EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105461/2020 (V)

Public Final Hearing held in Edinburgh by Cloud Based Video Platform (CVP) on 21-23 July 2021

Employment Judge Mr. A. Tinnion

Mr. Darren Amers	**Claimant** **Represented by** **Mr. Cunningham, Advocate**
DR Collin & Son. Ltd.	**Respondent** **Represented by** **Mr. Edward, Advocate**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal under ss.94 and 98 of the Employment Rights Act 1996 is well-founded.

2. The Claimant's complaint of wrongful dismissal is well-founded.

3. The Respondent shall pay the Claimant compensation in the total sum of £10,434.36.

REASONS

Claim

1. By an ET1 and Paper Apart prepared by his solicitors presented on 10 October 2020, Claimant Darren Amers (**Mr. Amers**) presented complaints of unfair dismissal and wrongful dismissal against his former employer, Respondent DR Collin & Son Ltd. In brief, Mr. Amers alleged he had been unfairly dismissed

without notice in July 2020. Mr. Amers pleaded three actions "*had a bearing"* on his dismissal: (i) his involvement in a workplace accident in Autumn 2018 in which another employee of the Respondent had negligently electrocuted him (ii) his choice to pursue a personal injury claim against the Respondent arising out of that accident (Mr. Amers contended this was the real reason for his dismissal) (iii) his informing the Respondent that there were pigeon droppings within the Cold Store and there was a lack of toilet facilities (he did not present a 'whistleblowing' claim in respect of either matter). For relief, Mr. Amers sought compensation. As well as challenging the reason for dismissal, Mr. Amers pleaded his dismissal for redundancy was unfair for two reasons: first, he was not warned or consulted, properly or at all, of the impending redundancy situation; second, he was not offered any right of appeal against dismissal.

Response

2. By an ET3 prepared by its solicitors, the Respondent (i) accepted Mr. Amers had worked for it, but only in the capacity of a worker, not an employee, hence alleged the Tribunal lacked jurisdiction to hear the unfair dismissal claim (ii) denied dismissing Mr. Amers, alleging he had "*terminated his own position by indicating that he did not wish to undertake any further work as offered by the Respondent*" (iii) contended that if he had been dismissed, the reason for dismissal was redundancy, and denied Mr. Amers' personal injury claim had anything to do with its treatment of him (iv) denied Mr. Amers was entitled to a redundancy payment because he had unreasonably refused an offer of suitable alternative employment.
3. In its ET3, the Respondent did not claim that if Mr. Amers had been dismissed on grounds of redundancy that he had been warned or consulted beforehand about the impending redundancy situation, nor did the Respondent contend that Mr. Amers had been offered a right to appeal if he had been dismissed.
4. In correspondence prior to the start of the hearing, the Respondent conceded that Mr. Amers had been one of its employees (without qualification). Given that concession, and the undisputed fact that Mr. Amers had worked continuously for the Respondent for over 2 years, the Tribunal was satisfied that it had jurisdiction to hear the unfair dismissal claim.

Evidence

5. The claim was heard on 21-23 July 2021. The following witnesses gave evidence: for the Claimant, Mr. Amers; for the Respondent, Ms. Shona Wilson (Director, co-owner) and Mr. Paul Virtue (Sales Director). Mr. Amers was represented by Mr. Cunningham (Advocate), the Respondent by Mr. Edward (Advocate). A joint production bundle of c.250 pages was produced.

Findings of fact

6. The Tribunal makes the findings of fact below on the balance of probabilities. References in square brackets are to the relevant page(s) of the joint production.

Respondent

7. The Respondent was incorporated on 4 November 2020. Its registered office address is Unit 1, Coldingham Road Industrial Estate, Eyemouth, Scotland TD14 5AN. According to Companies House, the nature of its business is 46380 – wholesale of other foods including fish, crustaceans and molluscs.
8. The Respondent's business processes and supplies fresh and frozen fish and seafood products to wholesale customers in the UK, the EU and (on occasion) outside the EU, including bars and restaurants. Its business is connected 'vertically' to other fish and seafood businesses also owned by its owners.
9. The Respondent's main premises are at Coldingham Road Industrial Estate, Eyemouth, where it operates a number of sites, each within close proximity: Site #1 is the original site; Site #2 stores and packs lobsters, has a 'crab haul', and a small cold store with a lorry loading bay; Site #3 has a cooking factory for crabs; Site #4 is the location of the Respondent's main 'cold store' used to receive, freeze and despatch seafood including shellfish, with a small office; Site #5 is the location of the main office, a factory which packs fresh langoustine, and also some lobster tanks.

Claimant

10. On 1 May 2017, Mr. Amers joined the Respondent's employment as a Cold Store Operative in Site #4, and was paid £10/hour plus overtime. During his employment, Mr. Amers' primary place of work was always the Cold Store. He was originally managed by Mr. Derek Sim.

11. When Mr. Amers joined the Respondent, he already knew – and was on good personal terms – with its owner/director Mr. James Cook. Mr. Amers and his wife socialised together outside of work with Mr. Cook and his wife. It was in fact through Mr. Cook that Mr. Amers obtained this employment.

12. On 30 June 2017, Mr. Amers signed a document entitled "*Zero Hours Contract for Causal Worker*" [3-10] which stated it was not an employment contract and that he was engaged by the Respondent as a causal worker. The ET3 makes no reference to this document and does not place any reliance on its terms.

May 2017 – February 2020

13. Between May 2017, when Mr. Amers joined the Respondent, and the Covid-19 pandemic which began in March 2020, four events occurred of note.

14. First, in August 2018 Mr. Amers was involved in a workplace accident at the Respondent's premises, which on his account was caused by the negligence of Mr. Sim, which caused Mr. Amers to receive an electric shock, throwing him out of the reach truck he was in at the time.

15. Second, in 2019, after the accident but before he intimated any intention to bring a personal injury claim, the Respondent promoted Mr. Amers to the post of Cold Store Manager, gave him a pay rise to £11/hour, and provided him with a company car and fuel allowance. Mr. Amers continued working in the Cold Store at Site #4. Mr. Amers' duties as Cold Store Manager included (i) being supervisor and line manager of Mr. Duncan Crombie, who had previously worked at Site #2 (where he was paid £9/hour plus overtime – his pay at Site #4 increased to £10/hour) (ii) compiling stock lists and 'loading sheets' (iii) dealing with hardcopy and electronic paperwork. With the Respondent's knowledge, Mr. Amers held himself out as the Cold Store Manager. At no point during his employment was his status as the manager of the Cold Store challenged. In his oral evidence, Mr. Amers said he loved his job as Cold Store Manager – the Tribunal accepts this.

16. Mr. Amers and Mr. Crombie worked closely together as part of a team. Mr. Crombie had previously worked at Site #2 (where there was a substantially smaller cold store). Mr. Amers was responsible for authorising Mr. Crombie's overtime. Mr. Amers was responsible for approving Mr. Crombie's requests for annual leave, and dealing with any sickness absence/absences on his part.

Other staff came to the Cold Store to assist Mr. Amers and Mr. Crombie when the need arose, eg, stacking big containers of frozen seafood to be despatched to China (including on occasion Mr. Ian Mulvey, the Health and Safety officer).

17. Third, in 2019 Mr. Amers issued a personal injury claim against the Respondent for a PTSD injury which he claimed the 2018 accident caused him. See Supplementary Report dated 9 September 2020 [56-62].

18. Fourth, after Mr. Amers issued a personal injury claim, Mr. Amers' previously friendly personal relationship with Mr. Cook ended, the Tribunal infers at Mr. Cook's instigation.

Covid-19 pandemic

19. Prior to March 2020, the Respondent was trading as normal. In March 2020, the Covid-19 pandemic began, affecting the UK and other countries worldwide.

20. Following the onset of the pandemic in March 2020 and the measures the UK government (and EU governments) introduced to address it – primarily, "lockdowns", the temporary closure of most businesses for retail customers (bars, restaurants), and social distancing requirements – the Respondent's business suffered a significant downturn in trade.

21. The Respondent closed the Cold Store, and put Mr. Amers and Mr. Crombie on furlough. The precise date on which Mr. Amers was put on furlough is unclear.

22. At some point in time before 10 July 2020 Mr. Crombie came off furlough (the precise date is unknown) and returned to work. Mr. Amers never returned to work, and remained on furlough until the events of 9-14 July 2020. Mr. Amers says – and the Tribunal accepts – that during this period Mr. Crombie occasionally called him to ask for advice and assistance about matters concerning the Cold Store in Site #4.

9-14 July 2020

23. On Thursday 9 July 2020 during a discussion in her office in Site #5, Ms. Wilson and Mr. Virtue discussed and agreed to terminate Mr. Amers' post in the Cold Store. In Ms. Wilson's words, "*We discussed how we could bring him back. There wasn't a part-time position at the Cold Store. There was very little activity at the Cold Store*." At the time, Mr. Amers had no notice that his job in the Cold Store

was at risk and might be about to end. No-one at the Respondent consulted or sought to consult Mr. Amers beforehand about this decision.

24. On 9 July 2020 at 17:04, Mr. Virtue sent the following WhatsApp message to Mr. Amers: "*Evening, you ok to come out to the office site 5 @3p tomorrow for a back to work talk*." [13]. Mr. Amers replied "*Aye can do see you then*." [13].

25. On Friday 10 July 2020 at 3pm, Mr. Amers attended what turned out to be a brief meeting in Site #5 with Mr. Virtue and Ms. Wilson. At the meeting, Ms. Wilson told Mr. Amers that due to the way business was going the business was doing more fresh fish, the Cold Store would no longer be used as much as there was less need to store frozen food, and there was no longer a position for him at the Cold Store. Ms. Wilson told Mr. Amers he could work at Site #2. Mr. Amers asked if he'd be on the same pay. Ms. Wilson said no, he'd have to take a pay cut to £9.50/hour. Mr. Amers asked when they needed to know his decision by. Mr. Virtue and Ms. Wilson indicated they wanted to know there and then. Mr. Amers told them he needed some time to think about it. He then left the premises. No contemporaneous note of the meeting was made.

26. At the time, Mr. Amers understood his employment as Cold Store Manager at Site #4 had just been terminated. He was disappointed: "*it felt like a kick in the teeth*". Mr. Amers was sceptical about the alternative post, no written terms having been prepared. In his eyes, the Site #2 post would be a clear demotion. In her evidence, Ms. Wilson accepted no "*great detail*" about the job in Site #2 was provided to Mr. Amers at the 10 July meeting.

27. Over the weekend (11-12 July), Mr. Amers thought about the job offer in Site #2 and provisionally decided not to accept it: (i) the post was more junior to the managerial post he had just lost at the Cold Store (ii) the pay (£9.50/hour) was less than his existing pay (£11/hour) (iii) nothing had been put in writing. Mr. Amers was sceptical the offer was genuine, and doubted the Respondent genuinely believed he would accept it.

28. On Sunday 12 July 2020 at 17:04, Mr. Amers sent a WhatsApp message to Mr. Virtue stating he wouldn't be making a decision until he had spoken to his solicitor on Monday [13]. On 13 July 2020 at 6.55pm, Mr. Amers informed Mr. Virtue via WhatsApp that it was looking highly unlikely that he would be accepting the new role and pay cut offered to him [13]. On 14 July 2020 at 12:08, Mr. Amers

informed Mr. Virtue via WhatsApp that he would not be accepting the new job and pay cut offered to him [14]. Mr. Virtue relayed that information to Ms. Wilson.

29. On 14 July 2020, Ms. Wilson telephoned Mr. Amers. She had prepared a script for the call [12] which stated: "*Further to communications by telephone, we have received your message advising that you do not wish to be considered for alternative work which was offered during your back to work talk. For the avoidance of doubt, we have taken this as notice that you no longer wish to be considered for casual work under the termination section of your contract. Please return any company equipment at your earliest convenience*."

30. No finding is made that Ms. Wilson used these exact words. On their call, Ms. Wilson said that Paul (Mr. Virtue) had forwarded his 12:08 message. Mr. Amers confirmed again that he was not accepting the offer to work in Site #2. Ms. Wilson expressed disappointment at the decision. She asked Mr. Amers to return the keys to the Cold Store and his car keys. Mr. Amers did not tell Ms. Wilson on the call that he resigned or use any other words indicating he was resigning or voluntarily leaving the Respondent's employment. At no point did Mr. Amers state or indicate he no longer wished to work in the Cold Store Manager post.

31. Mr. Amers was not offered any right to appeal against the termination of his employment. The Respondent did not pay any notice pay to Mr. Amers. At some point afterwards (date unknown), Mr. Crombie called Mr. Amers, and was told that everything was back to normal – "*same shit, different day*."

32. When asked in his evidence in chief what he believed the true reason for his dismissal was, Mr. Amers stated "*That's what I would like to find out*." Mr. Amers stated that once his personal injury claim was made public within the company and he made a request for CCTV, his relationship with the Respondent's directors changed. He also stated that he raised two health and safety issues about Site #4: there was no toilet, washing facilities or running water; and every morning there was pigeon droppings all over the loading bay. Mr. Amers claimed he regularly raised these issues with Mr. Ian Mulvey.

33. As at the date of the hearing, Mr. Amers had not found employment. The joint production contains sick notes certifying that due to depression and PTSD he was not fit for work for the periods (i) 29 September – 28 November 2020 [70] (ii) 26 November 2020 – 25 January 2021 [71] (iii) 22 January – 15 April 2021 [72].

34. There was no evidence in the joint production bundle that Mr. Amers had applied for alternative employment after 14 July 2020. There was equally no evidence that suitable alternative employment was potentially available to him after then - the production did not contain a single job advert/position which the Respondent alleged Mr. Amers could have applied for after the termination of his employment.

Law

35. The parties to a Tribunal claim must set out the essence of their case on paper in the ET1 and the answer to it. The Tribunal must take care not to be diverted into thinking the essential case is to be found other than in the pleadings. Chandhok v Tirkey [2014] UKEAT/0190/14, paras. 17-18. Although there may be exceptions (eg simple cases where the parties are not legally represented and there has not been extensive case management), the Tribunal is not required in every redundancy unfair dismissal claim to investigate and determine whether there was unfairness in the selection process, lack of consultation and/or failure to seek alternative employment if not specifically pleaded or raised in an agreed list of issues. Remploy Ltd. v. Abbott [2015] UKEAT/0405/14/DM.

36. Per Sir John Donaldson in Martin v Glynwed Distribution Ltd [1983] ICR 511 at 519: "*Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, 'Who really ended the contract of employment*?'".

37. Where an employer uses ambiguous language which the employee alleges constituted a dismissal, the Tribunal must ask itself whether a reasonable employee in the circumstances would have considered that the employer's words amounted to a dismissal. Devaney v DNT Distribution Co. Ltd [1993] UD412.

38. Sec 139(1) of the Employment Rights Act 1996 states that for the purpose of that 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 (a) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (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 or are expected to cease or diminish.

39. A reason for dismissal is a set of facts known to and/or beliefs held by the employer which cause it to dismiss an employee. Abernethy v Mott, Hay & Anderson [1974] ICR 323.

40. Provided a genuine redundancy situation arises, the Tribunal does not have jurisdiction to determine whether an employer's decision to have redundancies either at all or in the numbers decided upon rather than take an alternative course of action was unfair or unreasonable, or decide an unfair dismissal claim on the basis that that decision was unfair or unreasonable. In a genuine redundancy situation, the decision whether or not to make posts redundant is a business decision for the employer. Moon v Homeworthy Furniture (Northern) Ltd. [1976] IRLR 298.

41. Williams v Compair Maxam [1982] UKEAT/372/81. Where employees are represented by an independent union recognised by their employer, reasonable employers will generally seek to act in accordance with the following principles. First, the employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary find alternative employment in the undertaking or elsewhere. Second, the employer will consult the union as to the best means by which the desire management result can be achieved fairly and with as little hardship to the employee as possible. The employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria. Third, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency, experience or length of service. Fourth, the employer will seek to ensure that the selection is made fairly in accordance with these criteria, and will consider any representations the union may make as to selection. Fifth, the employer will seek to see whether instead of dismissing the employee the

employer could offer the employee alternative employment. The factors above are not present in every case, and can be departed from where good reason is shown.

Conclusions: Unfair Dismissal

42. First, the Tribunal finds that the Respondent's Ms. Wilson dismissed Mr. Amers at their meeting on 10 July 2020, with that dismissal taking effect on 14 July 2020 immediately after Mr. Amers told Ms. Wilson on their phone call that day that he did not accept the Respondent's offer of employment at Site #2.

43. While Ms. Wilson was careful during her meeting with Mr. Amers on 10 July 2020 not to use the word "*dismiss*" (or any similar technical/vernacular term having the same meaning), the Tribunal finds that (i) the words Ms. Wilson spoke to Mr. Amers that day (for which, see para. 25 above), and the context in which they were said, were more than capable of giving Mr. Amers the clear, unambiguous impression that his employment in his substantive post as Cold Store Manager in the Cold Store had been terminated (ii) Mr. Amers subjectively understood from what Ms. Wilson said to him that his employment as the Cold Store Manager had been terminated (iii) Mr. Amers' understanding to that effect was entirely reasonable (iv) Mr. Amers correctly understood that the only way he could continue to remain in the Respondent's employment after 10 July was if he chose to accept the Respondent's offer of alternative employment in a different location (Site #2) at a lower rate of pay (£9.50/hour) in a different, non-managerial post. The Tribunal finds that Mr. Amers was expressly dismissed. If that is an error, and the words Ms. Wilson used were ambiguous, the Tribunal finds that a reasonable employee in Mr. Amers' circumstances would reasonably have considered that Ms. Wilson's words amounted to dismissal. Devaney v DNT Distribution Co. Ltd applied. The Tribunal has no hesitation in concluding that in this case it was the Respondent which terminated the contract of employment.

44. Second, the Tribunal is satisfied, on the balance of probabilities, that the sole reason for Mr. Amers' dismissal in July 2020 was genuinely that of redundancy.

45. The Tribunal pauses to note that the evidence on this issue was less than satisfactory. The obvious way to establish that the Cold Store was less busy in the second quarter (**Q2**) of 2020 than it would normally have been would have

been for the Respondent (on whom the burden of proof lay) to provide data comparing the Cold Store's utilisation in Q2 2019 (numerous quantitative metrics could be used – daily/weekly/monthly number of deliveries into Cold Store; number of deliveries out of Cold Store; stock count of items in Cold Store) versus Q2 2020, with an anticipated decline in the chosen metric(s) between the two. An 'apples to apples' comparison like this would avoid the monthly/seasonal variations the Respondent's business undergoes. Given monthly/seasonal variations, the Tribunal could not see how it could draw any strong inferences from comparing Cold Store utilisation during the period of the Covid-19 pandemic in 2020 (24 March, 30 June, 31 July, 31 August). Mr. Virtue accepted that Cold Store data for 2019 and 2020 was obtained at the time and retained (ie, it had not been destroyed – destruction would be highly unlikely as all such information would ultimately be stored electronically and be kept/maintained for audit/ reference purposes), but did not rely upon it, and the Tribunal did seriously consider drawing an adverse inference from the Respondent's failure to produce this data (given its availability) and establish its case this way.

46. Ultimately, however, the Tribunal accepted that in Q2 2020 and the first two weeks of July 2020, following the onset of the Covid-19 pandemic in March 2020, that there likely must have been, and was in fact, a substantially reduced demand from bars and restaurants in the UK and the EU for the fish and seafood products the Cold Store was involved in supplying because of compulsory establishment closures (UK/EU bars and restaurants were closed) and lockdowns (customers were not permitted to leave home to visit bars and restaurants), and with it, an inevitable reduced demand for the services of those employed to work in the Cold Store. It is not in dispute that because of the effect the Covid-19 pandemic had on its business, the Respondent temporarily closed the Cold Store for a period of time, and the two employees who normally worked there full-time – Mr. Amers and Mr. Crombie - were both put on furlough at the same time. Neither Mr. Amers nor Mr. Crombie could be furloughed without their consent, hence the Tribunal infers that (i) both did consent (ii) they consented because both were aware (if not the finer detail, then at least in broad general terms) of the adverse effect the Covid-19 pandemic was having on the Respondent's business and the demand for frozen fish and seafood products passing through the Cold Store.

47. The Tribunal finds it difficult to reconcile Mr. Amers' position that he was not in a redundancy situation in July 2020 with the fact that in July 2020 he remained on furlough. In cross-examination, Mr. Amers accepted that the Respondent's profit and loss accounts for 31 August 2019 showed a monthly turnover of £3.9 million and for 31 August 2020 showed a monthly turnover of £2.9 million - a 25% reduction. The Tribunal infers from that that in August 2020 the Respondent's business – including its frozen seafood business – was still suffering substantial difficulties because of the Covid-19 pandemic. The Tribunal accepts Ms. Wilson's evidence that as late as March/April 2021 the Respondent still had one or two members of staff on furlough.

48. The Tribunal rejects Mr. Amers' case that there was not a genuine redundancy situation around the time of his dismissal (10-14 July 2020) merely because by July 2020 there had (or may have) been a slight improvement in the Respondent's business (by then the Cold Store had re-opened) compared to the beginning of the initial lockdown period. Comparing (i) the Respondent's business in March 2020, before the Covid-19 pandemic and resulting measures to counteract same – lockdown, social distancing – were introduced and when UK national life was "*normal*" (ii) July 2020, when UK bars and restaurants remained closed to the public and the UK public remained at home on lockdown, it is highly likely if not virtually certain that the Respondent's Cold Store business in July 2020 was facing a significantly worse trading environment than it had been in July 2019 (no Covid, normal trading conditions) or March 2020 (immediately pre-Covid). Nothing in s.139(1) of the Employment Rights Act 1996 prevents the Tribunal from adopting a common sense approach to determine whether the Respondent was in a genuine redundancy situation in July 2020, and the Tribunal rejects Mr. Amers' submission (in effect, albeit not phrased precisely this way) that whether or not there is a redundancy situation ***must*** be measured by the ***day***. Taking that approach literally would mean that if demand for a business' product was eg 100 units/day on Days 1-50, 1 unit/day on Days 51-99, and 2 units/day on Day 100, that there would not be a potential redundancy situation on Day 100 merely because demand on Day 100 was higher than it had been on Days 51-99. Nothing in the legislation or any authority requires the Tribunal to approach the issue of whether the Respondent was in a

genuine redundancy situation in July 2020 so narrowly. To determine whether there was a genuine redundancy situation, it is lawful and appropriate to compare the Respondent's business situation then against the situation that prevailed before the onset of the Covid-19 pandemic (only a few months before). Using that base of comparison, the Tribunal is satisfied that there was a genuine redundancy situation in July 2020. The Tribunal is also satisfied that Mr. Amers' dismissal was wholly attributable to that redundancy situation.

49. The Tribunal rejects Mr. Amers' case that there was not a redundancy situation in July 2020 based on photos [46-51] he took in the weeks after his dismissal showing trucks in/around the vicinity of the Cold Store. None of the photos are dated; none of the photos show what is (allegedly) happening; none of the photos show what is in the trucks (the trucks could be empty or full).

50. The Tribunal rejects Mr. Amers' case that the reason for his dismissal was his workplace accident in 2018 and/or the personal injury claim he brought against the Respondent in 2019. Whatever Mr. Amer's suspicions, there was no evidence before the Tribunal that Mr. Cook (who by July 2020 was partly retired and had largely stepped out of the business) was involved in the decision to dismiss him (which was taken by people who did not need Mr. Cook's authority to do so), or had sought it (either then or on any other occasion), or been consulted about it beforehand, or expressed approval of the decision to dismiss Mr. Amers after the fact. The Tribunal concludes that Mr. Amers' suspicion that Mr. Cook sought, or was involved in, his dismissal is groundless.

51. The Tribunal rejects Mr. Amers' case that the reason for his dismissal was because of, or related to, him complaining about the lack of toilet/washing facilities at Site #4 and/or bird droppings at the Site #4 loading bay. The Tribunal accepts that Mr. Amers may on occasion have mentioned these matters to more senior management at one time or another, but the Tribunal does not accept that Mr. Amers was making a serious complaint about either, and there is no reason to believe that the Respondent was or would have been particularly troubled about these matters being brought to its attention. The Tribunal is satisfied that there were toilet and handwashing facilities available to Mr. Amers and Mr. Crombie only a short distance away from Site #4, and Mr. Amers chose not to use those facilities to urinate because of the small, mildly inconvenient bother

of getting there. There was no credible evidence corroborating Mr. Amers' suggestion that these matters played a causal role or had any involvement in the decision to dismiss him or end his employment as Cold Store Manager.

52. Third, the Tribunal is satisfied that Mr. Amers' dismissal on 14 July 2020 was unfair and outwith the range of reasonable responses open to the Respondent at the time. The Tribunal reaches that conclusion on the following grounds:

53. *First*, the Tribunal accepts Mr. Amers' case that he was not warned or consulted, properly or at all, about the impending redundancy situation. It is a fact that the Respondent did not – and made no effort to - consult Mr. Amers personally or any workplace representative (if there were any) before deciding to make his post in the Cold Store redundant and informing him of that fact. The first Mr. Amers knew that his post was at risk was on 10 July 2020 when he was told that that his Cold Store Manager post had in fact ended. The Tribunal holds that consultation is an important part of a fair redundancy process, and the Respondent has not put forward (in principle) or established (in fact) any good reason why consultation with Mr. Amers was not reasonably required.

54. *Second*, the Tribunal rejects the Respondent's submission that it adopted a fair basis on which to select for redundancy and followed a fair process (*Respondent Skeleton Submission*, para. 2.1, unnumbered sub-paras). There was no redundancy pool, and there were no consultations with Mr. Amers about who should be included in any pool. No redundancy selection criteria were applied, and there were no consultations with Mr. Amers about what any selection criteria should be. What happened, as a matter of fact, was that the Respondent decided to dismiss Mr. Amers on 9 July 2020, and did so the next day. The Tribunal rejects the Respondent's case that the "[*R]espondent adopted an informal procedure*" (*Respondent Skeleton Submissions*, p.3, unnumbered para.) – on the face of it, the Respondent adopted no discernible procedure at all. The Tribunal rejects the Respondent's submission that Mr. Amers "*was given time to consider his position*" – the only thing Mr. Amers was given time (a weekend) to consider was whether he wished to accept the Respondent's offer of alternative demoted employment in Site #2. There was no suggestion, and no evidence before the Tribunal, that the Respondent ever gave Mr. Amers the option (or

mooted the possibility) of Mr. Amers continuing in his employment as Cold Store Manager at Site #4 under any circumstances.

55. *Third*, the Tribunal accepts Mr. Amers' case that his dismissal was unfair and outwith the band of reasonable responses because he was not offered a right of appeal against his dismissal. A right of appeal was especially important in Mr. Amers' case because of the Respondent's failure to consult him before deciding to make his post redundant. Mr. Amers had no opportunity before 10 July 2020 to put his case as to why his Cold Store Manager post should not be terminated, or to suggest alternative arrangements which might allow him to remain in that post, and it would be wrong to suggest that Mr. Amers could reasonably have been expected to do so on 10 July, given that he was caught by surprise that day. Affording Mr. Amers a right of appeal against his dismissal would have given him a proper opportunity to consider the situation and state his case to his employer to the best of his ability. That opportunity was denied him, and in the Tribunal's judgment the Respondent acted unfairly and unreasonably in doing so. The Respondent denies Mr. Amers was dismissed, but in its ET3 has put forward no reason why (if he was dismissed) it was reasonable not to offer him a right of appeal against dismissal.

56. The Tribunal's judgment is therefore that Mr. Amers' unfair dismissal claim is well-founded and he is entitled to a remedy in respect of same.

Conclusions: Wrongful Dismissal

57. For the reasons already given, the Tribunal's judgment is that Mr. Amers was dismissed without notice on 10 January 2020, with that dismissal taking effect on 14 July 2020 immediately after Mr. Amers told Ms. Wilson on their phone call that day that he did not accept the Respondent's offer of employment at Site #2.

58. Mr. Amers was statutorily entitled to 3 weeks notice of termination of his employment contract (the Respondent did not contend otherwise in its ET3 or suggest otherwise in cross-examination). The Tribunal finds that a 3 week notice period was also a term of his employment contract.

59. The Tribunal's judgment is therefore that Mr. Amers' wrongful dismissal claim is also well-founded and he is entitled to a remedy in respect of same.

Remedy

60. The Schedule below sets out how Mr. Amers' remedies entitlement has been calculated. Any figures used in the Schedule are findings of fact.

61. Period of loss. Given the major uncertainties in the UK/Scottish labour market since March 2020 due to the Covid-19 pandemic, the Tribunal determines that it would be reasonable to expect Mr. Amers to have found suitable alternative employment at some point within 12 months of his dismissal. The Tribunal would have applied a lesser figure of 6 months in "*normal*" business circumstances.

62. Mitigation of loss. Save as noted below, the Tribunal makes no finding that Mr. Amers failed to take reasonable steps to mitigate his loss arising from dismissal. The Respondent failed to identify a single specific job opening in the vicinity allegedly suitable for Mr. Amers which (on its case) he should have applied for. The Tribunal is mindful of the fact that the UK/Scottish labour market remained in flux as a result of the pandemic. The Tribunal makes no criticism of Mr. Amers for turning down the Site #2 post, and concludes it was reasonable for him to do so. First, the position offered was inchoate, with nothing in writing. Second, the post involved a pay cut. Third, the post involved a demotion from his existing position. Fourth, the circumstances in which the alternative post was offered to him were unattractive, to say the least – Mr. Amers was effectively 'bounced' without notice into a position where he had to decide whether to accept that post or not. Having put Mr. Amers into that position, the Respondent has only itself to blame if Mr. Amers chose not to accept it.

63. Credit. The Tribunal assumes and makes a finding of fact on the balance of probabilities that Mr. Amers sought to mitigate his loss arising from dismissal by applying for and duly receiving a minimum £74.70/week Job Seekers Allowance (JSA) in the 52 week period following his dismissal, and requires Mr. Amers to give credit for that sum. If that finding is incorrect and he did not apply for JSA (or other support benefits available to him), the Tribunal finds that he failed to mitigate his loss by not doing so, and is still required to give credit for that sum.

64. Polkey. The Tribunal finds there was a 50% chance that Mr. Amers would have been fairly dismissed if the Respondent had applied a fair redundancy procedure. The obvious selection pool would have included Mr. Amers and Mr. Crombie. While Mr. Amers held the more responsible position, the Tribunal accepts Mr.

Virtue's evidence that (i) Mr. Crombie had worked longer for the Respondent (ii) Mr. Crombie had a "*lifetime*" experience of shellfish (iii) Mr. Crombie was paid less than Mr. Amers, and cutting costs forms a legitimate aim of a redundancy exercise. In these circumstances, the Tribunal finds it impossible to say which of the two would more likely have been dismissed following a fair redundancy process. On that basis, the Tribunal adopts a ***Polkey*** figure of 50%.

65. ACAS uplift. Mr. Amers requests an uplift to the unfair dismissal award on the basis that his dismissal did not comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal declines that invitation. As its title suggests, that Code sets out guidance on how employers should conduct disciplinary and grievance cases. In the period 10-14 July 2020 the Respondent did not discipline Mr. Amers, did not subject Mr. Amers to a disciplinary process, and Mr. Amers never lodged a grievance about his treatment. In the premises, the ACAS Code of Practice on Disciplinary and Grievance Procedures did not apply. ACAS has not (yet) published any code of practice setting out the minimum procedure an employer should adopt in redundancy situations.

66. Ill-Health. The Tribunal does not accept that due to ill-health Mr. Amers would have remained off work even if he had not been dismissed on 14 July 2020. There is no evidence Mr. Amers was in poor mental health rendering him unfit to work prior to the events of 10-14 July 2020, and the Tribunal makes a finding of fact on the balance of probabilities that had Mr. Amers been told on 10 July 2020 that he was returning from furlough to the Cold Store Manager post he "*loved*", and then duly come back to work in that post, his mental health would likely have improved, not deteriorated.

SCHEDULE

Key facts	
Date of birth	30 January 1972
Date employment commenced	1 May 2017
Effective date of termination (EDT)	14 July 2020
Completed years service at EDT	3
Weekly pay (gross)	£480.77
Weekly pay (net)	£380.00
Notice period	3 weeks
Company car: weekly BIK value	£38.46
Employer pension contribution (weekly value)	£14.46

Wrongful Dismissal

3 weeks x (£380 + £38.46 + £14.46) = £1,298.76

Unfair Dismissal: Basic Award

3 weeks x 1.5 x £480.77 = £2,163.46

Unfair Dismissal: Compensatory Award

Loss of statutory rights = £500

Lost wages/benefits in kind = 49 weeks x (£380 + £38.46 + £14.46) = £21,213.08

Sub-total = £21,713.08

Sub-total after 50% *Polkey* reduction = £10,856.54

Total compensation payable (before credit)

= £14,318.76 (£1,298.76 + £2,163.46 + £10,856.54)

Credit

52 weeks x £74.70 = £3,884.40

Total compensation payable (after credit)

= £10,434.36 (£14,318.76 - £3,884.40)

Employment Judge: Antoine Tinnion
Date of Judgment: 19 September 2021
Entered in register: 23 September 2021
and copied to parties