EMPLOYMENT TRIBUNALS

Claimant:	Mr K Keld
Respondent:	Kebbell Developments Ltd
Heard at:	Leeds ET (via CVP) **On**: 20 October 2021
2021	
Before:	Employment Judge M Rawlinson (sitting alone)

Representation

Claimant	In person, not represented
Respondent	Mr Clark (solicitor)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. There is, however, a 50% chance that he would have been fairly dismissed after the completion of a reasonable consultation process which would have ended 4 weeks' after his termination of employment on 27 July 2020. Such reduction in the compensatory award for unfair dismissal will be made under the principles in ***Polkey v A E Dayton Services Limited*** *1988 ICR 142. In circumstances where the claimant has received a statutory redundancy payment there is no entitlement to a basic award.*

3. A remedy hearing with a time estimate of 3 hours will be fixed to take place in due course in order to determine the claimant's entitlement.

REASONS

Introduction

1. The respondent is concerned in residential development. The claimant worked for the Respondent as a fork-plant operator on a construction site. The claimant commenced on the respondent's payroll on 23 October 2017 until his dismissal on 24 July 2020.

2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996.

3. The respondent contests the claim. It says that the claimant was fairly dismissed by reason of redundancy as part of a cost saving exercise.

4. The claimant represented himself, and gave sworn evidence. Mr Clark, solicitor, appeared on behalf of the respondent company. The respondent called live evidence from Mr Andrew Ramsay, Site Manager at the material time, and also Mr Mike Mulligan, Regional Director. Both sides adopted the contents of their witness statements as their evidence. Each side was also subjected to cross-examination by the other.

5. As well as hearing live evidence, I also considered numerous documents that had been produced by both parties. These were contained in an indexed and paginated hearing bundle comprising of some 44 pages.

Issues for the Tribunal to Decide

6. At the start of hearing I went through and agreed with the parties the issues for me to decide. This had already been canvassed at a previous case management hearing. In simple terms, these were:

    i. Was the Claimant dismissed?
    ii. What was the reason for such dismissal?
    iii. Was dismissal by reason of redundancy as asserted by the respondent?
    iv. Was dismissal for that reason a potentially fair reason?
    v. Did the Respondent follow a fair procedure?
    vi. What is the likelihood of the Claimant being dismissed in the event of a fair procedure being followed?

7. To the extent that they were originally suggested issues around compliance with the ACAS Code of Practice, these have previously fallen away (see correspondence from EJ Davies regarding that matter dated 8 June 2021). The parties also agreed that the only sums now in issue in terms of the claimant's losses related to loss of income, loss of pension contributions and loss of employment rights.

8. I agreed with the parties that I would deal with the issue of liability only, and the issue of remedy and any compensation payable, if it arose, would be dealt with at a later date. Although the ***Polkey*** issue concerned remedy and will only arise if the claimant's complaint of unfair dismissal succeeded, I agreed with the parties that I would consider that at this stage and invited them to deal with that issue in evidence and in submissions.

Facts

13. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

14. The claimant was employed by the respondent for a period of around 2 years and 9 months years from October 2017 until his dismissal in July 2020. He was employed as a forklift truck driver. The respondent was and is a company concerned in building, construction and, in this particular instance, a residential development. Whilst its head office is located in Buckinghamshire, the business operates development sites across various regions of which, of relevance for present purposes, the Northern region is one. The company as a whole has a turnover of around £15 million per annum and does not have a dedicated Human Resources Department.

15. The claimant was employed at the material time as one of four people engaged by the respondent company as employees at a residential housing development project at Middle Deepdale, Scarborough. The claimant was the only fork lift truck driver employed by the respondent at the development. His line manager (another one of the four employees) was the Site Manager, Andrew Ramsay. Aside from two other employees, in addition to the claimant and Mr Ramsay, the respondent company was heavily reliant on what were described as "outsourced people", namely by way of subcontractors.

16. On Friday, 24 July 2020 Mr Ramsay was contacted by the Head Office of the respondent company and told there was going to be a restructure. He was also told on that date and at that time that the claimant's position of

forklift truck driver would be made redundant. He therefore arranged to meet the claimant at the site office on the same day in order to inform him of the redundancy situation. There had been no discussion with Mr Ramsay regarding this issue prior to this date and, also as of that date, the issue had never previously been raised with the claimant.

17. A meeting duly took place on that date between the claimant and Mr Ramsay. The meeting was recorded and an agreed transcript appears within the bundle (P 35 – 36).

18. During the meeting, indeed immediately at the start of the meeting as an opening remark, the claimant was told "*we are going to have to lay you off*". He was also told that he would finish today (i.e. 24 July 2020) but still get paid for 2 weeks and receive redundancy. The claimant asked how the company was restructuring and was told in response " *By laying you off and saving money, and not being an expense to this site".* This was followed by (in response to the claimant's question regarding who he should get in touch with regarding the issue) the answer from Mr Ramsay "*nobody – me*".

19. Following the claimant then stating that he wanted to contest the matter, the claimant was told to contact Head Office. The claimant then asked if he could "*come and see you officially on Monday morning*?" to which he was told yes.

20. Towards the end of the conversation, and in response to the claimant asking how the company was restructuring, the claimant was told by Mr Ramsay that the respondent company were getting a driver/forklift package. The conversation ended with the claimant stating "*Yeah, all right I will see you Monday, see you Monday we will have a chat Monday".*

21. Following this meeting the keys to the forklift truck were surrendered by the claimant and he collected his belongings and left site. To the extent that there was a suggestion of a further meeting on Monday, 27 July 2020 this did not take place.

22. The respondent company then wrote to the claimant by way of a letter dated Monday 27 July 2020 and signed by the Finance Director. That letter is reproduced within the bundle (P 37).

23. The letter stated that further to the conversation on Friday (24 July 2020) "*I confirm that due to a restructuring of the way we operate on site that the position of Fork Truck Driver at Scarborough is redundant and we have no alternative position to offer you*." The letter also stated that "*your employment ended on 24 July 2020".*

24. The claimant wrote to the respondent on 18 August 2020 seeking clarification of the procedure the respondent would customarily follow in the event of a redundancy situation. The respondent company replied by letter

dated 1 September 2020 which is reproduced within the bundle (appendix 1 to the witness statement of the claimant).

25. That letter outlined that in the event of what was described as a "straightforward redundancy situation" the procedure would be a 3 stage procedure comprising:

    i. A face-to-face meeting/consultation between any employee potentially at risk of redundancy and their manager. At this meeting, the manager will outline the circumstances giving rise to the planned changes, the manager may be able to answer questions the employee may have, and the manager can listen to any ideas or suggestions the employee may have.

    ii. Having listened to and considered any ideas or suggestions raised in the face-to-face meeting, the company will confirm in writing to the employee the position regarding the redundancy, and, where applicable, arrangements relating to termination of the employment.

    iii. In the event that an employee feels the redundancy is unfair, they can appeal against that decision. Appeals should be made in writing, and explain why the employee considers the redundancy to be unfair.

26. Following the letter of 27 July 2020 sent by the respondent, the claimant's dismissal stood, and he duly presented this claim for unfair dismissal to the Tribunal on 20 October 2020.

Relevant Law

Unfair dismissal

27. **Section 94** of the **Employment Rights Act 1996** confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under **section 111**. The employee must show that he was dismissed by the respondent under **section 95**, but in this case the respondent admits that it dismissed the claimant (within **section 95(1)(a)** of the **1996 Act**).

28. **Section 98 of the 1996 Act** deals with the fairness of dismissals. There are two stages within **section 98**. First, the employer must show that it had a potentially fair reason for the dismissal within **section 98(2).** Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

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

30. In determining whether the dismissal was fair, the Tribunal's task is to consider all of the relevant circumstances including any process followed by the respondent.

31. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

32. If the Tribunal finds that a dismissal was unfair, it is open to it to reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly (known as a ***Polkey*** reduction following ***Polkey v AE Dayton Services Limited*** (1988 ICR 142). The Tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so.

Redundancy

33. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, ***Moon v Homeworthy Furniture (Northern) Ltd*** **[1976] IRLR 298,** ***James W Cook & Co (Wivenhoe) Ltd v Tipper*** **[1990] IRLR 6**. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, ***Orr v Vaughan*** **[1981] IRLR 63**.

34. Redundancy is defined in **s139 ERA**. It provides:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.
…

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason."

35. According to ***Safeway Stores plc v Burrell*** **[1997] IRLR 200, [1997] ICR 523, 567 IRLB 8** and ***Murray v Foyle Meats Ltd*** **[2000] 1 AC 51, [1999] 3 AII ER 769, [1999] IRLR 562** there is a three-stage process in determining whether an employee has been dismissed for redundancy. The Employment Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

36. In ***Safeway Stores Plc v Burrell*** **[1997] ICR 523 EAT**, Judge Peter Clark said that the question for a Tribunal is not whether there has been a diminution in the work requiring to be done; it is the different question of whether there has been a diminution in the number of employees required to do the work. Where "*one employee was now doing the work formerly done by two, the statutory test of redundancy had been satisfied*", even where the amount of work to be done was unchanged, ***Carry All Motors Ltd v Pennington*** **[1980] ICR 806**.

37. The manner in which a redundancy situation arises may be relevant to the fairness of a dismissal, but not to whether a redundancy situation exists in the first place. In ***Berkeley Catering Ltd v Jackson UKEAT/0074/20/LA(V)***, the employer admitted arranging matters so that its Director took over the claimant's duties in addition to his own duties. Those facts established a redundancy situation under section 139(1)(b). Bourne J said at para 20:

"… A redundancy situation under section 139(1)(b) either exists or it does not. It is open to an employer to organise its affairs so that its requirement for employees to carry out particular work diminishes. If that occurs, the motive of the employer is irrelevant to the question of whether the redundancy situation exists."

38. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact **fair under s98(4) Employment Rights Act 1996**. In doing so, the Employment Tribunal applies a neutral burden of proof.

39. The case of ***Williams v Compair Maxam Ltd*** **[1982] IRLR 83**, sets out the standards which guide tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters. In ***Langston v Cranfield University*** **[1998] IRLR 172**, the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

40. Both Mr Keld, on behalf of the claimant, and Mr Clark on behalf of the respondent, provided me with oral submissions with respect to the above matters at the conclusion of the evidence, which I have considered and refer to where necessary in reaching my conclusions. At the conclusion of the evidence, Mr Clark also produced a written skeleton argument supplementing his oral submissions, dealing explicitly with each of the questions and the agreed list of issues the Tribunal had to consider, and also quoting various authorities. I have also fully considered that document and the authorities cited therein in reaching my conclusions.

Conclusions and further Findings of Fact

Was the claimant dismissed?

41. There is no dispute by either party that respondent dismissed the claimant. On the evidence I have heard and seen, I find as a fact that the respondent did dismiss the claimant.

42. I also find as a fact that this dismissal took place on Friday 24 July 2020. Such a finding is entirely in keeping with both a common-sense interpretation of the conversation that took place between the parties on that date (see P 35 – 36), and in terms of what the claimant was told, his response, and indeed also Mr Ramsay's actions and the respondent's subsequent response to that conversation.

43. Importantly, such a finding is also in keeping as well with the respondent's own correspondence as sent to the claimant dated 27 July 2020, which indicated explicitly within it that the claimant's employment with them had ended on 24 of July 2020 (see P 37 of the bundle).

What was the reason for the dismissal? Was dismissal by reason of redundancy as asserted by the respondent?

44. In this case, both parties now agree that the reason for the claimant's dismissal related to redundancy. The only criticism that the claimant ultimately pursued at the hearing, and indeed in his evidence and closing submissions, was with respect to the procedure that was adopted when making him redundant.

45. The onus was on the respondent (by reason of **section 98(1) ERA 1996**) to show the reason for the claimant's dismissal. The respondent consistently claimed (in the meeting of 24 July 2020 between the parties, in subsequent correspondence to the claimant on 27 July and in evidence before me) that there was a genuine redundancy situation.

46. On the evidence that I have heard and read, I am satisfied and I find as fact that the only motivation of the respondent in dismissing the claimant by way of redundancy was a financial one. I find that the respondent genuinely decided that there was the possibility of significant savings that could be made to the company by making the claimant redundant. This was with respect to cost of both a forklift truck itself at the site, and the allied role of forklift truck driver. There was no suggestion by the claimant himself of any other oblique or ulterior motive for his dismissal.

47. There was also no dispute raised to the evidence contained within the bundle with respect to this matter (see page 38 and 39 of the bundle) or indeed any dispute raised to the evidence given by Mr Mulligan. This was to the effect that by engaging a self-employed contractor rather than the claimant as an employee, this amounted to a total potential cost saving to the respondent company of around 24% or around £16,000 a year. I conclude that the claimant's role could be undertaken much more cheaply by a third party independent contractor, retained on a self-employed rather than on an employed basis.

Was it a potentially fair reason?

48. There can be no dispute that redundancy is potentially a fair reason for dismissal.

Did the respondent act reasonably in all the circumstances? In particular:

Did the respondent otherwise act in a procedurally fair manner?

49. Having carefully considered all of the evidence and the submissions in this case, I have concluded that the respondent did not act in a procedurally fair manner. I prefer the evidence of the claimant with respect to these issues.

50. The question as to whether or not an employer consulted adequately with an employee is always a question of fact and degree for the Tribunal to decide in each individual case. It must take account of the particular circumstances and evidence which is presented. A lack of consultation in any particular respect will not automatically lead to a conclusion of unfair dismissal and I must, and indeed I do, take account of the overall picture. I must not fall into the error of substitution, and I remind myself that the redundancy process did not need to be perfect or even good. It needed to be within the range of reasonable conduct open to a reasonable employer. The respondent says that all the steps taken by the respondent were within the range.

51. In this particular case and in these particular circumstances, I do not accept the evidence or submissions made on behalf of the respondent company to the effect that the respondent made reasonable efforts to both warn and to consult with the claimant regarding his potential redundancy.

52. I have already found as a fact that the claimant was in fact dismissed on 24 July 2020. In that regard alone, any purported warning and/or consultation process between the parties both began and ended on the same day, indeed within the few minutes it took to conclude the meeting that in fact took place.

53. Whilst the respondent in their skeleton argument relies upon paragraph 35 of the case of ***Mental Health Care (UK) v Biluan (UKEAT/0248/12/SM***) (to the effect that where there is no collective consultation, the scope for useful consultation on avoiding the redundancy situation altogether may well be less) one cannot ignore the remaining part of that paragraph in the judgment. This makes abundantly clear that the focus for individual consultation will normally be on the circumstances involving the individual's particular case, and in particular – though not necessarily only – the chances of alternative employment.

54. In this case, I find as a fact there was no adequate or meaningful warning or consultation of any kind with the claimant with respect to those specific matters (i.e. the circumstances involving the claimant's particular case and the chances of securing alternative employment). I also find as a fact there was no adequate or meaningful warning or consultation of any kind with the claimant with respect to his redundancy generally. I reject the contention urged on behalf of the respondent that the meeting held on 24 July 2020 amounted to anything like such a process.

55. I find that on any common-sense interpretation, an analysis of the transcript of the meeting of 24 July 2020 reveals that the claimant was effectively told at the very outset of that meeting that, rather than being at risk of redundancy, he was in fact being made redundant ("*Bad news Kev, I'm afraid we are going to have to lay you off*"). Nowhere within the conversation is there any mention by Mr Ramsay, on behalf of the respondent, of a "*risk*" of redundancy, or indeed of any type of continuing or future, formal or informal redundancy consultation process of any sort. The claimant was not asked at any stage for

any suggestions or ideas he had to avoid redundancy, nor was he given any proper or meaningful opportunity to put forward the same.

56. I conclude that a settled decision to make the claimant redundant had already been reached by the respondent company at that stage, and that rather than the purpose of the meeting of 24 July 2020 being to warn or meaningfully consult with the claimant, it was simply to inform him of that decision.

57. Such an interpretation is fortified by an analysis of the evidence of Mr Ramsay himself. His evidence was (as per paragraph 3 of his witness statement) that he was told by Head Office shortly before that meeting that the claimant's role "*would be made redundant*". He went on to adopt in evidence (as per paragraph 7 of his witness statement) that "*after informing the claimant of the restructure and his redundancy, I agreed to meet with him on the Monday, after the weekend, to allow him some time to think about it."*

58. That interpretation is also fortified by an analysis of the evidence of Mr Mulligan, who it seems was the ultimate decision maker in terms of the claimant's redundancy. Nowhere in his evidence is the issue of either a warning or any form of formal consultation process with the claimant touched upon. His evidence (given again as per his witness statement, paragraph 10) was that he had decided that profitability would be better achieved by making the claimant redundant and that the site manager was "*told to inform the claimant of the redundancy situation*".

59. To the extent that there was some reference during the conversation to a potential meeting on Monday, 27 July 2020, I find that it is evident on the face of the transcript (and indeed I find as a fact) that this was raised by the claimant rather than by Mr Ramsay on behalf of the respondent company. In those circumstances, the prospect of a future meeting as first raised by the claimant himself, did not somehow transform the nature of the meeting of 24 July 2020 into a meaningful consultation with the claimant regarding his redundancy.

60. It follows therefore that I do not accept the respondent's contention that the claimant had any meaningful opportunity to ask questions, make suggestions and to discuss ways of avoiding his redundancy at the meeting with Mr Ramsay on 24 July 2020. Such a conclusion is fortified by further analysis of the transcript of the meeting.

61. By way of example, when the claimant asked how the company was to be restructured, he was simply told initially that this was to be achieved by "*laying you off and saving money, and not being an expense to this site*". When he then asked again about restructuring and who he was to get in touch with he was initially told "*nobody – me*". The fact that the claimant was told he could contact head office, that the company were getting a driver/forklift package and that there may have been another meeting on Monday (a possibility that only arose at the behest of the claimant) in my view did not in any way cure

those deficiencies. In my view it was perfectly understandable that the claimant did not attend any further meeting on the following Monday as it had already been abundantly clear to him that his redundancy was a foregone conclusion. The respondent company cannot rely upon its own default in creating that situation in terms of the submission made that the claimant thereafter "failed to attend" further meetings or failed to appeal the matter,

62. As well as the inherent unfairness of the procedure that was adopted, in light of the above findings, I also conclude that the respondent failed to adhere to its own policy regarding redundancy – as contained in, and outlined within, a letter sent to the claimant dated 1 September 2020 (see Annex to claimant's witness statement).

63. Specifically, I make the following findings in this regard: whilst there was a face-to-face meeting, for the reasons I have already articulated there was in fact no "consultation". Rather than being an employee at risk of redundancy the claimant was an employee in respect of whom the decision to make him redundant had in fact already been made. Mr Ramsay also did not fully and properly outline circumstances that gave rise to the planned changes, changes which also in light of the above findings, I find were settled rather than planned in any event.

64. Given that I have already found that the claimant was given no opportunity to meaningfully ask questions, or to put forward any ideas or suggestions, it also follows that the respondent failed to adhere to its own policy in this regard also. The further stage suggested within the policy, whereby the respondent ought to listen to or consider any ideas or suggestions raised by the employee, simply did not occur.

65. Further, there was no evidence presented before me by the respondent of any analysis, examination or consideration that was undertaken by the respondent company by way of alternatives, including alternative cost saving measures as an alternative to making the claimant redundant. Contrary to the submissions made on behalf of the respondent, this is not a case where there is any evidence that the respondent actually turned their mind the issue of whether any consultation process or warning would have been useless or futile and positively decided to dispense with it – the evidence that I have heard suggesting that they simply did not turn their mind to that issue at all. The fact that the claimant did not suggest those options himself (especially where he was given no opportunity to do so) in my judgment, does not negate the respondent's duty to genuinely apply its mind to such options. I find that it did not do that.

66. To the extent there has been reference by the respondent to the exceptional class of case as referred to at paragraph 29 of ***Grayson v Paycare (UKEAT/0248/15/DA)***, I find that even if this meeting of 24 July 2020 could ever be described as consultation (which I find it could not be) it effectively

would have amounted to a consultation undertaken with a closed mind. As was said at paragraph 30 of ***Grayson:***

"*The discussions thereafter were not consultation worth the name. The decision was already made. That was unfair. It was a classic case of unfairness through failure to consult*."

67. The claimant was also at no point afforded any right or route of appeal whatsoever, this being in circumstances where he had, initially at least within the initial meeting itself, outlined an intention to contest the matter. Again, whilst it was asserted that this would have made no difference to the ultimate outcome, and not determinative in and of itself, in my view this was also procedurally unfair.

68. Whilst it was asserted repeatedly by the respondent that such steps as outlined above would have made no difference, in my view this was procedurally unfair. I find that an employer acting within a range of reasonable response would not have acted in that manner.

Conclusion on Unfair Dismissal

69. I have considered the size of the respondent's undertaking. It is a business as a whole with a turnover of around £15 million per annum with no dedicated HR Department. The evidence would suggest the regional offices are run somewhat separately from each other. However, within the range of reasonable responses, the respondent's size and resources do not excuse the unfairness in terms of the procedural failings in this case.

70. I find therefore, to the extent of the matters outlined above at paragraphs 49-67, that the respondent's decision to dismiss the claimant fell outside the range of reasonable responses open to a reasonable employer and therefore his dismissal was unfair. The claimant was unfairly dismissed by the respondent within the meaning of section 98 of the Employment Rights Act 1996.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the claimant's compensation be reduced? By how much?

71. As recorded above, I agreed with the parties at the start of the hearing that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in ***Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;*** *and* ***Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604****.* I turn to this issue now.

72. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer (acting reasonably) would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274 at paragraph 24.

73. ***Polkey*** reductions tend to arise in cases where there has been procedural unfairness, but not necessarily so, and in this case, where the unfairness lies in procedural failings that arose as a result of a failure to consult, it is appropriate in assessing just and equitable compensation as to what might have happened if they had not acted unfairly in that way.

74. The respondent asserted that a 100% reduction was justifiable in this case, suggesting further that this was within an exceptional category of cases where despite a procedurally unfair dismissal there could be a 100% ***Polkey*** reduction. A ***Polkey*** reduction to that extent only makes sense if it could be said that the consultation which, unfairly, did not take place, would have generated a nil chance of this claimant avoiding dismissal.

75. In my view, there is a distinct lack of evidence on this issue. Part of the difficulty is that that, as I have already found, the respondent did not turn their mind at all to any alternatives in terms of cost reduction such as reduced wages, part-time working or any other areas where similar cost savings could be made (save for the fact that they simply concluded there was no alternative employment available within the respondent company). They also did not engage in any sort of meaningful consultation with the claimant. In those circumstances it is very difficult to know what twists and turns any such fair procedure may have taken along the way, including what suggestions or alternatives may have been made by the claimant, and what conclusion the respondent may reasonably have reached had it actually properly turned its mind to the issue. The situation is analogous to that as described in paragraph 40 of ***Grayson:***

    "*The Respondent did not adduce any analysis of what the reviews that were not done, and the call for volunteers that was not made, would have achieve or rather not achieved. The evidence was lacking that costs could not have been saved by these alternative measures on which consultation did not take place*."

76. However, particularly given the potential savings that the respondent company could make by making the claimant redundant, despite the limited evidence available, I find that even if the respondent had properly considered all relevant matters following the meeting of 24 July 2020, thereafter engaged in a fair procedure, the respondent company would still have dismissed the claimant by way of redundancy.

77. For the reasons I have outlined above I reject the respondent's assertion that there was no prospect of the claimant attending a further consultation meeting after he did not attend the meeting on Monday 27 July 2020. I also prefer the claimant's evidence on this issue and find that he did not "*withdraw*" from any consultation process as asserted by the respondent. A proper redundancy procedure should have occurred after that date, with meaningful consultation and a proper opportunity given for claimant to raise issues, ask questions and suggest alternatives. In my view, allowing for that to occur and for any appeal process, this would have taken a period of 4 weeks from 27 July 2020.

78. This is not a small business and I heard very little evidence about its Northern operations beyond the contract the claimant was working at. Nor did I hear detailed evidence about the new self-employed role that was to replace the claimant's role, other than in terms of the anticipated cost savings. Nevertheless, I do conclude that the work of the claimant could be performed more efficiently by a contractor – e.g. the claimant as an employee had downtime for which he was paid a fixed salary whereas the contractor could be called upon sporadically as the need arose. I am fortified in this view by the unchallenged evidence in the bundle produced by the respondent to which I have previously referred (pages 38 and 39 of the bundle).

79. In the round, I therefore consider that there is a 50% chance that the claimant would still have been dismissed by way of redundancy if the respondent had conducted a fair procedure and after the procedure outlined above had been completed. As outlined above, had the respondent company at least given the claimant a meaningful opportunity to engage with them, listened to any suggestions that may have been made by the claimant, and thereafter properly considered all alternative potential options, any such dismissal would have been within the range of reasonable responses.

Employment Judge Rawlinson
Date: 1 November 2021

Judgment and Reasons sent to parties on:
Date: 17 November 2021