative of the DVSA yesterday who raised concerns that we were putting our company reputation at risk if we were to run these DEs knowing that they were more than likely overweight.*' The email refers to criminal responsibility and the possibility of a public inquiry if overweight vehicles were put on the road. In response to the email, Mr Gifford suggested a meeting on 11 March 2020, and, in his reply, he stated that there was no intention of the lorries being on the road illegally and that if they had to be used for lighter loads, so that the weight limit was not exceeded, '*then so be it*' [143]. The conditions of the respondent's licence mandate that vehicles must not be overloaded [69]. Mr Gifford responded in turn to each of the issues raised [143-5 (in red)]. JF (the then MD) sent an email on the same day, setting out the context [142]. The respondent did not intend to use the vehicles if the axel was over the weight limit. There was no health and safety concern if the vehicles were not used. There was no breach of a legal obligation if the vehicles were not used. When the claimant sent the email there was no reason for him to believe that a legal obligation was being or would be breached; the claimant's evidence in cross examination was that he was considering the 'what-ifs', but that at the time he did not consider that the vehicles would be put on the road unless the issues were resolved. Mr Gifford accepted that if the vehicles had been used before the issues were resolved that would have amounted to a breach of a legal obligation [69], and a health and safety issue. Mr Gifford agreed with the implications set out by the claimant at [144]; the DVSA were aware of the issues. When asked why he considered the disclosure to be in the public interest, the claimant said '*Walsh said that they needed a solution – wanted Mr Gifford to be aware of risks and in spotlight with London Mayor which might lead to a public enquiry. It was information more than anything else'*.

50. The claimant emailed Mr Gifford again on 25 March to say that DR and GS wanted to meet with him on 28 March 2020 when a test was to be carried out on a DE lorry. Mr Gifford responded to say that was a good idea and he would also attend the meeting [147].

51. In the first quarter of 2020, Mr Gifford met with F Ltd on a couple of occasions. He did not invite the claimant to those meetings as they were arranged to discuss F Ltd buying back parts; to discuss the chassis and cab issues and therefore not

relevant to the claimant. The meetings were commercial meetings and outside the claimant's remit. They were 1 on 1 meetings between Mr Gifford and F Ltd. The claimant accepted that it was reasonable for him not to be invited, given the context. It was suggested to Mr Gifford that the reason the claimant was not invited was because he was seen as a troublemaker. Mr Gifford refuted that suggestion, and we accept that was not the reason for the claimant not being invited to the meetings.

52. In March 2020, the respondent furloughed 171 staff. The claimant was notified that he was being furloughed on Friday 27 March 2020 with effect from Monday 30 March 2020 [149-151]. The TMs and drivers were also furloughed because there was no work. The claimant said during cross-examination that his last day before furlough was Monday 23 March 2020. That does not accord with [148 or 149-51]. The national lockdown restrictions came into force on 26 March 2020. Nothing turns on the date that the claimant was furloughed but given [148-149], we conclude that the claimant and others were furloughed with effect from 27 March 2020. The claimant was told that he would receive 100% of his salary until 27 March; 80% of his full salary, not capped at £2,500 for the period from 30 March. There was therefore a cost to the respondent. In addition, the claimant's annual leave and continuous service continued to accrue whilst on furlough and annual leave would be paid at 100% (not 80%) of the claimant's salary. The claimant was asked to confirm his agreement to being furloughed. We presume that he did, although we have not seen anything in writing. The other TMs (SP & LG) were also furloughed [153-159 (there is no letter for DB in the bundle, but we were told that he was also furloughed)] on the same terms.

53. On 20 April 2020, the claimant telephoned Mr Robinson to express concern that some drivers were back at work and that (in Mr Robinson's words) '*in the absence of 'him [the claimant] or the Walsh Transport Managers [the respondent] was operating illegally'*. When the claimant said this to Mr Robinson, he was not aware that IU had been brought in to oversee the drivers in the absence of a Walsh TM.

54. The claimant's evidence in chief is that in *his* absence, the respondent was operating illegally (para 13 witness statement). Whilst the claimant states at paragraph 13 of his witness statement (cut and pasted from paragraph 10 of the further information [48]) that in *his* absence, the respondent was operating illegally, he refers at paragraph 15 to the three other TMs. At paragraph 15, the claimant refers to the operating licence being issued to him. In cross-examination, the claimant readily accepted that the licence is issued to the respondent and that the TMs are all named on the licence.

55. Given Mr Robinson's evidence that the claimant '*expressed concern that some of the Walsh drivers had returned to work in the absence of him or the Walsh TMs returning, which he said was illegal*', we find that the claimant made it clear that it was the absence of any of the TMs named on the operating licence that the claimant considered was illegal and not just his absence.

56. Mr Robinson advised the claimant that IU (GRSBP) was managing and overseeing the respondent's drivers and that he, Mr Robinson, and a junior employee, CS, were covering day to day activities (work allocation, routing, vehicle inspections), and that the respondent was acting lawfully. In response to that, the claimant told Mr

Robinson that GRS were not on the operating licence [68]. In cross examination, the claimant accepted that the temporary arrangement, if that's what had happened, was lawful.

57. Mr Robinson told Mr Gifford that the claimant had expressed concerns and that the claimant considered that drivers being back in the absence of a TM to be illegal. He reassured Mr Gifford that the respondent was operating legally (because IU was overseeing the drivers in the absence of the claimant or a TM). We accept Mr Gifford's evidence that he does not recall Mr Robinson telling him that. The claimant did not raise the issue separately with Mr Gifford before or during the redundancy meetings (below).

58. The rules require that changes are notified to the Traffic Commissioner within 28 days (above). The bundle contains a letter that Mr Gifford told us the respondent (JF) sent to the Traffic Commissioner [308-9], asking for permission to rely upon IU as the acting TM as a temporary measure. The letter is dated 21 April 2020, but the email correspondence suggests that the letter was not sent until or about 6 May 2020 [306-7]. We find as a fact that the letter was not written until 27 April 2020 and that if the letter was sent it was sent on or about 6 May 2020 [307]. The email from TLL at [307] states that she and JF had a conversation in w/c 20 April (the claimant raised the issue about drivers being back and no TMs on 20 April). We did not see a response to the letter from the Traffic Commissioner. But in the end, for reasons we explain in our conclusion, we decided that nothing turns on this. It is clear however that the claimant's conversation with Mr Robinson prompts a later letter to the Traffic Commissioner. By the time it was sent events had moved on because LG was back at work.

Events leading to dismissal

59. In April 2020, following the lockdown, the respondent reviewed its business [260-61]. Mr Gifford anticipated that the downturn in business would continue for a significant period. The Executive Committee agreed that the business needed to make significant savings. Mr Gifford reviewed the Walsh business and decided that he had to remove 32 roles from the organisational structure, including the STM role.

60. The document at [277-300] 'Walsh organisational structure 2020 rev April RONE'. Mr Gifford told us during evidence in chief that these were the final documents but, in cross examination, when referred to [282 & 286], he said that the documents were not the final versions. Given that the respondent has not disclosed another version of the document, we have concluded that this was the version of the document that the respondent was working with prior to the claimant's dismissal. Mr Gifford told us that the document was produced in the 3-week closure period (i.e., 30 March 2020-20 April 2020).

61. Page [279] shows the structure that existed before proposed changes were mapped out and subsequently made and therefore refer to the claimant as the STM, SP as 'Transport and General Manager', LG and DB as TMs. This was the first time we had seen SP referred to as 'Transport & General Manager'. Mr Gifford told us that SP sat slightly above LG in the TM structure because whilst LG was responsible for work allocation to drivers, along with his other TM responsibilities, SP managed

drivers and lorries on a day-to-day basis and did compliance and wages along with his other TM responsibilities. The boxes marked in red indicated staff on furlough. The document continues at [282] with an organogram setting out an 'operational structure' scenario based on a '75% pipeline'. SP (his name is spelled incorrectly throughout the document) is shown as 'Senior Transport Manager'. At page [283] SP is referred to as 'General & Lead TM' sitting above LG (TM). The claimant does not feature in either organogram. Neither does DB. The 50% pipeline projection scenario at [286] also shows SP as 'Senior Transport Manager'; at page [287] he is again referred to as 'General & Lead TM'. Again, the claimant does not feature in either organogram. Nor does DB. At [196], Mr Gifford told the Traffic Commissioner that the TM team is led by SP. Page 301 was not produced by Mr Gifford until July 2021.

62. Mr Gifford told us in evidence that the references in the planning organogram scenarios to SP being a STM was an error. On balance, we did not accept that. It is clear from the documents, and we find as a fact that, whilst the respondent was planning for fewer TMs in the revised structure, the hypothetical scenarios drawn up between lockdown and 3 weeks later (30 March and 20 April 2020) envisaged that SP would be a STM or a 'General and Lead TM'. He would sit above LG (and DB) not alongside (he had previously sat slightly above LG and DB) in the new structure, with a new title of *STM* or '*General & Lead*' TM.

63. We were not told why DB does not feature at all in the organograms, although Mr Robinson suggested that if he came back DB would return to driver duties. Mr Gifford does not refer to DB, but we think he confused MO with DB in his witness statement. We know that DB was shielding. We note that MO's job title changed in October 2020 to 'Logistics Manager', reporting to LG [92].

64. LG received a letter dated 24 April 2020 inviting him back to work [162-3]. Mr Gifford approved all decisions about who should come back to work and when, although Mr Robinson had suggested to Mr Gifford that LG be asked back first as he did routing and therefore that would fit with their immediate requirements. Mr Robinson joined the respondent in November 2019; he was not aware of the claimant's routing experience but knew that LG had done routing for a 'good while'. MO was invited back to work on 20 April 2020 [160-161]. MO returned on 24 April to do logistics work and drive. MO was not a TM; he was a foreman driver, responsible for teams of drivers, and he helped in the office. MO was not named on the Operator's licence as a TM [68/194-7]]. Mr Robinson and Mr Gifford decided that the routing of lorries (work done by LG) was business critical and took priority. DB was, we understand shielding and not back at work. Mr Robinson knew that the claimant was capable of logistics work, given his qualifications and experience but LG had been doing it on a day-to-day basis. Mr Robinson's evidence was that the claimant and other TMs could all do the TM role (routing, compliance etc) but that he needed someone with logistics experience back first (LG). We accept Mr Robinson's evidence that he did not take the 10 March or 20 April email into account when deciding, in consultation with Mr Gifford, to invite LG back first.

65. The claimant received a phone call from NW (Director) on 4 May 2020 who told him that JF had asked him to advise the claimant that he 'was redundant'. We did not hear from NW or JF.

66. The respondent notified the claimant by letter dated 4 May that the company intended to carry out a reorganisation and that he was at risk of redundancy [165]. The decision to limit the pool to one was made before the consultation meeting on 7 May. The claimant was not asked to comment specifically on that decision. The TM roles were not put at risk. By now LG was back at work. The claimant's evidence is that the letter he received was dated 5 May but the letter at [165] is dated 4 May. We did not see a letter dated 5 May. We find as a fact that the letter sent to the claimant was dated 4 May 2020. The letter stated that '*the purpose of the consultation period is to explore options and take your views into consideration. In the current challenging times, it is clear that the options are extremely limited. However, we are keen to consider your suggestions before any final decision is made*.' The claimant was invited to a meeting scheduled on 7 May. The respondent's undated records record at [166] that the claimant is at risk because he is '*not multi-skilled. Doesn't do compliance, oversees and manages but this can be maintained by others. Doesn't deal with routing or planning of lorries therefore can't step in if*'. We were not told who wrote this document or who decided that was the case. The claimant accepts that he did not do the tasks listed on a day-to-day basis. However, he did have TM responsibilities alongside the other TMs.

67. A short telephone meeting took place at 11am on 7 May 2020 between Mr Gifford and the claimant. At that meeting Mr Gifford had a crib sheet prepared by HR [167-9]. The notes in the box are Mr Gifford's notes of the meeting:

- *Market volumes significantly down. Expected a 3 week lockdown now in week 7*
- *Future volumes are down, being told parts of any orders not rushing back*
- *From above the workload is down significantly.*

68. The claimant recorded the meeting. The respondent accepts that the transcript is accurate [170-173]. The transcript records that Mr Gifford said at the start of the meeting '*'obviously as we informed you Mon, Tuesday we informed you didn't we*?' The claimant considers that this is a reference to him being advised by NW on Monday 4 May that he 'was redundant' (above). The letter that the claimant received was dated Monday 4 May 2020 and the claimant also had a telephone conversation with Mr Gifford (or Mr Robinson) on Tuesday 5 May. We find as a fact that the reference to the claimant being told on '*Mon, Tuesday'* is a reference to the letter dated 4 May and the telecon with the respondent on 5 May. But we also found as a fact above that the claimant was notified by NW on 4 May that he 'was redundant'.

69. Mr Gifford explained to the claimant at the meeting that the respondent had 104 lorries on the road pre pandemic and 30 post pandemic. The claimant accepts that the figure is accurate, give or take one or two lorries. The claimant accepts that the respondent did not need as many TMs. The claimant asked Mr Gifford why he had been selected. Mr Gifford replied that the respondent was '*trying to work out in every area what…is the best and most versatile use of people's skills*'. Mr Gifford said that the respondent had 4 TMs and that two of the TMs were effectively drivers/had driven more recently (LG & DB), one did compliance (SP). The claimant explained that he had an HGV licence; had driven for 23 years and been working in the respondent's office for 7.5 years and had been a TM. The claimant also explained that he had done compliance and had done LG's job (logistics) too before bringing

LG and SP into the office and that he had done all the TM 'jobs' and that he was therefore '*trying to understand why it was just me up for the shout…*'. Mr Gifford said that he '*would elaborate on*…' at the next meeting on 12 May.

70. Mr Gifford did not ask the claimant to explain his compliance and/or logistics experience or any details about what the claimant did on a day-to-day basis. Mr Gifford did not accept in his evidence that the claimant had done logistics work but nor did he ask the claimant about that when the claimant told him he had done so. Mr Gifford did not ask the claimant about his compliance work because, he told us, he did not need to do so as he had seen SP do the compliance work. Mr Gifford told the Tribunal that he did not know that the claimant had driven for 23 years (the claimant told him so at the meeting). He told us that he assumed the claimant was a good driver. He did not consider length of service. Rather, when deciding who should be made redundant, he looked at what the TMs were doing as of April 2020 because 'their skills would be much better'. LG did logistics and knew the routes and clients, SP did compliance. The claimant oversaw logistics and compliance. Mr Gifford did not consider whether LG had experience of/could do compliance, whether SP had experience of/could do routing. The claimant's evidence is that he could do all the roles, but Mr Gifford didn't know that because he didn't investigate.

71. Mr Gifford's evidence in chief is that he determined after the initial consultation meeting on 7 May that 'the claimant's role overseeing the functions performed by the Transport Managers was to be removed from the new company structure and made redundant'. He said that was an error in his witness statement, but we do not accept that. The witness statement doesn't just refer to 7 May, it states 'after the initial consultation meeting'. We find as a fact that the decision to dismiss the claimant by reason of redundancy was made before the second meeting (below). Indeed, we also conclude that the decision to dismiss the claimant by reason of redundancy was made by 20 April because the planning scenario organograms were completed by 20 April. By then, the claimant did not have a role. The claimant was, we conclude, selected because he was paid more than the TMs as the then STM. Whilst we set out what happened at the second meeting below, we conclude that the second meeting was a sham. The decision had been made before the second meeting (and we also conclude, before the first meeting).

72. SP returned to work on 11 May 2020 (we did not see a letter inviting him back). The respondent (Mr Robinson & Mr Gifford) invited him back to manage drivers, including wages, vehicle maintenance and compliance. The decision to dismiss the claimant had been made by now.

73. The second meeting between Mr Gifford and the claimant took place at 11am on Tuesday 12 May 2020 [175-86]. Again, Mr Gifford had a crib sheet [175-78]. The words in the box are Mr Gifford's notes, written during the meeting:

> *Further discussions with Nathan around why him. Senior role not required. I stated that I always treated Walsh as a stand-alone throughout my time with integration within the group kept at a distance. Current situation with workload and future workload and drastically reduced fleet size means role not required and any, if required at all, assistance will be backed up within group. This will also apply to the external advisor role. Both are highest earners.*

Lower level management / staff currently carrying out specific function as previously so no need to change

Out of remaining 3 TM's one will go straight back into lorry if he returns. The other plans and routes but if role not required in near future then he will go back into lorry if lorry work is available going forward.

Cost and higher salary have been taken into account on above roles.

74. The claimant's transcript of the meeting is at [179-186]. The claimant raised extended furlough with Mr Gifford. There was no meaningful response to that. There was a discussion about the state of the business. At [181] the claimant asks Mr Gifford whether the other TMs were spoken to about redundancy. Mr Gifford explained that DB would come back to driving if he returned from shielding, so too would LG but that he could not afford to pay office staff rates for driving a lorry. We note that LG came back as a TM, not as a driver, because the whole point, we were told, was to get him back to carry out his routing function. Mr Gifford does not mention SP at this stage of the meeting, although SP had returned to work on 11 May. Mr Gifford confirms that the claimant was selected because he was paid more than the other TMs. The claimant tells Mr Gifford that he is more qualified and more experienced than the others [182]. Mr Gifford responds by saying that the other TMs have specific job roles/functions '*so that there wasn't any necessary need to change that you know…*'. At [183], after explaining that he has carried out all of the other TMs jobs in the past, the claimant says '*if it's a cost issue you know because I am the highest paid out of the lot of us, …then you know, maybe we should have a chat about that I don't know. But you know, to be like you know, a consultation part, I'm the only one being discussed with about redundancy because …you've all decided that it's gonna be me because I'm the highest paid…has there been any consideration about another role within the company…GRS…*'. Mr Gifford does not respond to the, albeit vague reference, to cost raised by the claimant. The claimant did not say that he would be willing to drive at driver rates, but nor was he asked whether he would do so. The claimant has not looked for driver roles between the date of dismissal and the week before the hearing (he worked as a compliance manager from June 2020 to February 2021). In response to the claimant's question about whether there were any jobs elsewhere in the company, Mr Gifford tells the claimant that the same thing was happening across the group. Mr Gifford says that he recognises that the claimant could step in for LG or SP but that the claimant has been away from that side. The claimant explains that he has not stepped away from it - he still makes decisions for them and that he could run the fleet 'standing on his head' (compliance, logistics, manage drivers etc) [183]. The claimant tells Mr Gifford that he doesn't think that Mr Gifford understands what he and the TMs do. Mr Gifford says that he 'thinks' that he has a good idea, that he knows that claimant could step back into the other roles but that he has not been doing the roles [184].

75. Mr Gifford accepted that the TM and STM roles were similar, but the STM carried out additional tasks. Mr Gifford did not consider whether SP could do routing work or whether LG could do compliance work. He looked at current roles and that determined his decision, a decision we conclude was reached before the consultation process started. Mr Gifford said, in answer to a question, that *if* the selection pool had

been the four TMs, he did not accept that the claimant would have scored more highly because he would not have assessed against 'those' parameters. Mr Gifford did not ask the claimant whether the claimant would accept a salary cut, notwithstanding the claimant's reference to cost at the second meeting – we infer because the decision had already been taken. He did not ask the claimant if he was willing to drive because he considered that the furloughed drivers knew the business better than the claimant in respect of their driving roles.

76. Mr Gifford advised the claimant at the end of the 12 May meeting that he was being dismissed by reason of redundancy [186]. A letter of dismissal was written after the meeting and is dated 12 May 2020 [188-9]. The letter advised the claimant that he had a right of appeal and that the deadline for appealing was Friday 15 May (3 days). On the same day, Mr Gifford asked for a letter to be drafted to advise the Traffic Commissioner that the claimant's name should be removed from the operator's licence [310]. The respondent subsequently agreed to the claimant's request of 13 May 2020 to pay the claimant a PILON [190-2]. The claimant did not ask for an extended appeal deadline. The claimant wrote to the respondent on 8 June to advise that he would like to appeal the decision [200]. He wrote again on 23 June with the grounds of appeal [201-203]. In his letter of 23 June, having taken legal advice the claimant alleged that:

1. *The outcome of the process was pre-determined, and the company failed to consult properly*
2. *The company had failed in its obligations to avoid redundancy by having a pool of one*
3. *That he had been specifically targeted for redundancy.*

77. The respondent denied the allegations and advised the claimant that the deadline for the appeal had passed [204-205]. In response to the allegations the respondent stated:

> *"… Whilst we do not intend to address each allegation in detail, we confirm that we refute all allegations made by you. We also note that the grounds of your appeal are largely consistent with the matters raised by Apex Employment Solicitors in their letter dated 15 June 2020.*
>
> *We strongly deny the allegation that the outcome of the redundancy was pre-determined and that the Company failed to consult properly. A fair procedure was implemented by the Company in accordance with ACAS guidelines and all redundancy decisions were based on legitimate commercial reasons. As outlined above, you were informed of your right to appeal the decision within a specific timeframe, however you chose not to exercise this right, nor to request an extension of time to lodge an appeal.*
>
> *Secondly, we strongly refute your allegation that the Company failed in its obligation to avoid redundancy by having a pool of one. Prior to your redundancy, there was only one Senior Transport Manager role in the Company structure, and this specific role was no longer required following an organisational review. We confirm that age was never a factor in the decision-making process.*

> *Thirdly, we strongly deny the allegation that you were specifically targeted for redundancy. In particular, we refute your allegation that the Company removed responsibilities from you in response to you "raising legitimate concerns". Your view that you were "perceived as a troublemaker" for raising a safety concern is entirely misguided. Safety is at the heart of our business and all concerns raised are dealt with in line with the Company's health and safety policies and procedures. We also strongly refute the allegation that the Company has in any way acted illegally…"*.

78. The respondent did not ask at any point of the process whether any of the TMs wished to take voluntary redundancy.

79. There were no other suitable alternative vacancies available in Walsh or the wider GRS Group, although Mr Gifford did not investigate whether there were vacancies in Cornwall, as he did not consider that a job in Cornwall would be suitable alternative employment. Mr Gifford did not consider bumping the claimant into a driver role. The drivers had recent driving experience and knew that side of the business better than the claimant.

80. The respondent did not consider keeping the claimant on furlough until the end of June, to see whether the scheme was extended, before making decisions about redundancies, nor whether it should impose the 2.5k furlough salary cap on all its employees, nor whether it should utilise the lay-off term in the claimant's contract.

Conclusions

81. We now consider how the relevant law applies to the findings of fact that we have made. We do so, taking the issues in turn. We may make some additional findings of fact here too.

82. We begin with a comment. We appreciate that these were exceptional times for employers and employees alike and that the respondent's senior management team was having to evaluate the impact of the pandemic and the lockdown on its business every day. Whilst we conclude, for the reasons set out below, that the claimant was unfairly dismissed, we think that in all other respects the respondent tried hard to 'do right' by its workforce during a very difficult time by, for example, paying 80% of actual wages.

Did the claimant make qualifying protected disclosures?

83. The burden is on the claimant. Taking each of the alleged protected disclosures in turn and applying the law to the facts on the basis that there was a disclosure of information to the employer:

(i) **10 March email**

84. Did the claimant reasonably believe that the information disclosed tended to show that:

- a criminal offence had been, was being or was likely to be committed, by knowingly sending out overweight vehicles; or
- a person had failed, was failing or was likely to fail to comply with any legal obligation, namely complying with DVSA requirements;
- the health and safety of any individual has been, was being or was likely to be endangered by the insufficient testing of vehicles; the risks of driving an overweight vehicle, and the absence of an airbag?

85. Whilst the List of Issues [66] refer to past events, the claimant's email of 10 March 2020 was concerned solely with the future, it was not about the past. The claimant does not allege a criminal offence or breach of a legal obligation or a risk to health and safety in 2018. The claimant's concerns were with the 'what-if's – what the position would be if the vehicles were used going forwards before the issues were resolved. That is the information that we must consider.

86. We reminded ourselves that likely means probable or more probable than not. We have concluded that the claimant did not believe and/or did not reasonably believe that the information disclosed on 10 March 2020 demonstrated that:

- it was probable or more probable than not that the employer would, going forwards, fail to comply with the relevant DVSA requirements. When the claimant sent the email there was no reason for him to believe that a legal obligation was being or would be breached; the claimant's evidence during cross examination was that he was considering the 'what-ifs' but that at the time the claimant understood that the vehicles would not be used unless and until the issues were resolved.

- it was probable or more probable than not that the employer would, going forwards, commit a criminal offence, by knowingly sending out overweight vehicles. We have concluded that was not the case because the claimant understood that the vehicles would not be used, unless and until the issues were resolved.

- it was probable or more probable than not that the employer would, going forwards, endanger the health and safety of any individual by the insufficient testing of vehicles; the risks of driving an overweight vehicle, and the absence of an airbag. We have concluded that was not the case because the claimant understood that the vehicles would not be used, unless and until the issues were resolved.

For those reasons, the information disclosed in the email of 10 March 2020 did not amount to a qualifying protected disclosure.

(ii) 20 April information

87. On 20 April 2020, the claimant telephoned Mr Robinson to express concern that drivers were back in the absence of a Walsh TM. We accepted Mr Robinson's evidence that the claimant said that drivers being back in the absence of the claimant, or a TM was illegal. Mr Robinson clearly understood that to be the information disclosed by the claimant.

88. Mr Robinson told the claimant that IU (GRSBP) was managing and overseeing the respondent's drivers and that he, Mr Robinson, and a junior employee, CS, were covering day to day activities (work allocation, routing, vehicle inspections) and that the respondent was acting lawfully. The claimant then told Mr Robinson that GRS were not on the operating licence [68].

89. In cross examination, the claimant accepted that the temporary arrangement, if that's what had happened (i.e. IU was overseeing arrangements), was lawful but that's not, we think, relevant as to the claimant's subjective belief and the reasonableness of that belief when he told Mr Robinson that the respondent was acting illegally in the absence of himself or a TM. What Mr Robinson told him in response and what the claimant then concluded is not relevant to the claimant's belief when he disclosed the information.

Did the claimant's disclosure of information have a sufficient factual content and did the claimant reasonably believe that the information he disclosed on 20 April tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation, namely DVSA requirements?

90. We have concluded that the claimant reasonably believed, when he disclosed the information in a phone conversation with Mr Robinson on 20 April, that the respondent was failing to comply with any legal obligation, namely DVSA requirements. When he disclosed this information, the claimant knew that neither he nor any Walsh TM were at work. Mr Robinson understood the legal obligation that the claimant was referring to because he advised the claimant that IU was overseeing things. However, when the claimant disclosed the information, he did not know that IU was overseeing the drivers. Mr Robinson told him that during the telephone call. But at the *time of* the information being disclosed the claimant reasonably believed that the respondent was in breach of the DVSA requirements. We think that what happened next (i.e. what Mr Robinson told the claimant and whether the claimant accepted that meant the respondent was acting lawfully (as he accepted in cross examination) is not relevant to whether the claimant reasonably believed that the respondent was failing to comply with its legal obligations.

Did the claimant believe that the disclosure of information was in the public interest and, if so, was that belief reasonable?

91. We have concluded that the claimant reasonably believed the information that he disclosed was in the public interest – that of ensuring the safe and proper use of vehicles and to protect road users. The claimant's evidence, taken as a whole, is that he was concerned that none of the TMs named on the respondent's Operating Licence were back at work by 20 April but that drivers were back at work. We are

considering whether the claimant believed and, if so, whether that belief was reasonable, that the disclosure of *that* information was in the public interest. What Mr Robinson said in response is not relevant to that analysis. The Claimant had no private interest in disclosing the information in question; it served a wider interest. The Tribunal finds that the Claimant reasonably believed that this information disclosed was made in the public interest; the claimant hoped that the information would be acted upon (in response to the claimant's disclosure, the respondent explained that there was no breach because IU was overseeing drivers).

92. In conclusion, the claimant made a qualifying protected disclosure on 20 April 2020.

Detriment

93. The claimant relies upon three 'detriments' which we must consider in light of the 20 April 2020 protected disclosure:

1. Being excluded from meetings (for example with F Ltd) [on dates between 11-22 March 2020. The claimant did not give evidence about other meetings, just those with F Ltd].
2. Not being asked to return to work to oversee lorries/drivers from late April 2020.
3. The selection for redundancy.

94. Taking each detriment in turn, we conclude that:

1. Detriment 1 (March 2020) cannot have been influenced by the 20 April disclosure. The detriment occurred in March.

2. In respect of Detriment 2, whilst we found as a fact that Mr Gifford was advised of the 20 April disclosure by Mr Robinson, we also accepted Mr Gifford's evidence that he did not recall being told this by Mr Robinson. We therefore accept his evidence that the claimant's disclosure on 20 April did not influence the decision not to invite the claimant back to work in late April 2020. Nor was Mr Robinson influenced by the disclosure. Moreover, by 20 April 2020, Mr Gifford had already mapped out a proposed business structure that did not include the claimant's role. The process of not asking the claimant to return to work to oversee the lorries/drivers was, rightly or wrongly, driven by that proposed structure. The organograms [[282, 283, 286, 287] were prepared in April, prior to the 20 April protected disclosure. For the reasons we set out below in relation to unfair dismissal, we are also satisfied that the decision to select the claimant for redundancy was driven by the claimant's salary and that the decision was made prior to the 20 April 2020 disclosure. The respondent has proven that the 20 April protected disclosure played no part whatsoever in the decision to not invite the claimant back to work.

3. We have concluded that Detriment 3 cannot be a detriment in law because selection for redundancy cannot, in our view, be severed from the dismissal itself and dismissal is excluded as a detriment by virtue of

s47B(2) ERA 1996. Lest we are wrong on that, for the reasons set out above at 2, we also record that the redundancy selection was not influenced in any way whatsoever by the 20 April disclosure.

Unfair Dismissal

Was there a potentially fair reason for dismissal?

95. The first issue for us to determine is whether the Respondent has established that the reason for the Claimant's dismissal was a potentially fair one; namely redundancy. There are two elements to this question. First, was there a genuine redundancy situation? Secondly, was that the real reason for dismissal? The Claimant submitted that the real reason for his dismissal was because he made protected disclosures (we have concluded that he made one PD on 20 April 2020).

96. The burden of proof lies on the Respondent to show that there was a potentially fair reason for dismissal. If the respondent does not succeed in proving that the dismissal was for a potentially fair reason (here redundancy), the Tribunal will consider whether the claimant has produced some evidence to show that it was for an automatically unfair reason (in this case, the protected disclosure of 20 April 2020). If he has, then the burden will shift back onto the respondent to demonstrate that the automatically unfair reason was not the principal reason.

97. We are concerned only with whether the reason for the dismissal was for the potentially fair reason of redundancy and not with the economic or commercial reason for the redundancy itself. The Employment Tribunal has no jurisdiction to consider the reasonableness of the decision to create a redundancy situation in the first place. However, we are entitled to examine the evidence available to determine what was the real reason or the principal reason for the decision to dismiss. A Tribunal is therefore entitled to ask whether the decision to make redundancies was genuine but not whether it was wise. In this context redundancy means a diminishing need for employees to do the available work.

98. We are satisfied that the Respondent has proved that the reason for dismissal was redundancy. The respondent needed to make significant financial savings because of the pandemic and therefore determined that it required fewer TMs. It required fewer employees to do work of a particular kind – namely team management (we are not persuaded that the respondent no longer required a STM - the planning organograms envisaged that SP would be a STM or a Lead TM). But there was a genuine diminution in the need for the work of TMs and so a potentially fair reason for the claimant's dismissal in accordance with ss98(2)/139(1(b) ERA 1996.

99. The Tribunal considered whether there was any evidence which undermined this position and suggested that the apparent redundancy situation was a sham. In this regard, the Tribunal bore in mind that, for the purposes of the claim under s103A ERA, the question was whether the main or principal reason was the disclosure on 20 April which the Tribunal found had been made.

100. The Tribunal took account of the fact that the disclosure was made on 20 April and the claimant was told by NW on 4 May that he was redundant. There was,

therefore, proximity between the two events that might suggest a link. We also bear in mind however that the respondent was planning the reorganisation as of 4 April and had determined that it required fewer TMs by 20 April 2020. We also accept Mr Gifford's evidence that the claimant was selected for redundancy because he was the highest paid manager of the TMs and that Mr Gifford did not think claimant's skills on a par with the other TMs (e.g., not driving, doing routing, doing logistics, doing compliance). The Tribunal was satisfied that the respondent genuinely decided that there was a need for fewer employees to do work of a particular kind – namely the TM role and that this reason caused the claimant's dismissal.

101. The Tribunal, therefore, finds that the Respondent has discharged the burden of proof and shown that, on the balance of probabilities, the reason for the Claimant's dismissal was the potentially fair reason of redundancy. This finding is sufficient to dispose of the claim under s103A ERA because it means that the main or principal reason for dismissal was not one which fell within the scope of that section. The claim under s103A ERA is therefore dismissed.

Fairness - s98(4) ERA 1996

102. Having found that there is a potentially fair reason for dismissal, the Tribunal turns its attention to the question of whether the dismissal was fair in terms of s98(4) ERA. Did the Respondent act reasonably in treating redundancy as a sufficient reason to dismiss the Claimant taking into account all the circumstances, including the size and administrative resources of the Respondent, equity, and the substantive merits of the case?

103. The Tribunal reminded itself that it should not substitute its own decision for that of the respondent but should determine whether the decision to dismiss fell within the broad band of reasonable responses of a reasonable employer. We have considered the size and administrative resources of the respondent (a medium sized employer), and we bear in mind that the respondent was operating in a pandemic. The Tribunal considered that the respondent acted outside the broad band of reasonable responses when they decided to dismiss the claimant for the following distinct reasons.

Pool

104. We remind ourselves that we must take care not to substitute our own view for that of the respondent. If a respondent genuinely applies its mind to the formulation of the pool and its decision is within the range of reasonable responses it is generally unimpeachable. In the first meeting on 7 May, the Claimant told Mr Gifford that he could drive, do compliance, do LG's job, could do all the jobs of a TM. However, there was never any analysis conducted of the Claimant's skills. There was simply no evidence that the respondent applied his mind to scoping an 'at risk' pool for selection (as to why that might have been, see below too). Mr Gifford had a closed mind and had, we conclude, decided by 20 April 2020 (see the planning organograms) that it was the claimant who would be dismissed. Mr Gifford simply did not consider whether he could and should widen the pool and that was, we concluded, outside a range of reasonable responses. In doing this, the Respondent guaranteed that the claimant would be selected for redundancy. The respondent's failure to *consider whether* the

pool for selection should have been wider was outside the range of reasonable responses open to the Respondent, and so was not fair.

Consultation

105. One of the key components of fair consultation is that consultation should take place when proposals are still at a formative stage. Another is that the employer should carefully consider the employee's response to the consultation. Neither happened in this case. The decision to dismiss the claimant was made, we conclude, in April 2020 during the first 3 weeks of lockdown, before the 'consultation' process began. That is when the scenario planning organograms were produced by the respondent. The claimant's name did not feature in those organograms. If we are wrong on that, the decision to dismiss the claimant was taken by Mr Gifford after the first consultation meeting and before the respondent responded to any of the questions raised by the claimant in that first meeting. There was therefore no meaningful response to the claimant's questions. The second meeting was we conclude a sham. We therefore conclude that there was no meaningful consultation in this case and that the dismissal was outside a range of reasonable responses.

106. We did not consider that it was outside a range of reasonable responses not to hear the claimant's appeal. We did consider that providing only three days for an appeal was outside a range of reasonable responses, notwithstanding the pandemic. We think that the minimum time for an appeal is five-seven days. However, the claimant did not, in any event, appeal until much later.

107. There were no suitable alternative jobs available. The respondent did not consider a role in Cornwall would be suitable, so did not explore jobs there. We conclude that decision was within a range of reasonable responses. In making an objective assessment of the suitability of alternative employment offered by an employer, a tribunal must have regard to the place of work. We think that many employers would have investigated nonetheless but it was not outside a range of reasonable responses not to do so.

Furlough/Lay-Off

108. The claimant suggests that his dismissal was also unfair because the respondent could and should have waited until 30 June before making decisions to see whether the government extended the furlough scheme and/or should have reduced the claimant's wages to the maximum paid by the government under the furlough scheme and/or invoked the lay-off clause in the claimant's contract. We disagree. Whilst we considered that we would have waited until 30 June to see what happened it was not, we concluded, outside a range of reasonable responses to press ahead with its business decision that it needed to save costs and therefore reduce the size of its workforce now. It is for an employer, not the Tribunal, to decide how to structure its business and whether to make redundancies. If an employee is reasonably considered to be redundant by the employer, the employer is not obliged to retain the furlough scheme, even though we understand why employees would urge employers to do that. It is an option the employer has, but we do not consider that the respondent was acting unreasonably in deciding to make redundancies which it considered to be in the best interests of the business. There were associated costs.

We cannot and must not step into the shoes of the employer and substitute our view for that of the respondent at the time. We conclude that the decision to dismiss the claimant, notwithstanding the existence of the furlough scheme/lay-off clause, was not outside a range of reasonable responses.

Polkey

109. A Polkey decision is a finding as to the chances that some event might take place. It is a predictive exercise, but evidence is needed to inform the prediction. The chances of the respondent, not a hypothetical reasonable employer, dismissing the claimant must be assessed. It is difficult for the Tribunal to say with any certainty as to what the outcome would have been had the Respondent consulted properly and genuinely applied its mind to the pool but nevertheless the Tribunal must do so in order to determine whether there should be a Polkey deduction, in other words, a reduction in compensation to reflect the chance that the Claimant would have been dismissed in any event had a fair procedure been followed.

110. Based on the evidence before the Tribunal, we think that if the respondent had acted within a range of reasonable responses and applied its mind to whether there should be a pool, it would have placed the claimant in a pool of two with SP. The planning scenario organograms envisaged a hypothetical scenario whereby there would still be a STM or a 'lead' TM, going forwards. SP was slotted into the organogram at that stage. The claimant was not. We concluded that should the respondent have decided upon a pool of one, we would, on the facts before us, have concluded that was outside a range of reasonable responses. We recognise that the question of how the pool should be defined is primarily a matter for the employer to determine, and that it is difficult to challenge a decision where an employer has genuinely applied its mind to the issue of the pool. However, we would have concluded that a failure to include SP in the pool would have been outside the range of reasonable responses on the facts we have found and not one that a reasonable employer would have taken, because the respondent envisaged in its hypothetical planning scenario organograms that SP would be the STM OR the 'lead' TM, sitting above LG. When Mr Gifford was asked about that, he said it was an error, but we did not accept that.

111. If there had been a pool of two, and meaningful consultation engaged in and fair selection criteria applied, we think that it is more likely than not that the claimant would still have been dismissed but we do not think it was a foregone conclusion, unless salary alone had been used to determine who should be made redundant. There was no suggestion that is what happened in other areas of the business when determining who should be made redundant. We were told that selection criteria were applied elsewhere. We conclude, doing the best we can, that there is a greater than not chance that the claimant would have been dismissed if fair selection criteria had been applied. We do not know what criteria would have been applied, although we do know that the respondent would have considered salary and given less weight to the claimant's historic compliance experience, but it would have learned during consultation what compliance work the claimant had done and about his experience and, for example, whether the claimant might accept a pay cut. The claimant had done compliance work and could do so going forwards, but he had not been the doing day to day compliance work, SP had. SP would therefore have scored higher on

compliance work, but the claimant would have scored higher on the management work; he had been the STM (lead TM) prior to dismissal. The claimant's length of service was longer than SP's. SP and the claimant could both drive HGVs but that the claimant had not done client work for the respondent, whilst SP had done so occasionally. The claimant was paid approximately 9k more than SP. We conclude, doing the best we can, that there is a 75% chance that the claimant could and would have been fairly dismissed if the employer had acted within a range of reasonable responses. We do not accept Mr Ross' submission that there is a 95% chance that the claimant would have been dismissed because that submission does not reflect our finding of fact that SP was, at the relevant time, to be slotted in as the STM or 'lead' TM in the revised structure.

112. Based on our collective experience and taking into account the pandemic situation in which the respondent was operating, we think that a fair consultation and selection process would have taken two weeks, given that we think that there would only have been two people in the pool. If the remedy is compensation only, the claimant is therefore entitled to 80% of his full pay for a 2-week period. Thereafter, the claimant is entitled to 25% of any losses to be agreed or assessed at a remedy hearing.

Employment Judge Scott

20 September 2021