EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107962/2020

Final Hearing held by Cloud Video Platform (CVP) on 19 and 20 July 2021

Employment Judge: R Sorrell

Mrs A Mungai	**Claimant** **In Person**
Allied Vehicles Ltd	**Respondent** **Represented by** **Stephen Hughes** **Counsel**

FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

(i) The claim for unfair dismissal is well founded and upheld.

(ii) The claim for less favourable treatment as a part-time worker is well founded and upheld.

COMPENSATION

E.T. Z4 (WR)

(iii) The respondent is ordered to pay to the claimant the sum of **£12,792.11 (**Twelve Thousand, Seven Hundred and Ninety Two Pounds and Eleven Pence).

(iv) The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply to this award. The prescribed element of the award is **£8,534.81** (Eight Thousand, Five Hundred and Thirty Four Pounds and Eighty One Pence) and relates to the period from 31 October 2020 to the date of judgment. The monetary award exceeds the prescribed element by **£4,257.30** (Four Thousand, Two Hundred and Fifty Seven Pounds and Thirty Pence).

REASONS

Introduction

1. The claimant lodged claims for unfair dismissal, the non-payment of a loyalty bonus and less favourable treatment as a part-time worker on 21 December 2020 in respect of the redundancy process leading to her dismissal.

2. In their response to the ET1, the respondent resisted these claims and argued that the complaint relating to the loyalty bonus was time-barred.

3. A case management preliminary hearing was held on 1 April 2021. At this hearing EJ Meiklejohn issued orders for the respondent to provide further information about the redundancy process and the loyalty service award scheme, as well as for the claimant to identify a full-time comparator (or comparators) in respect of her claim of less favourable treatment as a part-time worker. Arrangements for the final hearing were also made. These included that witness statements would be used and that the issue of whether the non-payment of the loyalty service award was time-barred would be determined at the final hearing.

4. This hearing was scheduled to determine the claim. It took place remotely given the implications of the COVID-19 pandemic. It was a virtual hearing held by way of the Cloud Video Platform.

5. As the claimant was unrepresented, I explained the purpose and procedure for the Hearing and that I was required to adhere to the Overriding Objective under Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to deal with cases justly and fairly and to ensure that parties were on an equal footing.

6. A joint bundle of productions was lodged by the respondent prior to the hearing and the claimant confirmed that the respondent had provided her with a copy of it. At the outset of the hearing the productions were checked with parties and the witness statements were added to it. (D141-152) The importance of referring to the relevant documents when giving their evidence was explained to parties.

7. At the outset of the hearing, Mr Hughes for the respondent advised that the respondent was no longer insisting on the time bar point in relation to the loyalty service award and that it was no longer in dispute the claimant was entitled to it. He understood that the respondent shall make this award to the claimant in the form of compensation to the same amount. However, the issue as to the amount of the additional holiday pay element of the award remained in dispute due to whether it was required to be calculated on a pro-rata basis for the claimant as a part-time employee.

8. The claimant gave evidence. Mr Furie, respondent IT Director and Ms Keirnan, respondent Admin Manager, gave evidence on behalf of the respondent.

9. As Ms Keirnan was not available to give evidence until the second day of the hearing, it was agreed that Mr Furie would give his evidence first and that the claimant would give her evidence after him. After hearing Ms Keirnan's evidence on the second day, the claimant was afforded a further opportunity

to give additional evidence in chief and the respondent, an opportunity to cross examine her on that, which she declined.

10. In their evidence in chief, the claimant and the two respondent witnesses adopted their witness statements. (D141-152)

Preliminary issue

Respondent's application for disclosure of information

11. On 9 July 2021 the respondent made a written application for disclosure of the author of two text message documents which the claimant had produced pursuant to the Overriding Objective to deal with cases fairly and justly.

12. It was not in dispute that the two text messages contained within the same document sent to the claimant dated 7 July 2020 related to the respondent's proposed redundancies. (D84) The first one advised the claimant that the author had not heard any more and they were just being told the decisions would be made by the middle of August. The second message informed the claimant she should not mention to anyone, but that six individuals the author then named were away, which would cost the respondent given the amount of years between them all. The claimant's name was not one of the six individuals named.

13. The claimant's position was that she did not wish to disclose the authors of the two text message documents as although one of them was no longer working for the respondent, they still had connections with them and had been told the information in confidence by an existing employee. The claimant believed this was important evidence which proved the redundancies were pre-determined before any scoring was undertaken.

14. On 13 July 2021 EJ Eccles informed parties that the application would be considered at this hearing.

15. At the hearing, Mr Hughes confirmed that the respondent was insisting on the application as it was unfair to present a document and conceal the identity of the parties therein. In response, the claimant advised that the author of the

text message at D127 of the joint bundle was Linda Love, whom she has also referred to at paragraph 27 of her witness statement. However, she remained unwilling to disclose the author of the text messages at D84 of the joint bundle for the reasons previously given.

16. Having considered the application and parties' representations, I allowed the respondent's application and ordered the claimant to disclose the author of the text messages under Rule 29 of the Employment Tribunals Regulations 2013 and in accordance with ***Sarnoff v YZ 2021 ICR 545, CA.***

17. In reaching this view, I had regard to the principle of open justice and that anything which interferes or restricts it must be regarded as an exception rather than the rule, as well as the Overriding Objective to deal with cases fairly and justly.

18. In balancing the importance of the disclosure of the author of the text messages to ensure the case will be disposed of fairly against the need to protect the author's identity, I took due account of the fact that the author was no longer employed by the respondent.

19. In light of the approach to follow for disclosure applications set out in ***Plymouth City Council v White EAT 0333/13***, I am satisfied that identifying the author of the text messages was relevant. This is because the text messages referred to the respondent redundancy process and named six individuals who were going to be made redundant, even though the redundancy scoring had not yet taken place and that in terms of the reliability of this evidence, it was necessary in the interests of fairness for the author to be disclosed. I further considered the case of ***Birds Eye Walls Ltd v Harrison 1985 ICR 278, EAT*** was also applicable on these facts, which held there is a high duty by the Tribunal not to withhold disclosure where it would render a disclosed document misleading and a party may suffer disadvantage if there is a risk of a claim or defence being unfairly restricted by not ordering disclosure.

20. For these reasons the respondent application was allowed.

21. The claimant accordingly disclosed the author of the text messages as Alex Hazlett.

22. I thereafter granted a short adjournment for Mr Hughes to take instructions from the respondent in view of this disclosure and whether any additional evidence would require to be led on that. Following the adjournment, Mr Hughes confirmed that no further evidence would be led.

Findings in Fact

The following facts are found to be proven or admitted;

23. The claimant's date of birth is 28 July 1974.

24. The respondent is a vehicle conversion business which specialises in the sale, maintenance and repair of new and used cars and light motor vehicles. It has 680 employees in the UK.

25. The claimant commenced employment with the respondent on 13 March 1995 and was dismissed by reason of redundancy on 31 October 2020.

26. During her twenty five years of employment with the respondent, the claimant worked in a variety of roles across different departments. These included Receptionist/Cost Clerkess, Finance Administrator and Sales Administrator.

27. The claimant worked full-time with the respondent until 11 July 2006 when she reduced her hours to part-time after returning from maternity leave.

28. At the time of the claimant's dismissal, she worked 18 hours per week in the Sales Administration Department as a Sales Administration Clerk. Her gross annual salary was £10,685.00.

29. There are different divisions/brands within the Sales Administration Department. These are Allied Mobility, Allied Fleet, Cab Direct, Leasing and Left-hand Drive Vehicles. The teams within these divisions of the Department are known as Motability, New Taxi Sales, Used Vehicles, International and Left Hand Drives and Fleet and Lease Vehicles.

30. Around 2010/2011, the claimant realised there was an issue with her working part-time when her newly appointed manager, Tony Parris, called her in to his office and said that her part-time hours didn't suit them. Thereafter, the Finance Director, Alan Russell would make comments to her, such as, it was nice to see her in the office and whether it was worth her while coming in.

31. Due to the outbreak of Covid-19 in March 2020, the claimant was furloughed by the respondent. Prior to that, the claimant moved from the Motability team where she had worked for 13 years, to the Taxi Sales Admin Team, following an appraisal by her line manager, Mr Simpson.

32. The claimant was informed by the respondent on 1 July 2020 that she and the 11 other team members within the Sales Administration Department were at risk of redundancy. They were all placed in the same selection pool. Of the 12 team members in the pool, the claimant was the only part-time worker.

33. It was not in dispute that the claimant and the 11 other full-time team members in the selection pool did the same or broadly similar work.

34. Ms Keirnan was promoted as Manager of the Sales Administration Department a few weeks before the first Covid 19 lockdown. She had previously been the Assistant Manager in the Department for 6 years.

35. The claimant's first consultation with Ms Keirnan took place on 9 July 2020 via Zoom, at which she was asked for suggestions as to how redundancies could be prevented.

36. After the first consultation, Ms Keirnan undertook the redundancy scoring for the claimant and her team members in the selection pool. Ms Keirnan relied upon her knowledge of the team members knowledge and skill set at the time of scoring. The only documents she referred to were the staff attendance and disciplinary records. She did not refer to staff appraisals.

37. Her second consultation took place with Ms Keirnan on 21 July 2020 via Zoom. At this meeting Ms Keirnan informed her that she had undertaken the redundancy scoring. She informed the claimant she had scored 260 points

and that she needed 263 points to be safe from redundancy. After the meeting, Ms Keirnan emailed the scores to the claimant.

38. The claimant was shocked when she saw the actual scores awarded to her, especially the scores of 5 out of 10 given for the criteria "knowledge" and "skills." This was incomprehensible due to her length of service and breadth of experience she had gained from working in different departments and brands. The scores did also not reflect her appraisals (D95-108), the positive feedback she had consistently received and the pay rises she was given over and above the company increases. (D81-83)

39. Apart from the score for the criteria, "relevant qualifications/training," all scores against the criteria were multiplied by a weighting of 5 points. This meant that the claimant was one point below the threshold required to not be at risk of redundancy.

40. On 22 July 2020 the claimant emailed the Human Resources Department as follows:-

"Hi there,

Can you supply me with a copy of my Appraisals please?

I received my scoring matrix results yesterday and the scoring received does not reflect on any Appraisal I have ever had. I have always had great Appraisals and always told they have no issues with me whatsoever, I always do everything that is asked of me and that I am very thorough etc etc.

I was 25 years with Allied in March there and in that time I have worked in many different departments. I started in the Accident Repair Centre and worked there for around 8 years. I then fancied a change so applied for the Used Car Sales Administrator position and worked here until I went on maternity leave.

On my return to work after maternity, I was moved to the Finance Dept as the used vehicle sales administrator position had been split between Finance and Sales Admin.

After a couple of years working in the Finance Dept, Gerry Facenna asked if I could do him a favour and move to the Motability Dept as they needed help so I did and worked here for around 12 years say until recently in an Appraisal, Shane said he needed someone in the Taxi Admin Dept and asked if I would like a wee change. My reply to this was "yeah, I don't mind, whatever" so bearing all this in mind, to then receive scores for example of 7 out of 10 for versatility and 5 out of 10 for knowledge just doesn't make sense.

I don't understand the rationale behind this scoring as my low scores do not reflect my experience in multiple areas of the business and I feel that these scores have been tweaked to keep me under the threshold all because I am part-time.

I worked for Allied for 10 years full-time and I've been part-time now for 15 years since coming back from maternity leave. My daughter is deaf and also has chronic kidney disease so I'm never away from hospital appointments so working part-time enables me to arrange all her appointments on my day off.

As I said, I have worked for Allied for 25 years now and have always been a loyal employee. I could count on one hand the number of times I've been off sick in 25 years and I just feel really let down to be honest with the whole scoring results especially when they in no way reflect on my Appraisal's and there has never been any issues or areas of concern with regards to my performance and I strongly believe that I am being discriminated against for being part-time." (D92-3)

41. On 24 July 2020, Debra from the Human Resources Department replied as follows:-

"Good Afternoon Angela.

Thank you for your email.

I wanted to reply to go through some of the points you have raised.

Please find attached a copy of your appraisals from the last 2 years that are related to the role you are performing currently.

I understand that you have been advised that you have been provisionally selected for redundancy. I want to re-iterate this means that until the third consultation meeting has taken place, redundancy is only a possibility, not a definite outcome.

All scoring for your team was done from the same criteria and was applied consistently to all team members. The third consultation meeting will be your opportunity to discuss your score with your manager and if you disagree with any score then that will be the forum to say so, and why you believe this to be the case. All scores are based on your current role and do not include or refer to any previous roles you may have held as it is only your current position that is at risk.

I am unclear as to why you feel that your hours of work would influence your score as this is not a criteria and would not, therefore, be included in or influence your score in any manner.

If you have any further questions regarding the process, please do not hesitate to contact us.

Many thanks,

Debra" (D92)

42. In 2019, the claimant had an appraisal with her line manager, Mr Simpson, who commented that: *"I am going to give Angela more responsibility within the admin team, it was noted that the job is a little repetitive, this is due to Angela's working hours. Training will enable Angela to help out more when the department is short staffed."* (D106)

43. The claimant's third consultation meeting took place on 4 August 2020 via Zoom with Ms Keirnan and the respondent Finance Director, Brian Ritchie. Ms Keirnan told the claimant she was not being retained by the respondent because she did not process vehicle orders due to working part-time. In response, the claimant said she knew she didn't process vehicle orders due

to her part-time hours. The minutes of this meeting were not an accurate reflection of the discussion had. (D113-4)

44. The processing of vehicle orders was not one of the duties contained within the claimant's job description. (D78)

45. On 16 August 2020 the claimant emailed Human Resources as follows:-

"Hi, Just to confirm that I do wish to appeal against my recent scoring as I feel the scores in no way reflect my performance or my appraisals as I have already detailed in my email to you dated 22 July." (D128)

46. This email was acknowledged by Human Resources on 18 August 2020 and the claimant was invited to attend an appeal meeting on 20 August 2020 via Zoom. The appeal hearing was conducted by Mr Furie.

47. In reaching his decision Mr Furie had the claimants scoring sheet, the individual consultation notes and his notes taken at the appeal hearing. He also consulted Ms Keirnan as he had limited knowledge of how sales administration worked. During that consultation, Ms Keirnan explained to him that the new vehicle order processing was a critical part of the sales administration function that the claimant lacked and that this function was best suited to a full-time role due to the constant need to invoice every day. (Paragraph 11 - D143)

48. On the basis of the information before him, Mr Furie decided that the claimant's score was fair and would remain the same. In reaching this decision, he considered the claimant's lack of vehicle order processing knowledge was an important knowledge and skills deficit. (Paragraph 14 – D143)

49. On 24 August 2020 Mr Furie wrote to the claimant as follows:-

"Dear Angela,

I refer to your appeal meeting on Thursday 20 August 2020, in relation to your allocated selection matrix score during the redundancy consultation process.

You were aggrieved at receiving a score of 5 for your knowledge, after investigating, it was found that the knowledge criteria was based upon knowledge of the department you work in and its factions, such as Cab Direct, Allied Motability, Allied Fleet, left hand drive and lease vehicles. Whilst you have a knowledge in a couple of these areas, notably Cab Direct and Motability, you do not have detailed knowledge of the other divisions and this is the reason for the score of five for knowledge.

You disagreed with your allocated score of five for skills, you advised that you were unsure how this criteria had been defined. Your manager advised me that skills were defined and scored through a variety of roles that team members could perform within the department. Due to the size of divisions covered by your team, team members need to be exceptionally multi-skilled with in depth knowledge of the campaigns involved, and whilst you have knowledge of some campaigns, you do not have in-depth knowledge of them all, which would have an impact on your skills, this is why you were scored a five.

You stated that you disagreed with the score of seven for your versatility score as you are always willing to help others and have never refused a task or request. The versatility score was not just about your willingness to do other roles/tasks, it was also about versatility in terms of roles that team members can perform in the team, and as noted previously, you have knowledge and skills in some campaigns, not all, and this would ultimately have an impact on your versatility within the team.

I also noted from your third consultation noted that you advised your manager that whilst you did not agree with your scores you did understand how they were reached.

However, having taken into account all the evidence and your statement I have concluded that the score will remain as it is.

I would add that there is no further appeal against your provisional selection for redundancy.

Yours sincerely,

Conal Furie

IT Director" (D132)

50. At the conclusion of the redundancy process, the claimant and three of her other team members in the selection pool were made redundant.

51. On 24 August 2020, the People and Compliance Director, Diarmid McBride wrote to the claimant as follows:-

"Dear Angela,

As you know, we have been consulting on the redundancy situation that has arisen in the organisation and your post was identified as being at risk of redundancy. Regrettably, I can now confirm your selection for redundancy and that we have been unable to find a suitable alternative role for you. In order for you to continue to benefit from the government's furlough scheme you will remain on furlough until 31 October 2020. Notice of redundancy will be served on 31 October 2020, meaning that your employment will terminate on this date.

You will not be required to work your notice period and the organisation will make a payment in lieu of notice to you. Statutory redundancy, notice period and any outstanding holiday accrual will be paid on 31 October 2020.

You will be paid a statutory redundancy payment of £4,623.30 and payment in lieu of notice of £2,465.76. The total of these payments is £7,089.06.

A letter has been sent via royal mail that will include a breakdown of how your payment has been calculated.

If you find alternative employment between now and 31 October 2020 we will serve notice on your last working day prior to starting with your new employer.

Please note that access to Allied Extra and Mitrefinch will cease from 25 August 2020. If you chose to use some of your holiday entitlement before 31 October 2020 please email Human Resources with your request.

Please accept my very best wishes for your future.

Yours sincerely,

Diarmid McBride"

People and Compliance Director (D133)

52. The claimant was dismissed by reason of redundancy as a result of being unfairly assessed against selection criteria for job functions which she could not be scored on because she was not permitted to do vehicle processing orders due to working part-time.

53. The claimant was treated less favourably than the full-time team members in the selection pool who were retained by the respondent because she was part-time.

54. The respondent has not justified the less favourable treatment suffered by the claimant.

55. The claimant has mitigated her losses. Since her dismissal, she has made efforts to secure alternative employment without success. She has applied for a number of administrative roles and has had one interview. (D137-140) She was in receipt of job seeker's allowance for a period of approximately 5 months. (D64)

56. As part of the loyalty service award due to the claimant, she is entitled to an additional 3 days holiday entitlement. (D79)

Respondent's Submissions

Mr Hughes submitted on behalf of the respondent that:-

57. Where there is a complaint for unfair selection for redundancy the employer is required to show that the grading carried out was carried out accurately. What is required is that the respondent set up a good system of selection and applied that system reasonably. Generally, an employer that sets up a system of selection which can be described as reasonably fair will have complied with the requirements and the Tribunal should not apply too much scrutiny to them. In order for the claimant to succeed, there has to be unfair conduct which affects the fairness of the system such as bad faith, victimisation or discrimination. There is no such factor in this case.

58. The claimant relies upon the text messages document at D84 of the joint bundle. There is no evidence of what jobs these people did and the claimant's name is not on the list. We don't know if these people were pooled or in pools of one and the provenance of the document itself remains unsatisfactory. Ms Keirnan also had no involvement with these people or the process they may have been engaged in.

59. The claimant did not put to Ms Keirnan that she deliberately set out to skewer the assessment of the claimant. Most of the claimant's criticisms of Ms Keirnan related to disagreement concerning the way in which the claimant and the other employees in the same team and pool were marked. Much of the criteria are of course subjective, but there is a mixture of objective and subjective criteria here. The claimant's criticism of her scores and the other employees is equally subjective. The criteria presented to Ms Keirnan was not selected by her and she has been in the same managerial position for a good number of years. There is no concrete or reliable evidence of unfair or underhand treatment and no real support for the claimant's evidence that her part-time working was an issue. It is the duty of the employer to act reasonably under section 98:4 of the Employment Rights Act 1996 and it did so.

60. The claimant made some criticism of the appeal process as she suggested that Mr Furie should have looked at the scores of the other employees in her team and pool. This would have meant he would have had to carry out the

exercise again. This was not his function. His role was to assess the reasonableness of the decision.

61. In terms of the claim of less favourable treatment as a part-time worker and objective justification, no clear evidence was led in relation to that issue. The evidence of Ms Keirnan was that the redundancies meant she would be left with half a team of staff to do the same amount of work. Evidence would need to have been led that there was a sound business reason for the claimant as a part-time worker to be made redundant. The evidence of Ms Kiernan was that this was not something she could have done and didn't do. In these situations, there will always be criteria applied that will disadvantage some people. The criteria were the same for everyone and the assessment was undertaken in the same way.

62. In respect of the loyalty service award, the respondent's position remains that it accepts the vouchers due in the sum claimed of £1,250.00 are a contractual obligation and that this sum will be paid to the claimant. The respondent was not able to lead or refute any evidence about whether the claimant's additional holiday entitlement due as part of this award was 5 days or 3 days pro-rata because of her part-time employment. The claimant gave evidence that the respondent document lodged at page 79 of the joint bundle, which referred to the additional holiday entitlement as being on a pro-rata basis, has somehow been added later to affect these proceedings. This is a little absurd as all the respondent is doing is saving itself 2 days holiday pay. It was understood that the respondent will make this award to the claimant in the form of compensation to the same amount.

Claimant's Submissions

63. The claimant submitted that she has demonstrated throughout this hearing there is enough evidence to show she was unfairly made redundant. Ms Keirnan's evidence in response to her questions completely failed to explain why she gave her those scores. This proves she was discriminated against due to her part-time employment. The evidence proves she was measured in

a completely different criteria to the other employees in her team and pool doing a lesser or similar role to myself. Mr Furie clearly stated in his evidence that the evidence he had of her scores was the information given to him by Ms Keirnan which she has proved to be unjust and unfair. Her redundancy was nothing to do with processing orders and everything to do with her being a part -time employee.

Relevant Law

Unfair Dismissal and Redundancy

64. The law relating to unfair dismissal is contained in Section 98 of the Employment Rights Act 1996 ('ERA'). It is initially for the employer to establish that the claimant was dismissed for a potentially fair reason, one of which is for "redundancy", as set out in Section 98(2)(c) of the 'ERA.'

65. The law relating to redundancy is defined in Section 139 (1) of the 'ERA' and in the leading case of ***Safeway Stores plc v Burrell 1997 ICR 523.***

Fairness of the Dismissal

66. Whether the dismissal is to be considered fair or unfair depends on whether, in the circumstances (including the size and the administrative resources of the employers undertaking and their knowledge at the time), the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee. This question has to be determined in accordance with equity and the substantial merits of the case (Section 98 (4) of the 'ERA'), and includes an assessment of whether the procedure adopted by the employer was fair. It is now well established that a dismissal may be found to be unreasonable under Section 98(4) of the 'ERA' on account of an unfair procedure alone. This was the result of the decision in ***Polkey v AE Dayton Services Limited [1988] ICR 143, HL***.

67. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer, that the employer has therefore acted unreasonably. The well known case of ***Iceland Frozen Foods Limited v Jones [1983] ICR 17, EAT****,* makes it clear that there may be a "band of reasonable responses" to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different response. In accordance with ***J Sainsbury PLC v Hitt [2003] ICR 111, CA,*** the Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to the dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

68. In ***Williams & Others v Compair Maxam Limited [1982] ICR166***, the EAT laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The factors which a reasonable employer might need to consider were:-

    (i) Whether the selection criteria were objectively chosen and fairly applied;

    (ii) Whether employees were warned and consulted about the redundancy;

    (iii) Whether, if there was a union, the union's view was sought;

    (iv) Whether any alternative work was available.

69. In ***Buchanan v Tilcon Ltd 1983 IRLR 417*** the Court of Session held that where an employee's complaint concerns unfair selection, it is for the employer to prove that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned. This principle was expressly approved in ***British Aerospace plc v Green & ors 1995 ICR 1006, CA*****,** which held that an employer who sets up a system of selection which can

reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness, will have done all that the law requires.

70. ***Dabson v David Cover and Sons Ltd EAT 0374/10*** further considered that while tribunals are entitled to consider whether selection criteria were applied fairly, they should not examine the actual scoring unless there has been some sort of unfair conduct on the employers' part which could mar the fairness of the system, such as evidence of bad faith, victimisation, discrimination or an obvious error.

71. The authority of ***E-Zec Medical Transport Service Ltd v Gregory EAT 0192/08*** provides that there may be instances where the absence of documentary evidence within a selection process could indicate a lack of objectivity as it makes it impossible for a Tribunal to decide that the selection criteria had been fairly applied.

Compensation

72. If the Tribunal find that the claimant has been unfairly dismissed, it can order reinstatement, re-engagement and/or award compensation.

73. The claimant has indicated in this case that she seeks compensation only. This is made up of a Basic Award and a Compensatory Award. The Basic Award is based on age, length of service and gross weekly wage (Section 119(2) 'ERA').

74. The Compensatory Award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant in consequence of dismissal, insofar as that loss is attributable to action taken by the employer (Section 123(1) 'ERA'). This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate, and a figure representing losses such as statutory rights and pension loss.

75. If the Tribunal finds that the claimant's conduct has contributed to his dismissal, it can reduce the amount by such proportion as it considers just and equitable as set out in Section 123(6) of the 'ERA.' If the dismissal is found to be unfair on procedural grounds, it may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed, that a fair dismissal would still have occurred. This is known as a ***Polkey*** reduction. In such circumstances, the Tribunal must have regard to all relevant evidence, as set out in ***Software 2000 Limited v Andrews & Others [2007] ICR 825***. Relevant evidence can include a finding that it is a genuine redundancy situation and that the employee formed part of the pool; ***Wilson UK Ltd v Turton and anor EAT 0348/08*****.** The Tribunal can also reduce the Compensatory Award if the claimant has failed to mitigate their losses (Section 123(4) of the 'ERA').

76. The ACAS Code of Practice does not apply to redundancy dismissals.

Less Favourable Treatment as a Part-Time Worker

77. Regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides that a part-time worker has the right not to be treated by his/her employer less favourably than the employer treats a comparable full-time worker as regards the terms of his/her contract or by being subjected to any other detriment by any act, or deliberate failure to act of his/her employer.

78. This provision only applies if the treatment is on the ground that the worker is a part-time worker and the treatment is not justified on objective grounds. The part-time worker's comparator(s) needs to be employed by the same employer under the same type of contract and be engaged in the same or similar work, having regard, where relevant, to whether they have a similar level of qualification, skills and experience.

79. The case of ***Hendrickson Europe Ltd v Pipe EAT 0272/02*** held that in considering whether a breach of Regulation 5 has occurred, the tribunal must determine what is the treatment complained of, is that treatment less favourable, is that less favourable treatment on the ground that the worker is part-time and if so, is the less favourable treatment justified. It is for the employer to identify the ground for the less favourable treatment.

80. In determining the reason for the treatment, the test set out in ***Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*** requires a tribunal to examine the reason for the less favourable treatment. Although it is for the employer to identify the ground for less favourable treatment, examining the reason for it may give tribunals scope to infer a discriminatory reason where the employer's explanation is unsatisfactory; ***Rogers and ors v London Borough of Barking and Dagenham ET Case No. 3201163/17.***

81. The less favourable treatment must be on the sole ground of part-time status; ***McMenemy v Capita Business Service Ltd 2007 IRLR, 400 Ct Sess (Inner House).***

82. In order for the employer to justify the less favourable treatment, the Supreme Court considered in ***Ministry of Justice (formerly Department for Constitutional Affairs) v O-Brien 2013 ICR 499 SC*** that the difference in treatment must pursue a legitimate aim, be suitable for achieving that objective and be reasonably necessary to do so.

Compensation

83. Where a Tribunal upholds a complaint that a worker has been subject to less favourable treatment as a part-time worker, Regulation 8 (7) provides that the Tribunal may, as it considers just and equitable, make a declaration as to the rights of the claimant and respondent in relation to the complaint, order the respondent to pay compensation to the claimant, make a recommendation that the respondent take certain steps to obviate or reduce any relevant adverse effect.

84. The claimant has indicated in this case that she seeks compensation only.

85. Where compensation is awarded the amount will be that which the Tribunal considers just and equitable in all the circumstances. The Tribunal will have regard to the infringement and any loss which is attributable to it. The common law principles of mitigation apply and the Tribunal may reduce any award for contributory fault.

86. There is no statutory cap as to the amount of compensation the Tribunal may award.

87. There is no right to compensation for injury to feelings where there has been an infringement of the right not to be less favourably treated under Regulation 5 of the Regulations.

Issues to be Determined by the Tribunal

88. The Tribunal identified the following issues required to be determined:-

(i) Has the claimant been dismissed?

(ii) Has the respondent shown the reason for dismissal?

(iii) Was the reason for dismissal a potentially fair one?

(iv) Did the respondent follow a fair procedure?

(v) Did the decision to dismiss fall within the band of reasonable responses?

(vi) If the claimant was unfairly dismissed, what remedy is appropriate?

(vii) What is the treatment complained of?

(viii) Is that treatment less favourable?

(ix) Is that treatment less favourable on the ground that the worker is part-time?

(x) If so, is the less favourable treatment justified?

(xi) If compensation is awarded, how much should be awarded?

Conclusions

Unfair dismissal

89. It was not in dispute that the reason for the claimant's dismissal was redundancy. The primary issue in dispute concerned the fairness of the claimant's selection for redundancy and in particular, whether the application of the selection criteria was reasonable.

90. Having carefully considered all the evidence in the round and applying the authorities of ***British Aerospace plc ("supra")*** and ***Dabson ("supra")*** to my findings, I preferred the claimant's evidence to the respondent's evidence that there had been discriminatory conduct on the respondent's part that marred the fairness of the redundancy scoring process in that the selection criteria was unfairly applied to her when the redundancy scoring was undertaken. In reaching this view, I have taken account of a range of factors.

91. Overall, I found the Claimant was a credible and reliable witness. Although she was evidently distressed and upset about her dismissal and the manner in which it was carried out, she gave detailed and consistent evidence in a straightforward manner.

92. In terms of the respondent witness, Ms Keirnan, I found she appeared agitated at times and somewhat defensive during cross-examination. In the round, I found her to be an unreliable witness in respect to material aspects of her evidence. As regards the respondent witness, Mr Furie, I considered he was an honest witness who was largely consistent in his evidence.

93. I preferred the claimant's material evidence that she was assessed against selection criteria in terms of job functions which she could not be scored on because she was not permitted to do vehicle processing orders due to working part-time.

94. I found Ms Keirnan's evidence unreliable in this regard because of the significant contradictions in her evidence.

95. Ms Keirnan gave evidence that she based her scoring on becoming a smaller team and therefore required each team member to have a high level of knowledge and skill set in all areas of the department as well as be able to perform tasks from start to finish. She relied upon her understanding of the team members knowledge and skill set at the time of scoring. She scored everyone exactly the same against the same criteria. As the claimant did not have knowledge of every area of the business, she was scored 5 out of 10 against the criteria for "knowledge" and "skills."

96. In cross-examination, Ms Keirnan denied that at the third consultation meeting she told the claimant she was not being retained by the respondent because she did not process vehicle orders due to working part-time. When the claimant put to her that Mr Furie's evidence was that she had told him the new vehicle order processing was a critical part of the sales administration function that the claimant lacked and that this function was best suited to a full-time role due to the constant need to invoice every day, she initially said she did not recall saying that. When asked why he would have said that, she responded that she did not know.

97. When Ms Keirnan was subsequently asked to clarify what she did recall from her discussion with Mr Furie, she said she didn't remember having a discussion with him. However, in re-examination, she then said she did remember saying that more or less to him, that she couldn't be sure she didn't say the order process function was best suited to a full-time role, but that it was not what she based her decision of the claimant on.

98. I considered that Mr Furie's evidence corroborated the claimant's position. This is because unlike Ms Keirnan, he was clear in his evidence he had consulted her about the scores awarded to the claimant and that this was the explanation she gave. Further, that as Ms Keirnan had expertise in her field, he had no reason to doubt her rationale for the scores she awarded the claimant for the "knowledge" and "skills" criteria which demonstrated an important knowledge and skills deficit.

99. I therefore found the claimant's evidence credible that Ms Keirnan told her at the third consultation meeting on 4 August 2020 this was the reason she was not being retained by the respondent and that in response to that, the claimant said she knew she didn't process vehicle orders due to her part-time hours. However, this was not recorded in the minutes taken by Ms Keirnan which stated under the heading 'Discussion with Employee' :-

"Angela does not agree with her score, but she can see where I am coming from. I marked a 5 for knowledge as this is based on knowledge across all Allied brands. Again Angela was not happy with that score but could see where I was coming from. I marked a 5 for skills again based on all the process withing admin and across the brands as she required additional training. This was notes in her appraisal She wasn't happy with this score but again understood where I was coming from." (D113)

100. I accordingly found the minutes of that meeting were not an accurate reflection of the discussion had. (D113-4) I am also satisfied these minutes were unreliable in terms of the reference to the claimant's appraisal, which conflicted with Ms Keirnan's evidence in cross examination that she did not refer to any staff appraisals when she undertook the scoring and the only documents she referred to were the staff attendance and disciplinary records. As such, I considered that in applying ***E-Zec Medical Transport Service Ltd ("supra")***, the absence of documentary evidence within the selection process also indicated a lack of objectivity in the application of the selection criteria.

101. I was equally not persuaded by Ms Keirnan's evidence that she would have expected the claimant to start processing orders on her own initiative and it was not her understanding the claimant's previous line manager, Mr Simpson told the claimant she could not process vehicle orders because she was part-time. This is because of her explanation to Mr Furie about the scores awarded to the claimant and that even though Ms Keirnan had only been promoted as manager of the sales administration team a few weeks before the first Covid 19 lockdown, she had previously been the assistant manager in the department for 6 years. Furthermore, I considered the comments made by Mr

Simpson in his appraisal of the claimant in 2019 that her job was a little repetitive due to her working hours, corroborated the claimant's position that her job functions were determined by her working hours. (D106)

102. I further found that Ms Keirnan attached weight to her view the claimant lacked knowledge in respect of the scoring awarded to her for the criteria "versatility" (7 out of 10) and "job performance" (8 out of 10), because of her evidence that she could not ask the claimant to perform duties in areas where she did not have the knowledge and skills. (Paragraph 7 – D146)

103. I am also satisfied there were inconsistencies in the respondent's evidence as to the role(s) the claimant and her team members were in fact assessed against in terms of the criteria.

104. This is because Ms Keirnan's evidence was that she required each team member to have a high level of knowledge and skill set in all areas of the department. Yet, in cross examination she said she had awarded a score of 9 for "knowledge" to a team member because the person had knowledge of another brand before being transferred to the department. Further, that another employee, who had been a personal assistant in a different department, was placed in the same pool as the claimant and transferred into the motability team, even though the claimant had worked in that team for 13 years. It also emerged during her cross examination that some of the claimant's team members had returned to work while the claimant was still furloughed in order to be trained in other brands before the scoring was undertaken which was taken account of in the scores awarded to them.

105. The lack of clarity and transparency surrounding the respondent's approach in this regard was further highlighted by the email sent from the Human Resources Department to the claimant on 24 July 2020 that stated: *"All scores are based on your current role and do not include or refer to any previous roles you may have held as it is only your current position that is at risk."* (D92)

106. Mr Furie gave evidence that he was appointed by Human Resources to hear the claimant's appeal against her redundancy as he was considered impartial

due to working in a different department and building from the claimant. I considered he had a clear sense of his remit which was to ensure that the scoring matrix was defined around the roles that the business would need for the future and to consider the claimant's overall score against the criteria.

107. In reaching his decision, he had the claimants scoring sheet, the individual consultation notes and his notes taken at the appeal hearing. He also consulted Ms Keirnan, who explained the scoring awarded to the claimant, as discussed above, and that she had approximately 20% of the skills needed to multi-skill across the 5 brands.

108. As previously considered, Mr Furie was clear in his evidence that the claimant's score was fair and should be upheld because he had no reason to doubt Ms Keirnan's rationale when assessing the claimants score and that the claimant's lack of vehicle order processing knowledge was an important knowledge and skills deficit.

109. He was also clear in cross-examination that he was not aware of the claimant's team members capabilities or their scores and that his focus was on the claimant's scores and what seemed fair. When it was put to him by the claimant that he had not been given the full facts by Ms Keirnan about her knowledge and skills, he was honest in his response that he made his decision based on the evidence before him and that he was unaware of the skills she had in the different brands/ campaigns.

110. However, when the claimant put to Mr Furie that Ms Keirnan's explanation of the scores awarded to her contradicted the email from Human Resources dated 24 July 2020, which said the claimant's hours of work were not included in or influenced her score, I found his evidence less coherent. This is because although he said he understood the claimant didn't get the opportunity to perform the vehicle order processing because she was part-time and accepted this was not one of her functions contained within the claimant's job description (D78), he didn't think she was penalised for being part-time. Yet, his evidence was clear that he knew the claimant was scored on job functions

that she did not perform and that Ms Keirnan told him the order process was best suited to a full-time role. (Paragraph 11 – D143)

111. In making these findings, I have not attached any weight to the text message document at D84 of the bundle. This is because it was untested evidence and the claimant's name was not included in the list of persons named.

112. Taking into account all of the above circumstances, I concluded that in accordance with ***Williams & Others ("supra")***, the dismissal was unfair on procedural and substantive grounds and that it fell out-with the range of reasonable responses available to an employer.

113. For all these reasons the dismissal was unfair.

Less Favourable Treatment as a Part-Time Worker

114. Having carefully assessed all the evidence in the round, I found that the claimant suffered less favourable treatment by the respondent as a part-time worker. In particular, that the claimant was subject to discriminatory conduct by the respondent as she was unfairly assessed against selection criteria in terms of job functions which she could not be scored on because she was not permitted to do vehicle processing orders due to working part-time.

115. The treatment complained of by the claimant was her dismissal by the respondent.

116. It was not in dispute that the claimant and her fellow full-time team members in the selection pool did the same or broadly similar work. I therefore considered the full-time team members in the selection pool were appropriate comparators.

117. It was the respondent's position that the ground for the treatment; that is the dismissal, was due to the overall score that the claimant was awarded by Ms Keirnan in the course of the redundancy process and that the claimant's part-time hours had no bearing on that score.

118. However, although it was Ms Keirnan's position that she scored everyone exactly the same against the same criteria, this was not borne out in the evidence for the reasons previously given.

119. Furthermore, I have attached due weight, as circumstantial evidence, to the comments made to the claimant by respondent staff about her part-time working hours since 2010 because of my credibility findings in respect of the claimant and that this evidence was unchallenged.

120. In applying ***Chief Constable of West Yorkshire Police ("supra")*** and ***Roger and ors ("supra")***, I therefore found that the reason for the treatment was due to the claimant working part-time, which I have inferred as a result of my conclusion that the respondent has not discharged the burden of proof to show that part-time working was not the reason for the claimant's dismissal.

121. I further found that the less favourable treatment was not justified because, as submitted by Mr Hughes, the respondent denied the claimant was dismissed by reason of redundancy due to working part-time and could therefore not lead any evidence in respect of that.

122. I am therefore satisfied that the treatment complained of was less favourable than the treatment of the claimant's fellow full-time team members in the selection pool who were retained by the respondent following the redundancy scoring and that this was on the sole ground the claimant was part-time.

Loyalty Service Award

123. In respect of the loyalty service award, I have noted that the respondent has agreed to pay the amount due to the claimant in accordance with her years of service as set out in the respondent document at D79. In terms of the outstanding dispute as to the amount of additional holiday entitlement due as part of this award, I considered that the claimant is due 3 days as a pro-rata amount because of her part-time employment. Although the claimant gave evidence that she had not previously seen this document and had only been

given the respondent document at D80 of the bundle which did not refer to the additional holiday entitlement being on a pro-rata basis, I was satisfied it was a reliable document. This is because it was dated prior to the document the claimant had received and it set out the amount the claimant was due for her number of years of service. (D79)

Compensation

Basic Award

124. In accordance with Section 122 (4) of the "ERA" 1996, the claimant is not entitled to the basic award as she was paid her redundancy payment by the respondent, commensurate with her age, length of service and gross weekly wage.

Compensatory Award

125. I considered that it would be just and equitable to award compensation for loss of earnings including pension losses up to the date of judgment and for loss of statutory rights. In respect of future losses, I am satisfied that 6 months was a reasonable period. This was on account of the claimant's age and the current nation-wide economic climate due to the Covid 19 pandemic.

126. I took the view that a Polkey reduction did apply in this case. In the event that a fair process had been carried out in dismissing the claimant, I considered there would be a 10% chance that the dismissal would have been fair. In reaching this decision, I applied the authorities of ***Software 2000 Limited* (*"supra"*)** by having regard to all the relevant evidence before it, which can include a finding that it is a genuine redundancy situation and that the employee formed part of the pool; ***Wilson UK Ltd v Turton ("supra").***

127. I am satisfied from the documentation produced by the claimant that she has mitigated her losses. (D137-140)

128. I have calculated the compensation in accordance with the principles that apply to both claims. As there is no provision for a statutory cap in the the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, this has not been applied to the total compensatory award.

129. The compensation is calculated as follows:-

a. The Compensatory Award is made up of net loss of earnings, from 31 October 2020 to the date of judgment for a period of 10 months x £834.23 plus 1 week x £192.51 = £8,534.81.

b. In respect of future loss, the claimant is awarded 6 months x £834.23 = £5,005.38. The claimant is awarded 10 months x £26.71 plus 1 week x £6.16 for the respondent's pension contributions (3% of the claimant's gross salary) = £273.26. She is further awarded £400 for loss of her statutory rights.

c. The total Compensatory Award before adjustments is therefore £14,213.45 (8,534.81+ 273.26+ 5005.38 + 400). The Polkey deduction of 10% applied to the compensatory award is calculated as 10% of 14,213.45 = £1,421.34. The total compensatory award after adjustments is therefore £12,792.11 (14,213.45 – 1,421.34).

Recoupment Regulations

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

Employment Judge: R Sorrell
Date of Judgment: 6 September 2021
Entered in register: 10 September 2021
and copied to parties