



5

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100310/2021 (V)**

10

**Held in Glasgow by CVP on 24 and 25 May 2021**

**Employment Judge Murphy (sitting alone)**

15

**Mr A Gordon**

**Claimant  
In Person**

**Height for Hire (UK) Ltd**

**Respondent  
Represented by  
Mr D Browe -  
HR Manager**

20

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25

The judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent shall pay to the claimant, subject to the Employment Protection (Recoupment of Benefits) Regulations 1996, a monetary award of FOUR THOUSAND THREE HUNDRED AND FIFTY ONE POUNDS STERLING AND FORTY FIVE PENCE (**£4,351.45**). The prescribed element is THREE THOUSAND ONE HUNDRED AND SIXTY-POUNDS STERLING AND TEN PENCE (**£3,160.10**). The monetary award exceeds the prescribed element by ONE THOUSAND ONE HUNDRED AND NINETY-ONE POUNDS STERLING AND THIRTY-FIVE PENCE (**£1,191.35**).

30

35

## REASONS

### Introduction

1. This final hearing took place remotely by video conferencing. The parties did not object to this format. A face-to-face hearing was not held because of the Covid 19 pandemic and issues were capable of determination by a remote hearing.
2. The claimant was dismissed by the respondent on 23 October 2020 and complained of unfair dismissal. The respondent denies having unfairly dismissed the claimant.
3. The claimant gave evidence on his own behalf. The respondent's representative, Dave Browe, gave evidence for the respondent. There were no other witnesses for either party.
4. Evidence was taken orally from the witnesses. A joint set of productions was lodged running to 40 pages, to which approximately ten further documents were added by parties during the course of the hearing.

### Issue to be determined

5. There was a preliminary discussion to clarify the issues to be determined in this case. The parties agreed the issues were as follows:
  - 1) The respondent accepted it dismissed the claimant from his role as Business Development Manager and the claimant accepted that the reason for the dismissal was redundancy, there being a genuine redundancy situation.
  - 2) The claimant contended, however that the dismissal was unfair pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA") in respect that the respondent had failed to make reasonable efforts to look for alternative employment for the claimant and, in particular had failed to notify or consider the claimant for advertised vacancies as follows:

- i. Two home-based internal sales manager role or roles (“the telesales roles”); and
- ii. a Dundee-based Self-Drive Handover Agent role (“the Handover Agent role”).

5 6. The claimant confirmed that he did not challenge the fairness of the dismissal on any other grounds, and accepted the adequacy of the respondent’s consultation and redundancy selection process in other respects. The issue was, therefore, limited to the respondent’s efforts, or alleged lack thereof, in relation to redeployment.

10 7. The parties agreed that a statutory redundancy payment having been made to the claimant in the appropriate sum, the claimant was ineligible for a basic award in the event he was unfairly dismissed.

8. The claimant sought a compensatory award to compensate him for his economic losses arising from the dismissal and his loss of statutory rights.

15 **Findings in Fact**

9. The following facts were found to be proved.

10. The respondent is the UK trading company of a family-owned business established in 1978. The respondent and the wider group trade in machinery rentals. The respondent operates in the UK and the other three  
20 group companies operate in Ireland, Hungary and Slovakia. At the time of the claimant’s dismissal, the respondent employed approximately 75 employees. Across the group, there are currently approximately 170 employees. There is a small HR function which supports the group comprising Dave Browe, HR Manager and an HR Officer, supported by a  
25 receptionist.

11. The claimant began employment with the respondent on 12 June 2006. He was recruited initially to a sales role which was focused on selling as opposed to renting machinery. This was an office-based telesales role, involving outbound sales calls. After a number of months, an opportunity

arose for promotion to Area Sales Manager (a field base role) and the claimant was successfully appointed. He remained in that role until 2016 when he was promoted again to Business Development Manager for Self-Drive in Scotland.

5 12. Self-drive products (also referred to as 'powered access products') are vans with equipment hoisted on the back of them. The respondent had decided to develop the rental of its self-drive product range and the claimant developed a particular specialism in this area. The Business Development Manager role which the claimant latterly held was field-based. Nonetheless, he continued to work on office based telesales as well as face-to-face sales throughout his employment.

10 13. The claimant's basic gross salary as Business Development Manager was £38,400 and his on-target earnings were £43,400. The claimant consistently achieved on-target earnings in his Business Development Manager role. He was a strong performer and was consistently one of the respondent's two top performing salespeople in Scotland. He enjoyed working for the respondent and was a loyal employee. He was approached from time to time throughout his employment by recruitment consultants canvassing his interest in other sales roles, but he had no interest in leaving the respondent or indeed the sector in which he was a specialist.

14. The claimant lives in Coatbridge and was based out of the respondent's Bellshill depot. In his Business Development Manager role, he had a company car and required to travel throughout Scotland to meet customers and potential customers.

25 15. Following the outbreak of the Covid pandemic and the restrictions put in effect by the UK government from 23 March 2020, the respondent placed the claimant on furlough leave from 3 April 2020. The claimant remained on furlough leave until his employment ended on 23 October 2020. During his furlough leave he agreed to a reduced rate of pay of £2,500 gross per month. Around the time when he was furloughed, the claimant was

30

informed by the respondent that he should not be accessing his work mobile phone or the work tablet with which he had been issued.

5 16. The respondent suffered a sharp decline in revenue because of the pandemic and the difficult trading conditions. They reviewed their costs and restructured their operations across all departments and locations. Between April and October 2020, the respondent dismissed approximately 22 employees by reason of redundancy (and more were dismissed group wide). On 20 July 2020, the respondent's Dave Browe telephoned the claimant to inform him he was at risk of redundancy. The claimant's role was unique in Scotland and the respondent proposed to delete the role from their structure. During that call, Mr Browe asked the claimant to think about any suggestions he might have to avoid a redundancy situation.

10 17. On 21 June 2020, the claimant responded to Mr Browe by email. He indicated he had looked on the respondent's website and noted there was reference to positions being available, but no mention of what these positions were. He continued:

*"Can you confirm any roles that are available and also anything that may be upcoming including their locations.*

15 *I would like to suggest a few options that I may be considered for to avoid a redundancy situation –*

*1. Promoter*

*2. Operator*

*3. Telesales*

*4. Yard Assistant"*

20 18. Between 21 and 27 June 2020, consultation continued between the claimant and the respondent. The claimant sent a further email, asking that the respondent consider offering him a shorter week on a reduced salary. The respondent considered this suggestion but concluded that it was not viable for the claimant's role due to customer expectations and

demands. During this time, Mr Browe also informed the claimant that there were no vacancies available. No vacant positions existed either in the respondent company or across the group. The respondent made no enquiry at this time or at any time thereafter, as to whether and to what extent the claimant might consider relocation or roles entailing reduced salary, benefits and status, should they arise. However, the roles the claimant listed in his email of 21 June 2020 would all have entailed a demotion from his Business Development Manager position.

5

10

19. On 27 July 2020, the respondent wrote to the claimant, serving notice of dismissal by reason of redundancy, to expire on 23 October 2020. Among other matters, the letter stated:

*“... we do not have any other vacancies within the company that you could consider and so this part of the process is also complete.”*

15

20. The respondent advertised three vacancies during the period of the claimant's notice. These were advertised on 28 August 2020, 30 September 2020 and 19 October 2020. They were advertised on the respondent's external website and on their internal employee portal.

20

21. The respondent did not contact the claimant to bring these advertisements to his attention. The respondent had not informed the claimant during the redundancy consultation or thereafter that the claimant should keep an eye on the website or portal in case vacancies were advertised. The claimant's understanding from the previous conversation which took place at the beginning of his furlough leave was that he should not access the respondent's employee portal. The claimant did not see the vacancies advertised on the portal or website while he remained employed by the respondent. He did not learn about these advertised positions until a former colleague brought them to his attention after the termination of his employment. He did not keep an eye on the respondent's external website because he believed that the respondent would draw to his attention any change to their previously stated position that there were no vacancies.

25

30

22. The roles advertised on 28 August and 30 September 2020 were for a job titled “Internal Sales Manager” roles. The roles differed from one another only in respect of the geographical coverage; one was to cover the north of the UK and the other the south. The advertised basic salary was £21,000, with on target earnings of a further £2,000. These were telesales roles, selling the respondent’s self-drive products for rental over the phone. The claimant had recorded his interest in telesales roles in his email of 21 July. The roles were to be initially based at home but would become office-based as government Covid restrictions eased. Because they could be performed flexibly with only phone access required, no geographical base was specified in the adverts. These stipulated “(2-3 years) of working in an outbound telemarketing or telesales position” as essential. They also indicated in the ‘requirements’ section that candidates would ‘ideally have experience within the powered access industry’.
23. By the time these positions were advertised, the claimant had already begun his external job search, having been served with notice of redundancy on 27 July 2020. He had already gained an appreciation of how difficult the job market was in the shadow of the pandemic, having made dozens of applications. For the most part, he did not receive responses, and those he did receive were rejections. The claimant had not secured alternative employment by the time either of the telesales positions were advertised. If the claimant had been aware of the advertisements, he would have applied for both roles. He had, by then, already formed the view that he would be extremely unlikely to secure a role on comparable salary and benefits to that which he had enjoyed as the respondent’s Business Development Manager. Had the claimant been offered one of the telesales roles, he would have accepted it, notwithstanding the reduction in salary and status.
24. The respondent did not bring the role to the attention of any of its potentially redundant employees who were, at the material time, subject to consultation or notice of dismissal. Despite the claimant’s expression of interest in telesales roles, the respondent did not discuss the position

with him. Mr Browe regarded the redundancy consultation process as completed when notice was served upon the claimant (and others affected by redundancy).

5 25. When the respondent published the adverts in August and September, its purpose was to see whether it would attract candidates who were , at the time, working for competitors of the respondent in roles focused exclusively on telesales. Although the advertisements made no mention of this, the respondent wanted to recruit external candidates with competitor knowledge who would be instrumental in setting up a telesales department within the respondent. Mr Browe had received a confidential  
10 brief to this effect from senior management.

15 26. Mr Browe had, therefore, already formed the view that no internal candidates would be suitable for the role. In relation specifically to the claimant's suitability, Mr Browe's objection was that he regarded field sales and telesales as completely different roles requiring different mindsets. The respondent had received external applications from other field salespeople who were rejected on that basis. Additionally, Mr Browe elected not to pursue any discussion with the claimant about the roles because of the reduction in status, salary and benefits the positions would  
20 have entailed for the claimant. Having regard to these matters, he did not believe that the claimant would be motivated to remain in the role for long, even if appointed.

25 27. The respondent did not initially receive applications from the candidates it hoped for (namely competitors' experienced telesales employees or ex-employees). For this reason, no interviews were conducted in the autumn of 2020, and the respondent elected not to progress the telesales roles at that time. They recruited to the roles some months later. After the claimant's employment had ended, interviews took place in April 2021 and two individuals began in the roles on 24 May 2021.

30 28. A significant proportion of the claimant's duties in his field-based Business Development role involved telesales. He regularly conducted between 15



and 30 outbound sales calls per day from the depot. Because of his niche role, his experience of the self-drive rental market in Scotland was unlikely to be equaled by competitor employees.

29. The targets applied to the recently appointed telesales employees include:  
5 150 outbound sales calls per week; 50 quotes per week; and the conversion of 25 of those quotes to machinery hires. If the roles had been initiated in October 2020, there may have been some slight reduction in the targets to reflect the trading conditions then, but it is unlikely such changes would have been significant. The targets are generally 'all or  
10 nothing' in that all metrics usually require to be reached in a month to achieve on-target earnings.

30. The claimant was confident that he would have been capable of achieving the targets from the outset in such employment. He cited his strong track record on sales targets within the respondent in support of his view. Mr  
15 Browe believed there was only a 10-15% chance the claimant would have achieved the stipulated targets in his first month in the role, had he been appointed.

31. If the claimant had been appointed to the role and had been achieving his targets, the Tribunal finds the claimant would have chosen to remain in  
20 the role for at least a year, having regard to the poor job climate. The claimant had enjoyed working for the respondent and had no wish to leave the sector.

32. On or around 12 October 2020, a Dundee based employee resigned his employment with the respondent, creating a vacancy. The respondent  
25 advertised the vacancy on 19 October 2020 while the claimant remained under notice. The respondent did not alert the claimant to the opportunity. The role was described in the advert as a "Self-Drive Handover Agent". This role was also known internally within the respondent as a "Promoter". This was, therefore, another role in which the claimant had specifically  
30 expressed an interest in his email of 21 July 2020. While employed as Business Development Manager, the claimant had helped establish the

Handover Agent role and trained those in post. He had himself undertaken all aspects of the duties associated with the role throughout his time with the respondent.

5 33. The advertised salary was £20,800 (gross) per annum. The role was based out of the respondent's Dundee location and entailed controlling and managing activity in the respondent's Self-Drive division in the Dundee and Perth region.

10 34. If the Handover Agent role had been offered to the claimant, and was the only role offered to him, he would have accepted the position notwithstanding the relocation and salary cut. By the time the role was advertised in October 2020, the claimant had not secured alternative employment despite an extensive search. He routinely applied for roles on lower salaries than that associated with this vacancy. The claimant had the necessary driver's license and experience of operating the machinery  
15 to perform the role. The claimant rented a property in Coatbridge and indicated he would have willingly relocated to a rental property in Dundee. The claimant had a strong desire to remain employed in the sector and believed that retaining a position with the respondent would set him in good stead for promotion opportunities in the longer term in the event of  
20 future growth and recovery.

25 35. The respondent did not draw to the claimant's attention the vacancy because Mr Browe considered the redundancy process had, by that stage, completed. At that time, the claimant and two other employees remained in employment, under notice of termination for redundancy. Mr Browe elected not to discuss the role with the claimant primarily because he considered the location unsuitable (approximately an 80-mile round trip from the claimant's home in Coatbridge) but also because the role would have entailed a significant reduction in salary, status and benefits for the claimant. Mr Browe held a belief based on his HR experience that  
30 employees who take a pay cut tend not to remain in post for long.

36. If the claimant had been appointed to the role, the Tribunal finds the claimant would have chosen to remain in the role for at least a year having regard to the poor job climate.
37. When his employment with the respondent ended on 23 October 2020, the claimant had not yet secured alternative employment, despite his ongoing efforts. He subsequently applied for a role with Tesco in mid-November and was appointed with effect from 24 November 2020. The role was a temporary position on night shift, initially for a period of 6 weeks. He was contracted to work 15 hours per week but was expected to work up to 36.5 hours, depending on the store's requirements. The role was extended on a few occasions by several weeks at a time but never made permanent. Given the lack of security in the role, the claimant continued to search for other job opportunities.
38. The claimant secured a fixed term post with South Lanarkshire Council as a Seasonal Grounds Services Operative. Although the pay was slightly lower than that received from Tesco, the appointment was for a longer term (5 months) and the claimant was contracted to work 37 hours per week. No night work was required. The claimant ended his employment with Tesco on 30 April 2022 and began his employment with the Council on 3 May 2021.
39. The claimant identified very few vacancies in field-based sales as part of his job search. He was contacted by a recruitment consultant in May 2021 about one such role, but the claimant did not pursue it because he felt he lacked experience in the relevant sector. The vacancy was in a sector of which the claimant had no knowledge.
40. The claimant's average gross weekly pay with Tesco was £369.08. His average net weekly pay with Tesco was £294.36. The employer's pension contributions with Tesco were at the rate of 5%.
41. The claimant's average gross weekly pay with the Council is £356.15. His average net weekly pay with the Council is £309.48. The claimant had access to the Local Government Pension Scheme with the Council,

attracting employer's pension contributions at a rate substantially in excess of 5%.

42. Had the claimant been appointed to either of the respondent's Internal Sales Manager roles, his gross basic weekly pay (if he did not achieve his on-target earnings) would have been £403.85. His net basic weekly pay (if he did not achieve his on-target earnings) would have been £341.44. Had the claimant achieved on-target earnings the gross and net weekly figures would have been £442.31 and £367.21 respectively. Employer pension contributions would have been paid at the rate of 3%.
43. Had the claimant been appointed to the respondent's Dundee based Handover Agent (aka Promoter) role, his gross weekly pay would have been £400. His net weekly pay would have been £341.44. Employer pension contributions would have been paid at the rate of 3%.
44. If the claimant was offered a trial period in either the telesales role or the Handover Agent role, the claimant would have accepted the telesales role which carried a slightly higher salary, would not have required a relocation, and would align more closely to the claimant's sales experience.
45. The claimant claimed benefits in respect of his period of unemployment following the termination of his employment and received a payment of Universal Credit in December 2020.

### Observations on the Evidence

46. The claimant and Mr Browe were both found to be credible and reliable witnesses. They both gave their evidence in a straightforward manner and conducted themselves with courtesy and patience throughout the hearing. Opinions differed about the claimant's suitability for the advertised roles and on the chance that he would have secured and sustained the roles had he had the opportunity of applying. However, there was little otherwise that was factually disputed.
47. Indeed, the only such conflict of any import related to the claimant's access to the respondent's employee portal. The claimant's evidence was that he

had understood the respondent's instruction at the time of being placed on furlough leave to be that he should not access the portal, albeit he conceded that he may have misunderstood what was said at that time in relation to IT. Mr Browe gave evidence that the claimant had, in fact, 5 logged into the portal on 22 September 2020. At that time, Mr Browe said the telesales vacancy was advertised on the landing page and the claimant would have seen it on logging in. The claimant could not recall making any such log in and categorically denied having seen the advertised vacancy. He was emphatic that he would have applied for the 10 role had he seen the vacancy. The claimant speculated that he may have logged in inadvertently ('pocket-dialled' in) as his password was saved on his phone, or that his son, who regularly played with the claimant's phone, may have done so.

48. The Tribunal accepted the claimant's evidence that, whether or not he had 15 logged on to the portal on 22 September 2020 deliberately or otherwise, he had not seen the telesales vacancy advertisement. Given the claimant had previously expressed his interest in such a role to the respondent on 21 July 2020 and given the claimant had not by the 22 September managed to secure any other role, the Tribunal was satisfied that the 20 claimant would have pursued the matter if he had spotted the vacancy.

## **Relevant Law**

### *Unfair Dismissal*

49. Section 94 of ERA provides that an employee has the right not to be unfairly 25 dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (s98(2)(c) ERA). Where dismissal is asserted to be for redundancy, the employer must show that the employee was in fact redundant as defined by statute.

50. An employee is dismissed by reason of redundancy if the dismissal is wholly 30 or mainly attributable to the fact that the employer has ceased or intends to cease to carry on that business in the place where the employee was

employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished or are expected to do so (s139(1) ERA). If satisfied of the reason for the dismissal, it is for the Tribunal then to determine (applying a neutral burden of proof) whether in all the circumstances, having regard to the size and the administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA, the Tribunal must not substitute its own view of the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

51. In **Polkey v AE Dayton Services Ltd** 1988 ICR 142, the House of Lords held that:

*“in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within its own organisation.”*

52. In order to effect a fair dismissal in a redundancy situation, an employer must, therefore, look for alternative work and satisfy itself that it is not available before dismissing for redundancy. This is a distinct question to that which sometimes arises under s141 ERA of whether an employer has offered a potentially redundant employee ‘suitable alternative employment’ (which disentitles the employee to a redundancy payment, if unreasonably rejected) (**Dunne v Colin & Avril Ltd** UKEAT/0293/16).

53. The duty on the employer is to take reasonable steps, not to take every conceivable step to find the employee alternative employment (**Quinton Hazel Ltd v Earl** [1976] IRLR 296). There may be circumstances where the duty could extend to considering the creation of a vacancy, possibly at the

expense of another employee (**Lionel Leventhal Ltd v North** UKCAT/0265/04), though this will always be a question of fact.

54. Depending on the facts and circumstances, employers might be expected to offer an alternative job even where this demotion and should not readily assume the employee will reject it (**Avonmouth Construction Co Ltd v Shipway** [1979] IRLR 14) or, at least, to discuss the opportunities with an employee (**Huddersfield Parcels Ltd v Sykes** [1981] IRLR 115, **Abbotts and Stanley v Wesson-Glynwed Steels Ltd** [1981] IRLR 51). Where alternative employment is available, the employer should ensure sufficient information is given to the employee to enable him to take a decision about whether to accept or reject the role (**Modern Injection Moulds Ltd v Price** [1976] IRLR 172).

#### *Compensation*

55. An award of compensation for unfair dismissal generally consists of a basic award and a compensatory award. Where an employee has received a statutory redundancy payment from the employer, the basic award should be reduced by the sum of the payment (s122(4) ERA).
56. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to either party (**Whelan v Richardson** [1998] IRLR 114).
57. An unfairly dismissed employee is subject to a duty to make reasonable efforts to obtain alternative employment to mitigate his losses and sums earned will generally be set off against losses claimed (**Babcock FATA v Addison** [1987] IRLR 173).
58. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The

Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% (**Polkey**, *ibid.*)

59. If there is an issue as to whether the employee would have found and accepted alternative employment with the employer, the initial burden is on the employer to raise the issue and provide evidential support for the lack of alternative employment. It is then for the employee to say what kind of job they believe was available and give evidence as to whether they would have accepted such a role (**Virgin Media v Seddington** UKEAT/0539/08).

10 **Submissions**

60. The relevance of the **Polkey** case was drawn to parties attention prior to submissions and the scope for compensation to be reduced to reflect the chance the claimant would hat have been retained following a fair procedure was explained. Parties were advised they may make submissions on this issue if they wished to do so.

61. Mr Browe for the respondent provided a written submission which he read aloud. The submission is not reproduced in its entirety but is summarised in the interests of brevity.

62. Regarding the question of the claimant's access to the respondent's systems and in particular, the portal where the vacancies were published, Mr Browe submitted that the claimant indeed had such access and had logged in on 29 September 2020. He submitted that the claimant therefore would have seen the telesales vacancies advertised on the landing page. He argued the claimant therefore had the opportunity, if he was interested in the post, to raise the matter with the respondent.

63. Mr Browe denied the approach of the respondent was unfair. He reiterated that the telesales roles were advertised as an exercise to see the calibre of the applicants that maybe interested in the positions. As they did not receive



the calibre of candidate they wished, the respondent did not proceed to introduce the roles at the time. He disputed the claimant's credentials to set up the department envisaged on the basis that the claimant's background was largely in field sales as opposed to telesales.

5 64. Mr Browe sought to rely upon the claimant's evidence that he had not, since his dismissal pursued any field sales roles and few telesales roles. He submitted that, had he been made aware of the telesales positions, the claimant would not have been appointed.

10 65. With regard to the Handover Agent role, Mr Browe argued that given its geographical location (80 miles from the claimant's home) and the significantly inferior salary and benefits to that previously enjoyed by the claimant, the claimant's suitability for the post was reduced. Had he been made aware of the vacancy, Mr Browe argued it was unlikely the claimant would have been appointed to this role either.

15 66. He submitted, therefore, that a 100% **Polkey** reduction should be applied to reduce any compensation to nil to reflect the fact that a fair process would equally have resulted in his dismissal.

20 67. On the question of the claimant's mitigation of his losses, Mr Browe said that the claimant's decision not to pursue sales roles would make it difficult for him to find a role close to his previous salary as Business Development Manager. He argued that, in those circumstances, the respondent should not have to compensate the claimant for economic losses attributable to his decision not to pursue sales roles.

25 68. The claimant was provided with the opportunity to make a submission. He indicated that, having received a phone call around ten minutes earlier, he now believed there was actually a different role advertised as a vacancy to those which had been extensively described in the evidence of both parties.

It was explained to the claimant that he had concluded his evidence, though he was free to make an application to amend his claim to refer to this other role which was not mentioned in his ET1 and had not been mentioned in his evidence to date.

5 69. The process for such an application was described to the claimant. It was explained that the claimant would have an opportunity to explain how he wished to amend the claim and explain the reasons for the timing of the amendment. It was further explained that Mr Browe would have the opportunity to respond to the application and that it was likely that having  
10 heard both parties, the Tribunal would adjourn briefly to consider the application. If granted, it was explained that further evidence would require to be heard from both parties. The claimant indicated he did not wish to pursue such an application and was content to proceed on the evidence which had been heard. He confirmed he had no other submissions to make.

15 **Discussion and Decision**

*Liability*

70. The claimant was dismissed and his dismissal is found to have been by reason of redundancy.

71. The question for the Tribunal is whether, applying section 98(4), in all the  
20 circumstances of the case, the respondent acted unreasonably in treating the redundancy as a sufficient reason to dismiss the claimant. The Tribunal reminded itself that it must avoid substituting its own view of the matter for that of the employer, and must apply an objective test of whether dismissal was in the circumstances within the range of reasonable  
25 responses open to a reasonable employer of the respondent's scale and administrative resources.

72. During the redundancy consultation process, the claimant expressed an interest in redeployment to telesales roles and to the role of promoter. He also had made it clear that he would be amenable to a pay cut in the

context of discussions regarding adjustments which might have been made to his own Business Development Manager role. When notice was served of dismissal on 27 July 2020, he was told that there were no vacancies.

5 73. Given the facts and circumstances, the Tribunal holds it was not reasonable for the respondent to assume that the claimant would not be suitable for or interested in the roles which were advertised, on an objective view. In coming to this assessment, weight was given to the fact that the claimant had specifically recorded his interest in these types of  
10 role during the consultation process. Weight was also given to the fact that the claimant was a loyal and long serving employee with a strong performance record. His significant experience of making outbound sales calls and of all aspects of the duties of the Handover Agent were also taken into consideration.

15 74. The reasons put forward by the respondent for declining to consult with the claimant over the advertised positions were not regarded as reasonable on an objective view. The respondent's Mr Browe suggested he had not done so because the consultation had concluded. However, to satisfy the requirements of section 98(4) of ERA it is reasonable that an  
20 employer should continue to look for deployment opportunities for a potentially redundant employee throughout his notice period.

75. Another reason proffered by the respondent was the reduction in salary, status and benefits associated with the advertised roles. The claimant had made clear his willingness to entertain such positions and his willingness  
25 to entertain a pay cut. As such, it was not reasonable to assume that the claimant would reject the roles on that basis (**Barratt Construction Ltd v Dalrymple** [1984] IRLR 385, **Avonmouth Construction Co Ltd v Shipway, Huddersfield Parcels Ltd v Sykes, Abbots and Stanley v Wesson-Glynwed Steels Ltd**).

30 76. In all of the circumstances, a reasonable employer acting reasonably would not have failed to consult with the claimant over the vacancies.

Further, the Tribunal is satisfied that a reasonable employer acting reasonably would have offered the claimant the opportunity of a 4-week trial period in the roles pursuant to s138(2)(a) of ERA. The Tribunal concluded the failure to do so was objectively unreasonable.

5 77. The Tribunal considered the respondent's argument that it had decided to  
pause the telesales roles, and did not progress the positions while the  
claimant remained employed. The respondent was clear, however, both  
in its pleaded case and in the evidence to the Tribunal that the reason for  
this pausing of the roles was because of the lack of interest from  
10 employees of the respondent's competitors at the material time. The  
Tribunal did not consider this approach to fall within the range of  
reasonable responses open to the respondent in circumstances where  
there was an internal candidate at risk of redundancy who appeared well  
qualified to perform the role, and indeed had had performed relevant  
15 duties of the role to varying degrees during the period of his employment.

78. The absence of consultation over the roles and the failure to offer  
redeployment to the roles rendered the dismissal unreasonable for the  
purposes of s98(4). The respondent, therefore, unfairly dismissed the  
claimant.

## 20 **Remedy**

### *Basic Award*

79. The claimant has no entitlement to a basic award in this case, by operation  
of s122(4) of ERA.

### *Compensatory Award*

25 80. The Tribunal awards £300 to the claimant by way of compensation for loss  
of statutory rights.

81. It is necessary to assess the loss sustained by the claimant in so far as  
attributable to the respondent's actions to determine the compensatory  
award.

82. The Tribunal finds that the claimant has discharged his duty to make reasonable endeavours to mitigate his losses throughout the post-dismissal period. The Tribunal notes his decision to suffer a potential pay cut on taking up employment with South Lanarkshire Council, but finds, in the circumstances, this did not conflict with the duty to mitigate, given higher number of contracted hours and the longer fixed term available from the Council.
83. Consideration was given to Mr Browe's submissions regarding the claimant's failure to pursue field-based sales roles as part of his job search. This was something of a moot point given that the claimant had identified very few vacancies of this nature in his search. The claimant's evidence was that he had been contacted by a consultant about one such role but considered he lacked the experience in the relevant sector to pursue the opportunity. That vacancy was in a sector of which the claimant had no knowledge. The respondent led no evidence of any particular roles for which it was said the claimant ought to have applied. The Tribunal did not accept that the claimant's omission to apply for the field-sales vacancy he mentioned in his evidence represented a dereliction of his duty to use reasonable efforts to mitigate his losses in circumstances where he had applied for hundreds of other jobs and had secured two roles post-dismissal. The duty to mitigate is not onerous but extends only to taking reasonable steps, which the Tribunal was satisfied were taken.
84. The Tribunal found that there was no pension loss or that any such loss was negligible and subject to the *de minimis* principle, given the employer contribution rates at both Tesco and at South Lanarkshire Council were more generous than that offered by the respondent in relation to the new roles. There were no other significant benefits offered by the respondent in relation to the vacancies to which the claimant might have been redeployed. The positions did not attract a company vehicle.
85. For simplicity, the calculation of loss of earnings is divided into four periods, namely:

- a. The period from dismissal until the 24 November 2020 when claimant secured his new role with Tesco;
- b. The period from 24 November 2020 to the 30<sup>th</sup> April 2020 when the claimant worked for Tesco;
- 5 c. The period from 30 April to 26<sup>th</sup> May 2021 when the claimant worked for the Council until the conclusion of the tribunal hearing; and
- d. The post-hearing period of loss.

86. Had the respondent acted fairly, it is necessary for the Tribunal to assess  
10 the chance that the claimant would have remained in employment and the chance he would have been dismissed fairly by the respondent either at the time his dismissal took effect, or subsequent point (**Polkey**). A finding in fact has been made, on the balance of probabilities, that if the claimant had been offered a trial period in either the telesales role or the Handover Agent role, the claimant would have accepted the telesales role.  
15

87. The claimant's losses are assessed on the basis not of his previous earnings as Business Development Manager but based on the income he would have received had he been redeployed to the (demoted) telesales position.

20 *23 October – 24 November 2020*

88. The claimant had no income for 1 month and one day (i.e. 4.57 weeks). Had he been employed in the telesales role, his net earnings would have been £1,560.38 (basic) or £1,678.15 (assuming he achieved all targets). The Tribunal assesses that, having regard to:

- 25 i. his industry experience
- ii. his sales record
- iii. the difficult trading conditions
- iv. his previous mix of field and telesales experience,

there is an 80% chance that the claimant would have achieved on-target earnings during that first month in the role. Adopting a broad-brush approach, the tribunal, therefore, assesses the claimant's loss to be his basic net pay plus 80% of the difference between basic and on-target net pay. That is:

$$£1,560.38 + 0.8(£1,678.15 - £1560.38) = \mathbf{£1,654.60}$$

*24 Nov 2020 to 30 April 2021*

89. During this 22.9 week-period the claimant earned approximately £6,740.84 net from his employment with Tesco.

10 90. Had he continued to be employed beyond the trial period and made full OTE in the telesales role in the period to 30 April 2021, the claimant would have earned £8,409.11.

15 91. The loss during this period is therefore £1,688.27 (net). However, that is based on a 100% chance that the claimant would have been retained in the telesales role following the trial period and would have continued therein until 30 April 2021. The Tribunal assesses there is an 80% chance that the claimant would have been so retained during this period. This aligns with the assessment that there is an 80% chance that the claimant would have achieved his sales targets during an initial trial period in the  
20 telesales post. It is reasonable to postulate that achievement of such targets would directly and substantially influence his chance of being retained in the role by the respondent after the trial. The loss for this period is, therefore, reduced to **£1,334.62** (net).

*30 April to 26 May 2021*

25 92. During this 3.7 week-period the claimant earned £1,145.08 (net) from South Lanarkshire Council.

93. Had he continued to be employed beyond the trial period and made full OTE in the telesales role in this period, the claimant would have earned £1,358.68.

94. The loss during this period is therefore £213.60 (net) assessed at 100%. The Tribunal assesses there is an 80% chance that the claimant would have been so retained during this period. The loss for this period is, therefore, reduced to **£170.88** (net).

5 95. The Tribunal therefore awards the sum of **£3,160.10** in respect of losses from the date of dismissal to the date of the hearing. This constitutes the 'prescribed element' for the purposes of the Recoupment Regulations 1996 and is attributable to the dates from 23 October 2020 to 26 May 2021.

10 *Post-hearing losses: 26 May to 8 October 2021*

96. During this 19.3 week-period, it is anticipated the claimant will earn £5,972.96 (net) from South Lanarkshire Council.

15 97. Had he continued to be employed by the respondent and made full OTE in the telesales role in this period, the claimant would have earned £7,087.15 (net).

98. The loss during this period is therefore £1,114.19 (net) assessed at 100%. The Tribunal assesses there is an 80% chance that the claimant would have been so retained during this period. The loss for this period is, therefore, reduced to **£891.35** (net).

20 99. The claimant has secured employment with the Council, the term of which is due to expire on 8 October 2021. The Tribunal assesses, on the balances of probabilities, that by the 8<sup>th</sup> October 2021, the claimant's ongoing losses will cease because he will, by then, secure employment on a salary which equals or exceeds the salary attached to the telesales  
25 role. No compensation is, therefore, awarded beyond that date. In coming to this assessment, the Tribunal considered the facts as known at the date of this decision, including with regard to the claimant's skills and experience, his sustained and motivated job search, his previous substantially higher salary, the likelihood that Covid restrictions will  
30 gradually ease with some attendant recovery in the labour market.



100. The Tribunal therefore awards the sum of **£891.35** in respect of the claimant's post-hearing losses.

*Total Award*

5 101. The compensatory award made in favour of the claimant is, therefore, as follows:

Loss of Statutory Rights                    £ 300.00

Losses to the hearing date                £3,160.10

Losses post-hearing                        £ 891.35

10            Total Award                                **£4,351.45**

**Conclusion**

15 102. The Tribunal finds that the claimant's dismissal was not within the range of reasonable responses open to a reasonable employer. A reasonable employer would have offered the claimant either or both the telesales and Handover Agent positions, at least on a trial basis. The tribunal declares that the claimant was unfairly dismissed and orders the respondent to pay him a compensatory award in the total sum of £4,351.45, subject to the Recoupment Regulations.

20 Employment Judge: Lesley Murphy  
Date of Judgment: 01 June 2021  
Entered in register: 11 June 2021  
and copied to parties