EMPLOYMENT TRIBUNALS

Claimant: Mr R Corr

Respondent: Eurocentres Global Language Learning Limited

Heard at: London Central (via CVP) **On:** 25th, 26th and 27th August 2021

Before: Employment Judge Nicklin

Representation
Claimant: in person
Respondent: Mr J Herbertson (Director of the Respondent and Bayswater Education)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

1. The claim of unfair dismissal and the claim for a protective award are not well founded and are dismissed.
2. The Claimant was wrongfully dismissed in breach of contract because he was not paid his full notice pay entitlement.
3. The Respondent is also in breach of contract for not paying the Claimant his full entitlement of contractual holiday pay and time off in lieu days upon termination of his employment.
4. The Respondent shall pay to the Claimant the following sums, subject to any deductions to be made to these sums for tax and National Insurance:

    4.1. £11,586.49, gross, in respect of notice pay;
    4.2. £1,375.38, gross, in respect of holiday pay; and
    4.3. £1,943.10, gross, in respect of time off in lieu days.

5. The Respondent shall pay the Claimant a **15% uplift** on the award of notice pay only for its unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. The 15% uplift is to be applied to the net amount of notice pay, once tax and National Insurance deductions have been taken into account.

REASONS

Introduction

1. By a claim form presented on 31st January 2021, the Claimant brought the following claims:
   1.1. A claim for unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 ("the ERA");
   1.2. A claim for breach of contract in respect of the Claimant's outstanding notice pay, holiday pay and lieu days; and
   1.3. A claim for a protective award pursuant to section 189 of the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULR(C)A").

2. The Respondent is an international language school offering English and French language services in different markets across the world. The Respondent faced insolvency in 2020 and entered into a Creditors Voluntary Agreement (CVA) in November 2020. It was later acquired by Bayswater Education and Mr Herbertson, from Bayswater, has represented the Respondent throughout these proceedings. By its ET3 Response, the Respondent defends the claim relying on redundancy as its reason for dismissal. The Respondent accepts there are sums owing to the Claimant arising from its earlier insolvency, but denies that the Claimant is entitled to any protective award.

3. The Claimant attended the hearing and gave sworn evidence. He represented himself throughout. He also called two witnesses who attended and gave sworn evidence: Mr John Alessi and Mr Moataz Elrasheedy (both of whom previously worked for the Respondent). All three provided witness statements, which I read.

4. The Respondent called Mr Zachary Gamble-Holmes (who was the CEO of the Respondent at the material time in 2020), Ms Paulina Kowalska (HR Officer/PA to Management) and Mr Herbertson (as a new director of the Respondent, since acquisition by Bayswater). All three provided witness statements, which I read.

5. I was provided with a 407-page joint bundle of documents. This was helpfully prepared by the Claimant using documents previously collated by the Respondent.

6. Prior to the hearing, there was a preliminary hearing for case management which took place on 28th July 2021. At that hearing the issues were clarified (as set out below) and the matter listed for this three-day full merits hearing with directions for a late witness statement to be prepared by Mr Gamble-Holmes.

7. After the hearing on 28th July 2021 and before this listing, the tribunal wrote to the parties explaining that the protective award claim was a type of claim which must normally be heard by a full panel tribunal (i.e. a judge sitting with members) but all other aspects of the claim would normally be heard by a judge alone. On this occasion, both parties gave written consent for the entire claim to be heard by a judge sitting alone. The tribunal has jurisdiction to hear such a claim, sitting alone, where written consent has been provided (section 4(3)(e) of the Employment Tribunals Act 1996).

Issues

8. Following a discussion with the parties at the hearing on 28th July 2021, it was agreed that the issues which I have to determine in this case are:

    8.1. What was the reason or principal reason for the Claimant's dismissal? The Respondent says that the Claimant was dismissed by reason of redundancy.
    8.2. Did the Respondent operate a fair selection procedure for redundancy? The Claimant alleges that he was selected because he lodged a grievance alleging unfair treatment.
    8.3. Did the Respondent follow a fair and reasonable procedure in its redundancy process and its decision to dismiss the Claimant?
    8.4. Was there another role which could have been offered to the Claimant (or a role for which he could have been invited to apply) to avoid his redundancy?
    8.5. If the dismissal was procedurally unfair, what, if any, adjustment should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed (*Polkey*)?
    8.6. Was the Claimant wrongfully dismissed by not being paid his full contractual notice pay entitlement?
    8.7. If so, how much is the Claimant owed?
    8.8. Does the Respondent owe the Claimant any outstanding holiday pay upon termination? If so, how much?
    8.9. Does the Respondent owe the Claimant any outstanding monies for time owed in lieu upon termination? If so, how much?
    8.10. Did the Respondent fail to comply with the ACAS Code of Practice in relation to the Claimant's grievance? If so, should there be an uplift to any applicable award?
    8.11. Was the Respondent obliged to collectively consult in respect of proposed redundancy dismissals pursuant to section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992?
    8.12. If so, does the Claimant have standing to be able to bring a claim for a protective award?
    8.13. If so, was the Respondent in default of its statutory obligations (as regards any default for which the Claimant has standing to bring the claim)?
    8.14. If so, should a protective award be made and, if so, in what amount?

9. Issue 8.4, above, has been added to this list as it became apparent at the full merits hearing that the Claimant's case contended that another role could or should have been offered to him. Both parties addressed this point in their evidence and submissions.

Findings of Fact

10. I make the following findings of fact.

11. The Claimant began working for the Respondent on 16th April 2018. He was based in London in the Respondent's Head Office. Initially, the Claimant was employed as the Business Development Manager for the Asia region. He was then promoted to Business Development Director in June 2019, extending the market area of his sales work to Latin America (known as the LATAM team) as

well as Asia. The Claimant's employment was terminated on 27th November 2020, following a redundancy process.

12. The Claimant's role involved managing a team of international sales managers around the world. He had strategic responsibility for the sales and recruitment plans for Latin America and Asia.

13. The Claimant's presumed counterpart was Moataz Elrasheedy who was the Business Development Director for the Middle East and North Africa region (known as the MENA region) and Europe. The Claimant and Mr Elrasheedy split the agent sales works for the global markets between them in these two roles and, as of 2019, were reporting to the CEO.

14. I find that these roles were similar in that they were at the same level, grade and title. The roles differed to the extent that the post holders were required to manage different regions which had different business needs.

15. As with many businesses, the COVID-19 pandemic had a significant financial impact on the Respondent. The Respondent reacted by considering its options as to the workforce, including the early consideration of redundancies. The Coronavirus Job Retention Scheme ("CJRS") assisted the Respondent to mitigate such redundancies in the early part of 2020.

16. As a result of this financial impact, Mr Elrasheedy was furloughed under the CJRS in or around early May 2020. The Claimant remained working and took control of the global agent sales team. This included the MENA region and Europe, which were normally under the leadership of Mr Elrasheedy. Mr Gamble-Holmes considered that the Claimant was a stronger member of staff to retain at that time because of his skills in moving some of the Respondent's business strategy online.

17. However, by 14th May 2020, the Claimant was contacted by Mr Gamble-Holmes because the financial situation was such that some of the international sale managers would have to be made redundant to ensure savings could be made. To avoid this, Mr Gamble-Holmes and the Claimant agreed that the Claimant would also be furloughed. The Claimant was held in high regard by the Respondent and, exceptionally, was paid 80% of his full salary during his furlough period, rather than the cap of £2,500.

18. On 15th July 2020, whilst the Claimant remained furloughed, Mr Gamble-Holmes sent out a memo to all furloughed staff (p.125-8 of the bundle). This letter advised that staff would receive a letter placing them at risk of redundancy. It then set out two options as follows:

    Firstly:

    In summary, our proposal to avoid redundancies that will be outlined in the letter is as follows:

    - *You will continue to receive furlough pay until 31 October 2020 at 80% of your normal monthly salary, capped at £2,500 per month.*

- *This is on the condition that you agree to take an unpaid leave of absence from 1 November 2020 for between 3 to 6 months (depending on your school and role). This will be confirmed to you in your individual letter.*

As part of this proposal, we make the following commitment to you:

- *Your role will be retained and, at the end of your leave of absence, you will return to work with all of your current terms of employment, holidays and continuous employment record.*

- *Your right to a redundancy consultation and any amounts owed to you as part of a redundancy process is protected. You will not lose any rights under this proposal.*

- *In the unlikely event that there is no work at time of your return, we will consult with you on how to avoid the redundancy of your role at that time.*

Alternatively:

If you choose not to accept this proposal, we will progress to a redundancy consultation with you next week. If your role is made redundant, we will unfortunately be unable to continue to offer you pay under the furlough scheme beyond the date that your employment would terminate.

19. The Claimant was duly sent a letter on the same date placing him at risk of redundancy. This was written by Ms Kowalska (p.129-30). This restated the proposal set out in the memo and explained that, if that proposal was not accepted, redundancy consultations would begin from 27th July 2020.

20. The Claimant elected the first option and therefore remained on furlough, accepting a period of unpaid leave from November 2020. In choosing this option, he believed that this was in his best interests. Mr Elrasheedy decided to take the second option and was made redundant with effect from 23rd November 2020.

21. Whilst the Claimant remained furloughed, he was contacted by Mr Gamble-Holmes on 26th August 2020 (via a WhatsApp message) and advised that the Respondent had signed 'heads of terms' with Bayswater Education, a potential buyer (which, in the event, acquired the Respondent in December 2020). The Claimant was asked to have a remote discussion with Bayswater on behalf of the Respondent. This meeting took place on 28th August 2020.

22. I accept the Claimant's evidence about the events of this meeting. The meeting took place between the Claimant and Stephan Roussounis, the managing director of Bayswater. Yellis Hussain, Global Director at Bayswater, was also in attendance. The Claimant's unchallenged evidence was that he not expecting the meeting to explore the details of contacts, relationships and recruitment agents. He considered this was sensitive information. The Claimant was therefore guarded in the responses he gave about the Respondent to Mr Roussounis. Mr Gamble-Holmes accepted in evidence that he told the Claimant afterwards that "Stephan didn't feel the love from you", meaning that the Claimant had not come over in the meeting as sufficiently enthusiastic towards Bayswater. The Claimant did not know he would be faced with the type of questions he was asked and did not know, until after the meeting, that it was acceptable to disclose any sensitive information.

23. A second meeting took place where the Claimant was able to provide fuller answers to Mr Roussounis' questions.

24. Whilst still on furlough and shortly before the point when unpaid leave was due to start, the Claimant learned that Mr Elrasheedy had been offered work beyond his scheduled departure date (which had been calculated as 30th October to accommodate a period of owed leave). Mr Elrasheedy was offered additional terms of working for the Respondent as follows:

    24.1. Mr Elrasheedy extended his departure date to the end of November 2020;
    24.2. He was offered an extension to his employment until the end of 2020, which he declined;
    24.3. Upon declining the extension, Mr Elrasheedy briefly worked for the Respondent in a contractor role, supplying services similar to those performed as an employee, with a specific focus on debt recovery in the MENA region.

25. The Respondent had a real and pressing need to engage Mr Elrasheedy to help get in a significant proportion of the Respondent's debts arising from the MENA region. I found Mr Elrasheedy to be a straightforward and reliable witness. I accept that the process was, as he described in his evidence, 'messy' as a number of skills were required to help recover owed fees in circumstances where, owing to the pandemic, services were not being supplied to customers. Whilst debts were owed from other regions, the majority arose in Mr Elrasheedy's region. He was accordingly deployed by the Respondent to improve cash flow and recover these debts where possible.

Grievance

26. The Claimant was disappointed that, given work was made available to Mr Elrasheedy, he had not been called back to work and was expected to endure a period of unpaid leave. The Claimant had been willing to accept unpaid leave to avoid redundancy on the basis there was no work available. He therefore challenged Mr Gamble-Holmes about this in a telephone call on 27th October 2020. During this call, the Claimant quoted parts of the 15th July 2020 memo to Mr Gamble-Holmes and told him that he felt he had been unfairly treated. I find that this was a heated exchange. Mr Gamble-Holmes accepted in his evidence that he told the Claimant to 'get his facts straight'. The exchange was a stressful one for the Claimant, who was seeking answers to the disparity between Mr Elrasheedy and himself.

27. Following the call, the Claimant lodged a grievance by email to Mr Gamble-Holmes on 30th October 2020. Having set out the position as regards Mr Elrasheedy, the Claimant concluded:

> *In light of this information, it is clear that there is still enough work available at Eurocentres to justify my return to work.*
>
> *However, it is unclear to me why this would not have been offered to me as was previously assured in the aforementioned proposal.*
>
> *I am extremely unhappy about this situation and I feel as though I have been unfairly treated, and that I am being kept on unpaid leave unnecessarily and this has undoubtedly caused me a lot of stress.*

I would like this to be addressed by you so that I can have a full and clear understanding as to why this has occurred and why necessary work was directed to a departing member of staff, both as an extension to this notice period, and as an external contractor, instead of to me who remains an employee of Eurocentres and in the same position.

In addition to the above grievance, I would also like to add that my future prospects with the prospective newly merged company have been hindered by your actions. In August, I received a WhatsApp message from you saying that Bayswater would like to have a discussion with me and you provided no further explanation about what the meeting was about.

As I had no indication as to what the meeting would entail, I felt ambushed and I was blindsided by the meeting and refused to divulge what I believed to be sensitive information about Eurocentres as I was unsure as to a) whether I was supposed to and b) whether it was in the best interests of the Eurocentres to do so. You subsequently apologised for not preparing me properly for the meeting and we held a second meeting where I divulged the information that was requested of me.

Unfortunately, I believe this negative encounter has been taken against me and I am now lead to believe that there is no place for me in the prospective new company. My fears concerning my future prospects were confirmed by you on our call this week when you commented that Stephan "didn't feel the love from me" when I asked why available work was sent to a departing member of staff instead of me.

Taking all of this into account, I feel as though I am being forced out of the organisation and that I am being kept on unpaid leave unnecessarily. There is clearly work available to justify my return and this is not what was outlined in your original proposal that I agreed to back in July. I find it shocking and deeply disappointing that work is being offered to a departing member of staff beyond his notice period, and has even been offered on an external contractor basis beyond the scheduled departure.

Once again, I feel as though I have been treated extremely unfairly and it has led me to conclude that there is no place for me at Eurocentres, either in the current structure or any future structure.

28. The grievance email was acknowledged by Mr Gamble-Holmes the same afternoon and a follow up response was sent by Ms Kowalska on 10th November 2020. This email said:

Dear Robert,

I hope you are fine.
Zach Holmes has notified me about your grievance.
I understand this must be a very stressful time for you. I am happy to support you and discuss with you the process or answer any questions you might have. Please let me know if you would like to proceed with the formal steps. I will be working till the end of this week and a few days in the following weeks.
If you would like to talk
to me, we can arrange
a call.
I am looking forward to
your response.
Thank you.

Kind regards,
Paula

29. Prior to this email, Mr Gamble-Holmes sent the Claimant a short WhatsApp message on 6th November 2020 explaining that Ms Kowalska would respond to him. He said: "*On a personal note however it's not too late to chat about how we can move forward. I've really enjoyed working with you and would love to help find opportunities for you, either with us or even elsewhere if that's what you prefer. The situation is difficult and I sympathise with that…*".

30. The Claimant replied to Ms Kowalska by email on 11th November 2020 saying: "*Zach mentioned there would be some announcements this week about furlough so I'll wait to see what they are, get all the details and then get back to you about the grievance that I submitted a couple of weeks ago*".

31. No further action was taken with the grievance. Mr Gamble-Holmes told the tribunal in his evidence that the grievance process was unable to be completed because the redundancy consultations began a little under two weeks later. He said: "*It made the grievance redundant itself*". He told the tribunal that he was '*distracted*' during this period with the inevitable financial difficulties the Respondent faced. I find that the Respondent neglected to deal properly with the Claimant's grievance but I accept that this was through a lack of attention (owing to the phase of redundancies on which it was about to embark) rather than because of any ulterior motive. The Respondent held the Claimant in high regard. The WhatsApp message sent to the Claimant on 6th November 2020 is an example of how the Respondent valued the Claimant and Mr Gamble-Holmes believed that the Claimant had skills which could add value, if the circumstances were such that a role was available for him.

32. The Respondent maintains a grievance policy in its employee handbook. However, evidence of this was not before the tribunal.

Redundancy process

33. All sales roles within the Respondent's undertaking were put at risk of redundancy and, ultimately, all of those roles were made redundant. The Respondent did not, therefore, carry out any separate selection of roles within that part of the business because it did not select between roles within sales.

34. There were some individuals engaged in direct sales as self-employed contractors. Some were engaged later on by Bayswater Education, but this was also in their capacity as contractors.

35. On 11th November 2020, the Claimant was given a further letter placing him at risk of redundancy. This letter, provided in generic form, explained that there were no alternative roles available but if roles become available, the Claimant would be considered. The Claimant was invited to a remote group consultation meeting on 16th November 2020, chaired by Mr Gamble-Holmes. The Claimant was notified of his right to be accompanied at the meeting and he was advised the process was likely to be finalised by 25th November 2020. The letter also included the Claimant's redundancy pay calculation along with confirmation that he was entitled to 12 weeks contractual notice along with any outstanding holiday pay (although this should have said 3 months). During this period, the Respondent obtained advice from a specialist employment lawyer.

36. The following day, the Claimant was given a letter from Turpin Barker Armstrong (insolvency practitioners) giving notice of a proposed CVA and a

creditors' meeting on 30th November 2020. The letter also included a proof of debt form to enable a creditor to enter their claim.

37. The Claimant attended the collective consultation meeting on 16th November 2020. This was attended by a member of the GMB Union. Mr Gamble-Holmes outlined the situation and explained that full entitlements would be received upon the Respondent becoming insolvent. That evening, Ms Kowalska emailed staff, including the Claimant, to advise that they will each be invited to a second consultation meeting on the 18th or 19th November, advising of the right to be accompanied. Staff were also invited to email any questions or suggestions/ideas about how to prevent their role from being made redundant.

38. On 17th November 2020, the GMB Union (of which the Claimant was not a member) raised a collective grievance regarding a refusal to hold a second collective group consultation meeting. This was responded to by Mr Gamble-Holmes on the same day explaining the steps taken.

39. A second consultation meeting took place on 20th November 2020. This was an individual consultation with the Claimant, conducted by Ms Kowalska. Ms Kowalska confirmed that the Claimant was entitled to his full redundancy entitlement (meaning his redundancy pay and contractual entitlements upon termination). The Claimant duly confirmed his expected entitlement after this meeting in an email on the same date.

40. On 21st November 2020, Ms Kowalska sent the Claimant a response (provided by Mr Gamble-Holmes) to questions he had raised during in the consultation. The Claimant's questions concerned: a.) the strategy of the company and whether a handover would be required; and, b.) when agent sales/partners would be updated about the company.

41. On 23rd November 2020, the Claimant was invited to a third consultation meeting (again individually). The letter of invitation confirmed that the Claimant's role remained at risk of redundancy. It explained that there were no alternative vacancies. The Claimant was again told of his right to be accompanied.

42. The third meeting took place on 24th November 2020. The Claimant checked again that the information given to him as to his leaving entitlements were correct. The Claimant also enquired about his grievance. Ms Kowalska confirmed she would come back to him on this, but it was not discussed between the parties again.

43. No alternative roles having been identified by the Respondent, the Claimant was given notice of termination of employment on 27th November 2020 with immediate effect. The Claimant was given a right of appeal in this letter, which he did not exercise.

44. The Claimant was entitled to 12 weeks' notice, to be paid in lieu, along with his outstanding holiday entitlement and his statutory redundancy payment. These sums were calculated and sent to the Claimant on 30th November 2020.

45. The Claimant says that the Respondent acted dishonestly at the point of the first meeting (and subsequently) by saying that full redundancy entitlements would be honoured. However, at this point, the Respondent did not know

exactly what was going to happen to it. If Bayswater had not acquired the company in December, it would have inevitably gone into liquidation. The acquisition prevented this. I find that Mr Gamble-Holmes was telling his employees that which he believed to be true at the time. Whether or not the information supplied about the CVA, insolvency and statutory payments was accurate, on the balance of probabilities, the information was believed to be the correct information at the time. I find this because:

45.1. I accept Mr Gamble-Holmes' evidence that he was navigating this period with the best of intentions. I found him to be a reliable witness who was not prone to exaggeration.

45.2. There is no evidence to support a contention that Mr Gamble-Holmes or his senior team were actively trying to mislead staff. Mr Gamble-Holmes was alert to the vulnerable position his furloughed workers were in and I find it highly unlikely that there was any gain to be found for the Respondent in telling untruths about the redundancy payment process.

45.3. Mr Gamble-Holmes was supported in HR functions by Ms Kowalska who lacked experience in dealing with this type of process. I found her to be an honest witness who was trying to assist the tribunal in her answers. She was not trying to mislead affected staff, even if there was any information which had to be later corrected.

45.4. The redundancy process was, unfortunately in this situation, unlikely to create new opportunities at the Respondent. The Respondent did not need to convince staff about the process or to seek their 'buy in' to it. As such, there would have been no reason for the Respondent to try to mislead staff about their entitlements. The only real option for staff to avoid redundancy in this process was for them to identify, with the Respondent, any alternative opportunities during the consultation. Where no such opportunities existed, there was no other real option available to the Respondent than to effect compulsory redundancies.

45.5. I have had regard to Mr Alessi's evidence on this point. He acknowledged that it was hard to say if the Respondent was being misleading or was incompetent in the process. His suspicion about the process arose because he was put at risk of redundancy (like the Claimant) on 11th November and then informed about the CVA proposal the next day. The redundancy then followed. His conclusion was that it appeared to be convenient to the Respondent to make staff redundant before it was acquired at a time when it entered a CVA. In my judgment, these events, occurring in this sequence as they did, were a set of events which, owing to the dire financial situation which had prevailed, were unavoidable. There was nothing in the evidence to develop the 'suspicion' about the Respondent beyond that.

45.6. It may well be that communication could have been better. The Claimant was clearly not aware of the practical effect of the CVA on the payment of his statutory and contractual entitlements. However, I do not consider that this arose from any deliberate or intentional conduct on the part of the Respondent in respect of the object and effect of its consultation procedure.

Alternative employment

46. Upon Mr Elrasheedy's employment terminating on or around 23rd November 2020, he then worked for the Respondent for 3 days per week into December and finishing in the first week of January 2021. On 17th December 2020, the day before Bayswater acquired the Respondent, Mr Elrasheedy was offered a

new role with Bayswater (not the Respondent) as Senior Regional Sales Director. This was a permanent role offered for 2021. He initially accepted the role and then declined it before the contract commenced.

47. I make the following findings about this role:

    47.1. It was not an advertised position. There was no recruitment process and no formal interviews planned.
    47.2. This was a role with Bayswater Education and not the Respondent (which continued to trade after acquisition in December).
    47.3. A significant part of the reason for the offer was Mr Elrasheedy's experience working in the MENA region and, initially, his relevant language skills.
    47.4. Another person was appointed to this role in January 2021 after it was declined by Mr Elrasheedy. This person did not have the same language skills as Mr Elrasheedy.
    47.5. Given that the role was offered to Mr Elrasheedy, on balance of probabilities, it is likely that the role may have been suitable for the Claimant. The Claimant had some previous experience working in the MENA region.
    47.6. The role was not available until it was offered to Mr Elrasheedy on 17th December 2020. At this point, the Claimant's employment had already terminated. On balance of probabilities, the role did not exist at any time when the Claimant was employed by the Respondent, including during his consultation. There is no evidence of a role having been created before this offer to Mr Elrasheedy.

48. There were no alternative opportunities identified by the Claimant or Respondent prior to the Claimant's termination of employment.

Contractual amounts owing

49. The Respondent admits that the Claimant is entitled to the following amounts (subject to any payments already made towards these sums):
    49.1. 3 months' contractual notice (at a rate of £4,220.83 per month);
    49.2. Holiday pay for 14.98 days at a gross rate of £194.31 per day;
    49.3. Payment for time owing in lieu from January 2020 to the date of termination, being 10 days at a gross rate of £194.31 per day.

50. The Claimant did not recover the full amounts owed through the Insolvency Service or from the Respondent, which, following termination, had become subject to the approved CVA. The Claimant complained by email on 23rd December 2020 that he had been misinformed about the recovery of his entitlements through the CVA and redundancy process.

The size of the Respondent's redundancy exercise

51. I accept the Respondent's unchallenged evidence that, during the period of 90 days up to 27th November 2020, the Respondent made a total of 30 employees redundant. These were spread across 5 different offices/schools of the Respondent. This included the Head Office (where the Claimant worked); the London Central School; the Brighton School; the Cambridge School and the Bournemouth School. In each establishment, there were fewer than 20 employees made redundant during this period. At Head Office, 15 employees were made redundant between September and November 2020. These were distinct physical locations where the staff affected were based.

Law

52. I must have regard to the test in section 98 of the Employment Rights Act 1996 ("ERA"). There are two stages. First, the Respondent must show that it had a potentially fair reason for the dismissal within section 98(2). If the Respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

53. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

54. The ERA provides a definition of a redundancy situation in section 139(1):

> *(1) 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—*
>
> *(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.*

55. The EAT provided some guidance that a reasonable employer might be expected to follow in a redundancy dismissal in Williams v Compare Maxam Ltd [1982] IRLR 83. In particular, it is not the tribunal's function to decide whether it 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.

56. Redundancy must be a sufficient reason for dismissing *the* employee (i.e. the Claimant). It is insufficient for it to be reasonable to dismiss 'an employee'. The EAT in Williams therefore confirmed that it is still necessary to consider the means whereby the Claimant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the Claimant, rather than some other employee.

57. Some of the factors identified in the Williams case that a reasonable employer might be expected to consider were:

    57.1. Whether the selection criteria were objectively chosen and fairly applied;

57.2. Whether the employee was warned and consulted about the redundancy;
57.3. If there was a union, whether its views were sought;
57.4. Whether any alternative roles were available.

58. The House of Lords in Polkey v A.E. Dayton Services Ltd [1988] AC 344 affirmed these key aspects as follows (per Lord Bridge):

> "…*The employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*"

59. In Octavius Atkinson & Sons Ltd v Morris [1989] IRLR 158, the Court of Appeal held that there was no right to complain of an unfair failure to re-engage an employee in respect of opportunities coming available post dismissal for redundancy.

60. As regards collective redundancies, section 188(1) of TULR(C)A sets out the duty to collectively consult (and, therefore, the remedy of a protective award for a breach of that duty) where there are 20 or more employees which the employer is proposing to dismiss as redundant at the same establishment within a period of 90 days or less. The sub-section provides:

> *(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.*

61. Following the decision of the European Court of Justice in USDAW and another v WW Realisation 1 Ltd (in liquidation) and others: C-80/14 [2015] IRLR 577 (a case concerning, amongst others, the redundancies occurring at the UK Woolworths chain which went into administration), the term 'establishment' was defined as: the entity to which the workers made redundant were assigned to carry out their duties and the number of dismissals effected at that establishment had to be considered separately from those taking place at other establishments within the same undertaking/business.

62. The EAT in Renfrewshire Council v Educational Institute of Scotland [2013] IRLR 76 (per Langstaff J) held that the employment tribunal had erred in finding that the relevant 'establishment' for collective redundancy purposes had been the education and leisure service of the council and not the individual schools where the employees (in that case teachers) worked. The EAT held that 'establishment' connotes a physical presence. A distinct geographical location might, depending on the circumstances, constitute an important definitional element in identifying the establishment. The focus is on identifying the unit to which the workers concerned were assigned to perform their tasks. The tribunal in that case had overstated the importance of the place from which many aspects of employment were controlled. Most organisations are likely to have high level control but actual assignment, rather than power to control it, is the relevant criterion.

63. Section 207A of TULRCA provides, as regards ACAS uplifts for failure to comply with the ACAS Code of Practice on disciplinary and grievance procedures, as follows:

> *(1)This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*
>
> *(2)If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
>
> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
>
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
>
> *(c) that failure was unreasonable,*
>
> *the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

64. The tribunal has jurisdiction to hear claims for breach of contract pursuant to Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order"). This includes a claim for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries), which a court in England and Wales would, under the law for the time being in force, have jurisdiction to hear and determine; it is not excluded by Article 5 (which does not apply here) and is a claim which arises or is outstanding on the termination of the employee's employment.

65. Claims for breach of contract (under the 1994 Order) is listed as an applicable jurisdiction for the above ACAS uplift discretionary power in Schedule A2.

Conclusions

Reason for dismissal

66. I conclude that the reason for the Claimant's dismissal was redundancy. The focus of the Claimant's claim is on his selection and the process. He has not actively sought to argue that there was no redundancy situation facing the Respondent in 2020, in light of the financial situation it was in. In any event, the Respondent plainly could not afford to retain its staff. The memo of 15th July 2020 was an attempt to try and retain staff and avoid redundancies. However, the Claimant (amongst others) was well aware from at least this point that the business, including the sales team, was facing a genuine redundancy situation because the requirements of the business to carry out its sales function had ceased or diminished or was expected to cease or diminish in light of the pandemic and impending insolvency.

Did the Respondent operate a fair selection procedure for redundancy?

67. I do not find that the decision to dismiss the Claimant was because of his grievance or for any other ulterior motive. The grievance was not properly dealt with by the Respondent, but this was because Mr Gamble-Holmes focused on the redundancies and consultations which immediately followed during

November 2020 across 5 different locations. The fact a grievance was lodged by the Claimant had no effect on the following redundancy process which faced all of the sales team.

68. The Claimant claims that he was unfairly selected for redundancy. However, I conclude that all of the sales team were selected for redundancy, as confirmed by Mr Gamble-Holmes in his evidence. The Claimant was originally placed at risk of redundancy on 15th July 2020 at the same time as being informed of Mr Gamble-Holmes' alternative option in the memo on the same date. This was well before the interactions with Mr Roussounis and Bayswater, giving rise (in part) to the grievance. Whilst the Claimant also complained about there being apparent work to justify his return (because of the work allocated to Mr Elrasheedy), this did not actually affect the Respondent's position in terms of redundancies. Mr Elrasheedy was made redundant and that process started later for the Claimant when it was clear there was no alternative. The work was of a limited nature and was primarily focused on the recovery of debt from the MENA region. Mr Elrasheedy was considered the best person to perform that task (notwithstanding that this did not affect his redundancy), having been the senior person who had been working with contacts in this region up to that point. That was a business decision for the Respondent. It did not mean that there was no longer a redundancy situation given that Mr Elrasheedy was simply working out his notice, the focus of the work was debt recovery and the Respondent was nearing insolvency if it could not be acquired by another company.

69. I therefore conclude that there was no unfair selection. Whilst other cases may require an objective scoring criteria to identify which employees are to placed into a pool for potential redundancy, this situation here was of an altogether different character. The financial losses were such that the Respondent could not retain the sales team. They were all selected because the Respondent could no longer afford to retain them, in circumstances where their work had ceased or diminished to such a point that retention was no longer commercially viable.

Did the Respondent follow a fair and reasonable procedure in its redundancy process and its decision to dismiss the Claimant?

70. Much of the complaint about the process undertaken by the Respondent in November 2020 is the allegation that the Claimant was misled by incorrect information, particularly in respect of how his statutory and contractual entitlements would be paid. In my judgment, whilst the communication and clarity about the CVA and the payment of the Claimant's entitlements could have been better, this issue is not one which goes to the fairness of the dismissal. These were consequential matters dealing with what and how the Claimant would be paid that which was owed to him. Insofar that the Claimant was interested in these matters during the consultation meetings (which is quite understandable for him personally), they do not concern the actual redundancy itself, whether the redundancy could have been avoided and whether or not there were alternative opportunities available. The parties were in the same situation as to the Claimant's role and redundancy whether or not a CVA was later approved.

71. In my judgment, the Respondent did reasonably consult with the Claimant in this process. He was invited to three meetings: the first a general meeting and the second and third individually. He was able to pose questions which were

ferried back to Mr Gamble-Holmes for response and he was invited to provide ideas or suggestions to avoid redundancy. It may be that both parties felt there was little that could be done to avoid the redundancy, but that itself is indicative of the exceptionally dire financial situation the Respondent was in.

72. For reasons set out below (regarding the application of TULR(C)A), there was no obligation on the Respondent to collectively consult. The Claimant was not a member of a union, although a union was in attendance at the general meeting.

73. The Claimant was notified of his right to be accompanied to these meetings and, upon termination of employment, was given a right to appeal the decision which was not exercised. The employer in a redundancy situation is not legally obliged to provide an appeal but, in my judgment, the offer of this right in this case was a reasonable response in the process.

Alternative roles

74. The real substance of the case on redundancy turns on the Claimant's contention that he could and should have been offered alternative work and this would have avoided a redundancy. In particular, he pointed to the additional contract work offered and performed by Mr Elrasheedy after his dismissal for redundancy on 23rd November 2020 and the subsequent permanent role at Bayswater Education, which was offered to Mr Elrasheedy on 17th December 2020.

75. I have carefully considered the evidence regarding the contract work performed by Mr Elrasheedy. In my judgment, whilst it may have been frustrating for the Claimant to have seen his effective counterpart invited back to perform work whilst the Claimant was placed into a period of unpaid leave, the function and scope of this work did not mean there was a role available for the Claimant to avoid his redundancy. The offer of an extension to Mr Elrasheedy to the end of 2020 and the contract work performed (which began just before the Claimant's employment was terminated) was not an alternative role which should reasonably have been made available to the Claimant. In any event, any contract work was not an offer of alternative employment since the employment relationship would necessarily come to an end. It was, at its highest, temporary work focused on recovering debts ahead of insolvency in a region which fell within Mr Elrasheedy's role and it was a region to which Mr Elrasheedy had the most recent contact and experience. Mr Elrasheedy was performing this function before and during the period of the Claimant's consultation. I conclude that the Respondent did not act unreasonably by not offering this temporary work to the Claimant having regard to the specialist nature of the regional debt recovery work which was required and was already being performed. The work was not therefore 'available' (even if it could be said that the temporary work should have continued as an employed role, rather than in a contractor capacity). Further, there was no basis, given the regional demand of that work, for the Claimant to be preferred over Mr Elrasheedy for the limited task involved.

76. The role which did materialise as an alternative role was the Senior Regional Sales Director position at Bayswater Education. That might have been a role which, if available, a reasonable employer would have considered as an alternative for the Claimant. However, in my judgment, that role did not exist at the time of the Claimant's redundancy. There is no evidence that it existed

before it was offered to Mr Elrasheedy on 17th December 2020. It is more likely than not that, if it had existed before then, Mr Elrasheedy would likely have been offered it earlier, given his employment with the Respondent terminated on 23rd November 2020. It was not an advertised position and, at the time of the Claimant's consultations and subsequent redundancy, the Respondent had not been acquired by Bayswater Education. It could not reasonably be expected to have had the ability or knowledge to have made such a role available to the Claimant in November 2020. The Claimant contended that the role would have effectively been developed earlier than this, but there was no evidence to establish that such a role was available for the Respondent to offer prior to the Claimant's dismissal. Accordingly, I conclude that there was no alternative role available for the Claimant which could reasonably have been offered to him to avoid his redundancy.

77. I therefore conclude that there was no alternative for the Respondent other than to effect the Claimant's dismissal for redundancy in the circumstances. I have had regard to the size and administrative resources of the Respondent but, on the facts of this case, those factors at the material time were such that redundancy could not be avoided. The Claimant's claim of unfair dismissal for redundancy is therefore not well founded.

Contractual monies owed

78. The Respondent admits that there are outstanding monies owing under the contract of employment in respect of notice. Accordingly, I conclude that the Claimant has been wrongfully dismissed in breach of contract because he has not been paid all of his notice entitlement of 3 months.

79. The Respondent also admits that there are monies outstanding under the contract in respect of holiday pay and lieu days. The tribunal will therefore order that the following admitted amounts are paid to the Claimant, subject to any deductions for tax and National Insurance (these sums are as set out on the ET1);

    79.1. Outstanding contractual notice £11,586.49, gross;
    79.2. Outstanding holiday pay of £1,375.38, gross;
    79.3. Payment for time owing in lieu from January 2020 to the date of termination, being 10 days at a gross rate of £194.31 per day, making a total of £1,943.10 gross.

ACAS Uplift

80. Whilst the unfair dismissal claim does not succeed, the Claimant has sought an ACAS uplift for a failure by the Respondent to comply with the ACAS Code of Practice on disciplinary and grievance procedures. In this case, this applies in respect of the Claimant's grievance which was sent to the Respondent on 30th October 2020. The tribunal has jurisdiction to apply an uplift to an award made for breach of contract.

81. I conclude that there was a failure to deal with and respond to the Claimant's grievance. Mr Gamble-Holmes had, in my judgment, considered it was effectively obsolete given that the redundancy process took over in November 2020. The Respondent had a procedure to deal with grievances but did not bring it into effect. The Code says that employers should arrange for a formal meeting to be held without unreasonable delay (with a right to the employee to

be accompanied); decide on any appropriate action and advise the employee in writing with a right of appeal. None of these steps took place.

82. I conclude that it was an unreasonable failure to comply in the circumstances. Despite the pressure of the financial situation and the redundancy process, the Respondent had access to legal advice and had a procedure it could and should have adopted. It was unreasonable not to take any action on the grievance in these circumstances, especially given that the Claimant was raising concerns about whether there was work which might justify his return.

83. It is, in my judgment, just and equitable to increase the award for the Claimant's contractual notice pay. This is because:

    83.1. The issues set out in the grievance raise concerns which were potentially relevant to the issue of redundancy and dismissal. The notice pay is the Claimant's contractual entitlement because of his dismissal. I do not consider it is just and equitable to adjust any holiday pay or lieu days award, given these are consequential amounts which were owing from employment, rather than the actual dismissal.

    83.2. The Respondent did acknowledge the grievance and I have had regard to the enquiry made to the Claimant about it by Ms Kowalska on 10th November 2020 where she attempted to offer support and ask about taking formal steps. The Claimant responded to this email on 11th November 2020 in a manner which gave the impression that the Respondent should await the outcome of a later announcement and that he would 'get back' to Ms Kowalska. This mitigated the gravity of the unreasonable failure to comply to some degree as Ms Kowalska was not given the impression that the Claimant expected her to instigate any formal steps at that time. Nevertheless, I conclude it was unreasonable for the Respondent to effectively abandon the grievance and the complaints raised simply because it moved into the redundancy process. I also have regard to the fact that there was scope to consider any concerns through the following consultation process and that it was raised by the Claimant at that time. However, this is not a substitute for properly addressing the grievance raised and applying the Code.

84. In my judgment, it is just and equitable, in these circumstances, to increase the award of contractual notice pay by 15%. The Respondent must therefore pay an additional 15% on the Claimant's total net notice pay owing.

Protective award

85. The Claimant was engaged at the Respondent's Head Office. I conclude that this and the other 4 schools across the UK where redundancies were proposed and implemented were plainly separate establishments for the purposes of section 188 of TULR(C)A. These were physically different locations where staff were based in order to carry out their functions, even though they were economically and organisationally part of the same business/undertaking (i.e. the Respondent).

86. As I have found that redundancies were proposed and made across 5 establishments within 90 days up to the end of November 2020, with fewer than 20 affected employees in each establishment, the collective redundancy provisions in section 188 of TULR(C)A do not apply and there is, accordingly,

no statutory basis to claim a protective award. This claim is therefore dismissed.

Outcome

87. It follows that the unfair dismissal claim and claim for a protective award are not well founded and both claims are dismissed.

88. The claim succeeds in respect of the contractual amounts payable to the Claimant and there shall be an uplift of 15% to the notice pay award (calculated on the net sum) for the Respondent's unreasonable failure to comply with the ACAS Code of Practice in respect of the Claimant's grievance.

Employment Judge Nicklin

Date 24th September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27/09/2021.

FOR EMPLOYMENT TRIBUNALS