EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107931/2020 (V)

Heard by CVP on 12 October 2021

Employment Judge L Wiseman
Members E Hossack
J Burnett

Mr O Riney	**Claimant** **Represented by:** **Ms C Hope** **Strathclyde Law Clinic**
Javacrest Ltd	**Respondent** **Represented by:** **Ms J Fennessey** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:

(i) the claimant was unfairly dismissed and the respondent shall pay to the claimant a monetary award of £2,845. The prescribed element is £2,520 and relates to the period 12/10/20 to 12/2/21. The monetary award exceeds the prescribed element by £325;

(ii) the respondent shall pay to the claimant the balance of a redundancy payment of £422.30;

(iii) the respondent shall pay to the claimant notice in the sum of £636.70 and

(iv) the Tribunal dismissed the complaint of disability discrimination.

REASONS

1. The claimant presented a claim to the Employment Tribunal in which he complained of unfair dismissal, disability discrimination (on the basis of perceived disability) and payments of redundancy and notice having been paid at the wrong rate.

2. The respondent admitted the claimant had been dismissed and asserted the reason for dismissal was redundancy. The respondent denied all other complaints.

3. The Tribunal heard evidence from the claimant; Ms C McNally, a colleague and from Mrs Fennessey. The Tribunal was also referred to a number of documents produced by each party. The Tribunal, on the basis of the evidence before it, made the following material findings of fact.

4. Mrs Fennessey accepted, during the course of her evidence, that the redundancy payment made to the claimant and the payment of notice, had been calculated incorrectly and that the sums of £422.30 and £636.70 were due to be paid to the claimant in respect of redundancy and notice respectively.

Findings of fact

5. The respondent company owns premises called The 13th Note, which operate as a vegan café, restaurant, bar and live-music venue.

6. The respondent employed 19 employees, including a management team headed up by the General Manager, Mr David Disbrowe. The Head Chef (Martine) was responsible for the kitchen. The Head Chef was supported by

a Sous Chef (Jessie), a number of Service Chefs (Alistair, Elfie, Caity and the claimant) and a Kitchen Porter (Eddie).

7. The claimant commenced employment on the 1 September 2015. He was employed as a Service Chef, responsible for preparing food, making food and placing orders for stock. The claimant, due to his length of service, also opened up and closed the premises on occasion.

8. The claimant earned £245.38 gross per week, giving a net weekly take home pay of £229.08.

9. The claimant fell off his bike in February 2020 and broke his shoulder. He contacted the Head Chef to advise her of the accident, the fact he required surgery on his shoulder and that he would be absent until April.

10. The respondent's premises closed in March 2020 because of lockdown, and all eligible staff were placed on furlough. Mrs Fennessey received an email dated 1 April from the claimant (who had been in receipt of statutory sick pay), asking to be placed on furlough. Mrs Fennessey spoke to the Office Manager and the Payroll Manager regarding this request. She was advised the claimant had submitted sick notes, but these had expired. Mrs Fennessey understood the claimant was fit to return to work and on that basis she agreed he should be placed on furlough.

11. Mrs Fennessey produced weekly turnover sheets (R pages 41 – 45) which demonstrated the very serious decline in turnover.

12. Mr Disbrowe, General Manager, posted a message on the Facebook Group page on the 10 July (page 45) which informed staff they were hoping to re-open, with limited hours and a limited menu, which would be doable with less staff. The message went on to say that staff would be working in teams to limit contact with other members of staff. The message confirmed the respondent would need less staff and that ultimately redundancies would be necessary.

13. The respondent was permitted to reopen The 13th Note on the 19 July 2020, on a limited basis. Mrs Fennessey, in advance of this re-opening, spoke to

the General Manager and asked him to organise for some employees to come in to clean and paint the premises to get them ready for reopening.

14. The Head Chef (Martine had left and had been replaced by Justin) and Caity McNally were contacted to come in and get the kitchen ready for re-opening. Other employees, including Elfie (who was a Service Chef but also did bar work) came in to get the premises ready for re-opening.

15. The team of employees who came in to get the premises ready for re-opening, continued to work when the premises opened. All other staff remained on furlough.

16. Mrs Fennessey monitored turnover in the four weeks after re-opening. She noted a 75% drop in revenue in the first week; 78% in the second; 76% in the third week and 71% in the fourth week. Mrs Fennessey concluded, on the 15 August, that the respondent did not have the turnover to support and continue to employ 19 employees. This was compounded by the fact the following month the respondent would incur greater cost for the employees on furlough because of having to pay national insurance and holiday costs.

17. Mrs Fennessey decided the team which had been brought in to prepare the premises for re-opening should be retained as a team, and that all other employees on furlough should be made redundant. This included the claimant, the kitchen porter and another service chef who had decided to resign rather than be dismissed for reasons of redundancy. The number of employees reduced from 19 to 9.

18. The team in the kitchen comprised the Head Chef, Justin and two service chefs, Caity McNally and Elfie.

19. Mrs Fennessey phoned the claimant on the 15 August to inform him that with the business shrinking, it could not afford to retain all of the staff and the claimant was being made redundant. Mrs Fennessey informed the claimant that the Head Chef needed a Sous Chef, and they were looking for someone who was qualified. The claimant mentioned Caity McNally was a sous chef.

20. The claimant had previously been offered a position as a Sous Chef, which he had refused. Mrs Fennessey did not offer the position of Sous Chef to the claimant as an alternative to redundancy because she needed to recruit someone who was qualified (and this included being trained in management). The business could not afford the cost of training up the claimant for the post, even if he had been interested in the post.

21. The claimant received a letter from Mrs Fennessey confirming his redundancy and that there was no suitable alternative employment which could be offered. The claimant was advised he would receive two weeks' notice of termination of employment and a redundancy payment of 4 weeks' pay. The claimant was also informed of his right to appeal.

22. The claimant, by email of 1 October, appealed against dismissal (page 57). The appeal focussed on there being a lack of consultation, no selection process and a lack of procedure. The claimant also referred to the fact someone had been recruited to work in the kitchen and he queried some staff gossip that the real reason for dismissal had been because Mrs Fennessey had seen him smoking a joint.

23. Mrs Fennessey responded to the claimant's email the following day (page 58) and confirmed she would contact the claimant after 3 November when she was allowed to reopen.

24. An appeal hearing did not take place because by the time the respondent had re-opened, the claimant had commenced legal proceedings.

25. The claimant secured alternative employment in March 2021. He was in receipt of Employment Support Allowance from 12 October 2020 until 12 February 2021.

Credibility and notes on the evidence

26. There were no real issues of credibility in this case. The claimant told the Tribunal that in July his shoulder was "still pretty bad" and so he had been

"quite happy" not to have been brought back in to help get the premises ready for re-opening. He had not thought he would be made redundant because he was the longest serving employee and, because of that, he had experience that others did not have. The claimant asserted he could carry out all of the duties listed on the job description for the Sous Chef.

27. The claimant believed he would need help with heavy lifting in the kitchen when he returned to work. He believed he had been selected for redundancy because of this.

28. The claimant accepted he had asked to be put on furlough because it was more money than statutory sick pay.

29. Ms McNally told the Tribunal that in early July, prior to lockdown, there had been an all-staff meeting at which they had been informed that those with less than 2 years' service would likely be made redundant unless there was a Government scheme to pay wages. She also confirmed that there had been a great deal of staff gossip and rumour regarding the reasons for selection for redundancy.

30. Mrs Fennessey rejected the suggestion that she perceived the claimant to be a disabled person because of the shoulder injury. She told the Tribunal that in fact it was the opposite. She was not a "hands on" Director, and knew little of the claimant or the work he did. She understood, upon receipt of his request to move from Statutory Sick Pay to furlough, that he was fit to work. She had not ever been told differently and had no reason to think the claimant was anything other than fit for work. Mrs Fennessey did not know the basis upon which the General Manager had decided who to contact to come in to help prepare the premises for re-opening.

31. Ms McNally referred to the staff gossip regarding the reasons why staff had been selected for redundancy. There was, in various e-messages, reference to the claimant having been dismissed because Mrs Fennessey had seen him smoking a joint. This was not put to Mrs Fennessey. We treated the staff e-messages as gossip and speculation in circumstances where they had no

knowledge of the basis of selection for redundancy. We have not referred to this evidence because we did not consider it material to the issues to be determined by the Tribunal.

Claimant's submissions

32. Ms Hope invited the Tribunal to find the claimant was an honest witness who had a good recollection of events. Ms McNally had been precise in her evidence. This was in contrast to Mrs Fennessey who had been unaware of the details of the claimant's role and who had acknowledged the procedure she followed had been unfair.

33. Ms Hope submitted there had not been a redundancy situation and that the real reason for the claimant's dismissal was because the respondent perceived him to have a disability associated with his shoulder injury, and perceived him to be unfit to return to work or to work at full capacity. This was direct discrimination in terms of section 13 Equality Act. The claimant relied on a hypothetical comparator and submitted the Tribunal should draw an inference from the way in which the other chefs were allowed to return to work.

34. Ms Hope submitted that even if there was a redundancy situation, the claimant's dismissal for redundancy was unfair because there had been no consultation, no pool for selection and no selection criteria. Ms Hope submitted there should be no Polkey reduction because if reasonable criteria had been used, the claimant would not have been selected for redundancy because he had the longest service and the most experience.

35. Ms Hope referred to the schedule of loss which had been produced and invited the Tribunal to make an award of compensation based on the schedule. Ms Hope confirmed it had been agreed between the claimant and the respondent that the calculation of the redundancy payment had been incorrect and that a further sum of £422.30 would be paid to the claimant. Further, the payment of notice had also been incorrect and it was agreed a further sum of £636.70 would be paid to the claimant.

36. Ms Hope referred to the cases of ***Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust 2019 EWCA Civ 498*** and ***Mhindurwa v Lovingangels Care Ltd ET/3311636/20***.

Respondent's submissions

37. Mrs Fennessey accepted she had made some procedural errors, for example, regarding consultation. She argued however that even if she had carried out consultation correctly, it would have made no difference to the outcome. She had selected for redundancy all those employees on furlough who had not been asked to come in to help prepare the premises for re-opening. The selection had been across the board and fair. The respondent had required to make employees redundant because it was losing money each week.

38. Mrs Fennessey said she had taken the claimant at his word when he asked to be moved from statutory sick pay to furlough. His sick note had expired and she assumed from this, and his request, that he was fit to work. The claimant had then been retained for five months on furlough.

39. Mrs Fennessey invited the Tribunal to have regard to the impact on employers during the pandemic and to the fact the business is still in a precarious state.

Discussion and Decision

40. We decided it would be appropriate to firstly consider the claimant's argument that the real reason for dismissal was because the respondent perceived him to have a disability associated with his shoulder injury and perceived him to be unfit to return to work in a full capacity. We noted the perception held by the employer must be of a health condition which meets the legal test of disability.

41. There was no dispute in this case regarding the fact the claimant fell off his bike in February 2020 and broke his shoulder: he required surgery. The claimant told the Tribunal that in July he had been happy not to have been asked back in to prepare the premises for re-opening because his shoulder was "still pretty bad". He understood there would be a reduced number of staff

in the kitchen when the premises re-opened and he was worried about this because he thought he would need help with the heavy lifting.

42. We accepted Mrs Fennessey's evidence that she was not involved in the day to day running of the respondent's business. There is a General Manager and a management team in place, and Mrs Fennessey also has other business interests. Mrs Fennessey did not know the claimant beyond the fact he was employed as a Service Chef.

43. Mrs Fennessey was aware the claimant had a broken shoulder, had submitted sick notes and was in receipt of statutory sick pay. Mrs Fennessey learned, whilst dealing with the claimant's request to be placed on furlough, that his sick notes had expired. She granted the claimant's request and placed him on furlough. Mrs Fennessey understood the claimant, having requested to be placed on furlough and his sick notes having expired, was fit to return to work. We were satisfied this was a conclusion Mrs Fennessey was reasonably entitled to reach in the circumstances.

44. The respondent's premises were closed throughout the period of lockdown, and employees were placed on furlough for five months. There was no communication between the claimant and the respondent, or vice versa, during this period. There was no evidence to suggest how Mrs Fennessey would have known or understood or perceived the claimant to have a disability associated with his shoulder injury. The only information she had was that he had requested to be placed on furlough, and she had taken from this that he was fit for work.

45. We could not accept the mere fact the claimant had a broken shoulder was sufficient from which to find or infer the employer would perceive him to have a disability associated with that injury. This was particularly so in circumstances where the claimant's own request to be placed on furlough suggested he was fit to return to work. Furthermore, the re-opening of the respondent's premises and the subsequent redundancies took place six months after the claimant's accident. There was no explanation of the basis upon which it was said Mrs Fennessey perceived the claimant still had

difficulty with his shoulder injury or would have needed assistance in the kitchen.

46. We concluded the claimant's case that he was dismissed because the respondent perceived him to have a disability associated with his shoulder injury was not supported by the evidence. Further, the primary facts found by the Tribunal did not support the drawing of any inference of perceived disability. The claimant, by his own actions in requesting to be put on furlough, indicated to the respondent that he was fit for work, and that is the basis upon which the respondent proceeded. There was nothing to suggest to the respondent the claimant had a disability associated with the shoulder injury, and nothing from which that could be perceived. We decided for these reasons to dismiss the complaint of disability discrimination.

47. We next considered the complaint of unfair dismissal. We had regard to the terms of section 98 Employment Rights Act, which provides that it is for the employer to show the reason for dismissal and, if they are successful in doing so, it is then for the Tribunal to ask whether dismissal for that reason was fair or unfair.

48. The respondent admitted the claimant had been dismissed and asserted the reason for dismissal was redundancy in terms of section 98(2)© Employment Rights Act. We had regard to the terms of section 139 Employment Rights Act which sets out the definition of redundancy.

49. Mrs Fennessey produced weekly turnover sheets which demonstrated the loss of revenue in the business. These events took place during the national lockdown, when many premises were closed and staff were placed on furlough. It was a period of no income for many businesses and staff were retained in employment because of the furlough scheme. Mrs Fennessey's evidence that the re-opening of the business in July 2020 was limited in terms of hours, staff and menu, and her evidence that turnover in the four weeks following the re-opening was nearly 80% down, was not challenged.

50. We accepted Mrs Fennessey's evidence that the drop in revenue and the fact the respondent was facing increased costs for staff retained on furlough, meant the business could not sustain the number of employees it had previously employed. In terms of section 139 Employment Rights Act, the requirements of the business for employees to carry out work of a particular kind had diminished.

51. We were satisfied there was a redundancy situation and that the respondent had shown the reason for the claimant's dismissal was redundancy. We must now go on to consider whether dismissal for that reason was fair or unfair.

52. We had regard to the case of ***Polkey v A E Dayton Services Ltd 1988 ICR 142*** where it was said that "*the employer will not normally act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation".*

53. We next had regard to the criteria used to select the claimant for redundancy. We noted that in carrying out a redundancy exercise the employer should usually identify the group of employees from which those who are to be made redundant will be drawn. The respondent employed 19 employees in different areas of the respondent business. There were, for example, kitchen staff, bar staff, lighting and sound technicians and front of house staff. There was, however, no exercise to group the employees into pools for selection.

54. Mrs Fennessey told the Tribunal that she asked the General Manager to organise some staff to come in and help prepare the premises for re-opening. The head chef and Ms McNally were contacted by the General Manager and attended at work to prepare the kitchen for re-opening. Mrs Fennessey was not able to explain the basis upon which it had been decided which staff were asked to come in.

55. The claimant and 8 others were selected for redundancy because they remained on furlough and the cost of keeping staff on furlough had become prohibitive for the business.

56. We acknowledged that on the one hand it could be said the criterion applied for selection for redundancy was clear and transparent in that all those who were furloughed were selected for redundancy. However, in the absence of Mrs Fennessey being able to explain the basis upon which employees were asked to come in to help prepare the premises for re-opening, and conversely the basis upon which some employees were left on furlough (and thereby selected for redundancy), the clarity and transparency of the basis for selection disappeared. We concluded the respondent had not been able to adequately explain the reasons why the claimant was selected for redundancy.

57. We next considered the procedure used by the respondent to dismiss the claimant. The respondent used a message on the Facebook group page to alert employees to the fact the premises would be re-opening but with limited hours, a limited menu and less staff. The message confirmed redundancies would be necessary and that staff affected would be contacted. There was no information to inform staff when the redundancies may take effect or how employees may be selected for redundancy.

58. We acknowledged the respondent was in the midst of a pandemic and lockdown, but we considered no other reasonable employer would have notified staff of impending redundancies by posting a message on Facebook. Mrs Fennessey, in her evidence, acknowledged this had not been appropriate. We considered that a remote meeting could have been arranged to enable Mrs Fennessey or the General Manager to provide information to staff and to answer questions.

59. The purpose of consultation is to provide an indication of provisional selection for redundancy; provide confirmation of the basis for selection; give the employee an opportunity to comment on his selection; consider alternative employment and generally provide an opportunity for any other relevant

matters to be raised. There should be time for the employee to absorb the information provided.

60. Mrs Fennessey did speak to the claimant by telephone on the 15 August to inform him he had been selected for redundancy and to confirm the payments he would receive. There was no explanation however of the reason the claimant had been selected and no opportunity for the claimant to absorb that information and ask questions about his selection or alternative employment.

61. We concluded the consultation process had not been adequate.

62. We accepted Mrs Fennessey made reference to the position of Sous Chef being available, but there was no suggestion this was offered to, or considered suitable for, the claimant. The claimant did suggest at this hearing that he could have done the job, and Ms Hope, in her submissions, argued this was essentially the claimant's job and he was being replaced. We could not accept either of those submissions because we preferred Mrs Fennessey's evidence regarding the position of Sous Chef, which was that the position of Sous Chef would not have been suitable for the claimant because it would have involved providing training and that was a cost the respondent could not take on at that time. We noted that whilst the claimant suggested he had carried out some of the Sous Chef duties, he did not suggest he had done the management training which was part of the job. We also had regard to the fact the claimant had previously been offered a position as Sous Chef and he had rejected this offer.

63. We noted, with regard to the procedure adopted by the respondent, that the claimant was advised of the right to appeal against the decision to dismiss. The letter of dismissal confirmed an appeal should be made within 7 days. The claimant appealed on 1 October. This was at least a month after having been informed of his redundancy (the claimant's employment ended on 31 August 2020).

64. Mrs Fennessey did not take issue with the lateness of the appeal. She confirmed to the claimant that she would be in touch regarding a hearing date

for the appeal once the premises re-opened in November. The hearing did not take place because the claimant had, by November, started proceedings against the respondent.

65. We would have accepted an argument by the respondent that the appeal had been received too late. However in circumstances where the respondent acknowledged and accepted the appeal, we considered no other reasonable employer would simply have ignored the matter without providing some explanation or confirmation they no longer intended to arrange a hearing.

66. We, in summary, concluded the consultation process and the procedure followed by the respondent were lacking, and the basis for the claimant's selection for redundancy had not been explained by the respondent. The Tribunal must, when determining the fairness of a dismissal, ask whether the employer's decision to dismiss falls within the band of reasonable responses which a reasonable employer might have adopted. We decided the flawed consultation process, the flawed procedure and the fact the respondent could not explain why the claimant had been left on furlough and thereby selected for redundancy, rendered the dismissal of the claimant unfair.

67. We turned to consider the award of compensation for the unfair dismissal. The claimant is not entitled to a basic award because that is offset by the fact he has received a redundancy payment.

68. The claimant lost wages in the period 1 September 2020 until 28 February 2021. His loss in this period is £5,040 (being 22 weeks x £229.08 net per week). The claimant also lost his employer's pension contributions in this period, which amount to £151. He has also lost statutory employment rights, for which we award the sum of £500. This makes a total of £5,691.

69. We referred above to the ***Polkey*** case which also made clear that where there has been a lack of consultation, the Tribunal must determine the percentage chance of dismissal still occurring even where appropriate consultation had been carried out by the employer. We, in considering this issue, had regard to the fact that if an appropriate consultation procedure had been followed in

this case, it would have provided the claimant with an opportunity to question Mrs Fennessey about his selection for redundancy and it would also have provided an opportunity for the claimant to inform Mrs Fennessey about his skills and experience. Equally, however, we had regard to the fact there was a need for redundancies and we had to acknowledge that even if appropriate consultation had taken place, the claimant may still have been selected for, and been made, redundant.

70. Ms Hope submitted the claimant's evidence suggested his length of service and experience would have meant it unlikely he would have been selected for redundancy if selection criteria had been used by the respondent. This submission presupposed the respondent would have used a selection process based on assessment criteria and that the selection criteria used by the respondent would have included length of service and experience. The evidence in fact suggested the respondent would have applied a broad brush approach to selection for redundancy, and if the respondent had been able to explain the basis upon which some employees were contacted to return to work (to prepare the premises for re-opening) that process may well have been fair and reasonable.

71. We, having had regard to these factors, concluded there was a 50% chance that even if the respondent had carried out an appropriate consultation process, the claimant would still have been selected for redundancy. We reached that conclusion because we considered there must be a chance the claimant would have been selected for redundancy in any event, and notwithstanding an appropriate consultation process, the fact remained the respondent required only 50% of the employees previously employed and there were no options for alternative employment. The effect of this decision is that compensation is reduced by 50% to £2,845.

72. Ms Hope invited the Tribunal to apply an uplift to compensation to reflect the fact the respondent had breached the ACAS code of practice. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act provides that "*If, in any proceedings to which this section applies, it appears*

to the employment Tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

73. The claimant's submission did not detail the breaches of the ACAS Code and did not explain why any such breach should be regarded as unreasonable. In the circumstances the Tribunal decided not to apply an uplift to compensation.

74. We decided to make an award of compensation of £2,845 to the claimant. The claimant has been in receipt of Employment Support Allowance and therefore the Recoupment Regulations will apply to this award.

75. The respondent agreed the calculation of the claimant's redundancy pay and notice pay had been incorrect, and agreed the sum of £422.30 should be paid to the claimant in respect of the redundancy payment, and that the sum of £636.70 should be paid in respect of notice.

Employment Judge: Lucy Wiseman
Date of Judgment: 22 October 2021
Entered in register: 26 October 2021
and copied to parties