EMPLOYMENT TRIBUNALS

Claimant: Ms M G Baiden

Respondent: Doc Cleaning

Heard at: London Central (remotely, by cloud video platform)
On: 24-25 June 2021 and 15 July 2021

Before: Employment Judge Smailes (sitting alone)

Appearances
For the claimant: Ms L Chapman, Counsel
For the respondent: Mr G Hine, Solicitor

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows

1. The respondent was in breach of contract by dismissing the claimant without the period of notice to which she was entitled.

2. The claimant's claim for unpaid holiday pay is dismissed on withdrawal.

3. The claimant's claim for unfair dismissal succeeds. The claimant was unfairly dismissed by the respondent on 12 October 2020.

4. The sum to be awarded to the claimant, payable by the respondent, is to be assessed at a remedy hearing on a date to be notified. The parties must notify the Tribunal by 15 December 2021 if a remedy hearing is needed.

REASONS

1. I have apologised to the parties via the staff of the ET for the delay in making this reserved judgment and I repeat that apology here.

2. By a claim form presented on 04 January 2021 the claimant complained of unfair dismissal by way of an unfair redundancy process and of failure to pay notice and holiday pay.

3. The Respondent filed a response on 01 April 2021 resisting the claim.

4. The appeal was listed for a 2-day hearing on 24 and 25 June 2021. A further day was required as the Tribunal had not been informed that the claimant required the assistance of an interpreter to enable her to give evidence. It was not possible to arrange an interpreter to attend at short notice on 25 June 2021. The hearing was adjourned to 15 July 2021. The claimant gave evidence that day with the assistance of an interpreter who spoke Twi, the claimant's first language. The claimant and interpreter confirmed that they understood each other.

5. I heard evidence on oath from the claimant and, on behalf of the respondent, Jane Malone (HR Director), Leigh Goldsmith (HR Manager), and Patricia Oliva (Operations Manager at Tower 42). Ms Chapman and Mr Hine made submissions.

6. I received an agreed bundle of 205 pages, a skeleton argument from the claimant, and a closing submission from the respondent. In addition the respondent provided an employee review form, being the respondent's record of a meeting on 29 September 2020. Except where stated otherwise, page references are to the pages in the bundle.

Issues for the Tribunal to decide

7. At the beginning of the hearing the claimant confirmed that the claim for holiday pay was no longer pursued.
8. The claimant raised an issue as to whether the response had been submitted in time. The parties were able to confirm that the response had in fact been submitted in time and this issue was not pursued.
9. The respondent confirmed that it now conceded that the start date of the claimant's employment was 17 May 2018 not 15 October 2018. As a result, it accepted that (i) the claimant had established an entitlement to redundancy pay and (ii) she was entitled to two weeks statutory notice and had received one week only.
10. The parties confirmed that it is accepted that the claimant was dismissed and that there was a genuine redundancy situation with the respondent making staff redundant in the wider organisation.
11. The list of remaining issues for me to determine was agreed at the beginning of the hearing:
    a. What was the real reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996?
    b. Was the claimant dismissed for raising a grievance about her contractual conditions and health and safety at work?
    c. Was the claimant dismissed by reason of redundancy? If so, was the dismissal fair: what were the reasons for redundancy, what was the consultation process, was there a fair selection pool?
    d. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed?

Relevant findings of fact

12. The claimant was employed by the respondent as a cleaner from 17 May 2018 until her dismissal on 12 October 2020. The claimant was employed for 15 hours per week, her hours of work were 4am to 7am Monday to Friday.

13. I note that the respondent conceded the claimant's start date on the first day of the hearing. Until that concession, the respondent had argued that the claimant did not become an employee until 15 October 2018.

Place of work

14. The respondent operated several cleaning contracts at various sites in London and the South East of England. At the beginning of her employment the claimant's place work was Tower Management Services, Old Broad Street, London. This is the location set out in the offer letter, job description and various documents completed at the start of employment (p41, 55-68). The Tower Management Services site comprises the large office complex at 25 Old Broad Street, and the neighbouring developments at 20 and 30 Old Broad Street, collectively known as the Tower 42 estate. The respondent held around 60 cleaning contracts on the Tower 42 estate.

15. The claimant's place of work changed on 15 October 2018. From that date her place of work changed from the general location covered by Tower Management Services to the specific location of Ecobank, a client of the respondent occupying office space at 20 Old Broad Street, within the Tower 42 estate. The statement of main terms of employment states (p72):

> **PLACE OF WORK**
> You will normally be required to work at or from Ecobank and at client sites as required. You will not be required to work outside the United Kingdom.

16. The reason for this change was confirmed in a document headed 'Amendment to Statement of Main Terms of Employment Hours' (p78) as 'Operative given permanent role at Ecobank – please remove from tower Management sheet'.

17. The statement refers to the Employee Handbook as forming part of the contract of employment. This includes a paragraph on mobility, which states (p92):

> ***D) MOBILITY***
>
> Although you are usually employed at one particular site, it is a condition of your employment that you are prepared, whenever applicable, to transfer to any other of our contracted sites. This mobility is essential to the smooth running of our business.

18. There were no further changes to the claimant's place of work. The claimant's place of work remained Ecobank until her dismissal. The terms of employment enabled the respondent to require the claimant to work at other sites. I deal with working at other sites within the Tower 42 estate below.

Furlough

19. The claimant was placed on furlough with effect from 01 April 2020 (p131). She returned from furlough on 27 July 2020. The respondent confirmed in a letter dated 24 July 2020 that (p134)

> I am writing to inform you that, due to the requirement for cleaning/associated services to continue at the client site/s at which you are contracted to work, you will be required to resume work on your normal working days and hours from 27th July 2020. You are required to attend the workplace at your normal start time.

Return from furlough and the claimant's health concerns

20. The parties agree that the claimant was asked to carry out work in other areas of the Tower 42 Estate on her return from furlough. The parties disagree about whether the respondent could require the claimant to do this and whether she was asked to work additional hours. The claimant says she was instructed to do this work outside her normal hours for no pay and she was dismissed when she raised her concerns about the impact on her health. The respondent says that the claimant was instructed to do

this work within her contractual hours, she was not asked to work without being paid and denies that she was dismissed for raining her concerns. I have found that the respondent could ask the claimant to work at other sites.

21. The claimant did not give evidence of how many hours she had been asked to work without pay. In her witness statement the claimant said that one week after her return from furlough she was asked by her supervisor, Evelyn Foriwaa (EF), to go to Tower 42 level 38 to work for free as the company had dismissed a lot of staff members and was struggling to meet commitments to clients. She said she agreed to do this, albeit reluctantly, and this situation continued for 2 weeks. After that she was asked by a different team leader, Christina (TLC), to work at 30 Old Broad Street and told she must do this additional work before she could do her usual work at Ecobank. Sometimes she would be recalled to work at 30 Broad Street after completing her contractual hours. She was concerned that she was being set up to fail by TLC as there were rumours that this had happened to other employees. The situation affected her health and she had to return to taking tablets for her high blood pressure, which had been under control. She emailed Patricia Oliva (Operations Manager)(PO) on 28 September 2020 to say she would not do the extra work anymore. When PO replied to tell her to meet EF to discuss this, she said the extra work had been voluntary and she did not see why she had to attend a meeting. Nevertheless, the claimant attended a meeting with EF on 29 September, during which she said the extra work and stress caused her to have shoulder pain and shortness of breath.

22. The claimant had completed a health questionnaire during her induction (p45-46), in which she said she had not had any of a list of health problems, including asthma, chest problems, raised blood pressure, depression, mental illness, rheumatism, arthritis or back trouble. The questionnaire is signed by EF with a statement that 'I have fully assisted the new worker/employee with the above health questionnaire and noted all relevant information.'.

23. The respondent did not provide a witness statement from EF or TLC. PO's witness statement deals only with matters relating to redundancy but she gave evidence about place and hours of work at the hearing. PO said that EF and TLC worked to her instructions so any instructions about changes to site or hours worked came from her. Even though some clients had returned to offices, occupancy remained low and it took less time to clean each area. The claimant was not needed for 3 hours per day at the Ecobank site so she was asked to complete the balance of her 3 hours in other areas within Tower 42. She was asked to work at 30 Old Broad Street once. The rest of the time she was asked to work at 20 Old Broad Street, the building where the Ecobank office was. The reception the claimant had been asked to clean was in 20 Old Broad Street. TLC had reported to PO that the claimant refused to clean the reception. PO contacted the claimant via whatsapp on 27 September 2020 to confirm that she was required to use her contracted hours to clean in different areas including the Ecobank office and that such instructions came from PO.

24. The bundle contains a sequence of whatsapp messages between the claimant and PO and the email sent by PO (p136-139). On 27 September 2020 PO sent the message described in the paragraph above. The claimant replied 28 September at 08:53 saying

> '…I'm try to manage to do the reception but this is the second time cristina reported me and I have a personal problem that, I can't do too much mop and this is stress so please from tomorrow I will not go to do reception again. I'm sorry. Thanks.'

25. PO replied at 18:25 on 28 September 2020:

> '… I tried to call you to discuss the problems you seem to have. As you may understand I cannot simply change a cleaning instruction with that small information. I will ask Evelyn to conduct a meeting with you tomorrow. But you have to know that

the cleaning of the reception is not an option so please continue doing it. After you have the meeting with Evelyn, I will call you to discuss further.'

26. The claimant's call log at exhibit 5 of her witness statement includes a missed call from PO at 18:21 on 28 September 2020.

27. The claimant replied on 29 September 2020 at 00:02:

'…I'm sorry I can't do the meeting with Evelyn because that job is not my contract I just helping you and Cristina has given me too much stress So I can't do it anymore.'

28. EF approached the claimant at work on 29 September 2020 and the meeting took place. A record of the meeting was provided on the first day of the hearing. It notes that the claimant said that the reception area is too big for her to mop because she has short breath and shoulder pain when she mops for too long and that she had not raised this before as she had only been cleaning Ecobank. The claimant denies that the signature on the record of the meeting form is hers. It is not necessary to make a finding about that. The parties agree that a meeting took place and the action arising from the meeting is set out in the email from PO to the claimant sent on 29 September at 19:08 and which was received by the claimant (p139):

Hi Martha,
After reading the notes from the Performance meeting review that you had with Evelyn today, I would like to ask you the following questions.
Would you please respond to them so we can assess the situation accordingly.
You have manifested to have short breath and shoulder pain when mopping the floors.
A- Do you have any medical condition that will provoke this pain that you would need to makes aware off?
B- Are you following any medical treatment regarding the symptoms described?
C- Are you taking any medicine to deal with these?
Also, I would like to clarify that you have a three hours cleaning contract; however, there is no specific area assigned to any member of the team in the contract.
You have not been asked to work over the three contracted hours but to use these hours to clean in different locations.
These hours have been paid accordingly, so I would like to highlight that you didn't do any cleaning as a favour or to help; any cleaning instruction would always be contemplated to be carried out within your contractual hours.
Therefore, the cleaning of the reception area and the office would need to continue in the following days until further notice.
Would you please come back to me in response to the above/
Many thanks
Kind regards,
Patricia

29. The claimant brought her medication to work on 01 October 2020 and showed it to PO and EF. She also sent a photo of it to EF via whatsapp (Exhibit 3, Claimant's witness statement). At the hearing the claimant maintained that this was the only thing she had been asked to do by EF and she had not received the email noted above. However, she went on to say that she had received it but had not opened it and only knew of it when EF told her to look for it and read it.

30. Once she read that email, the claimant did not say to the respondent that she was unwilling to carry out additional work because she wasn't being paid for it. She raised an issue about the impact on her health of working in a different area where the balance of the cleaning tasks was different, i.e. she had to do more mopping than she did at

Ecobank. The claimant did not provide any specific examples of being asked to work extra hours for no pay. I find that the claimant was asked to work in different areas of the Tower 42 Estate but she was not asked to work beyond her contractual hours.

31. The claimant had not raised a formal grievance yet. She had raised the issue that her health was affected by working in the reception area and the respondent had started to investigate the problem. The investigation had not concluded when it was interrupted by the start of the redundancy process. At that point, PO was waiting for the claimant to provide further information. PO was dealing with this within the scope of her ordinary duties and without referring it to the central HR department. No further action was taken in relation to the health issues raised by the claimant. It was overtaken by events when by email on 30 September 2020 sent at 12:25pm, PO was instructed by Leigh Goldsmith (HR Manager) (LG) to conduct an 'at risk' of redundancy meeting with the claimant (p143).

Redundancy

32. The parties agree that there was a genuine redundancy situation. The respondent had made several employees redundant across the organisation in a rolling programme that continued after the claimant's dismissal. The redundancy policy and procedures were approved by the company directors and managed by the respondent's central HR department.

33. Redundancies were not considered necessary in March 2020, when lockdown was expected to last for a short period. The respondent placed around 800 staff on furlough and made use of the financial support available through the furlough scheme. The situation was very different by July 2020. A significant number of the respondent's clients had advised that they would not return or did not know when they would return to their offices. Several clients cancelled their contracts or stopped paying. The respondent did not have funds to absorb that loss of income. The respondent's financial contribution towards the wages and National Insurance payments of staff on furlough was set to increase in line with the changes to the furlough scheme. The extension of the furlough scheme into the autumn of 2020 had not yet been introduced. The respondent decided this was not a sustainable business position and implemented a redundancy process. It also put a freeze on all recruitment.

34. Jane Malone (HR Director) (JM) and LG were involved in the development of the respondent's redundancy policy and collating the business case that lead to the claimant's dismissal.

35. The redundancy policy was to make 'short service' employees (employees with less than two years' service) redundant and offer any available work to staff with more than two years' service whose own role was at risk of redundancy. Although JM gave evidence that length of service was not the only selection criterion and that it would be different at different sites, no details of other criteria were provided. As at the date of the hearing, the respondent had made 210 employees redundant, 125 of whom were short service employees. No evidence was given of the criteria applied to longer service employees. Length of service was not the only criterion as the 85 employees who had more than two years' service included employees with many years' service as well as employees with just over 2 years' service. Across the organisation, the number of employees had reduced from between 1,500 to 1,600 to 947.

36. From July to October 2020 LG identified the short service employees. There was no single record that enabled her to identify all employees by length of service at the beginning of July. The respondent reviewed the situation throughout this time as individual client contracts were terminated or identified to be at risk of termination. Some short service employees were made redundant at sites where the contract with the respondent's clients was not at risk so that the respondent could transfer longer serving

employees to work at those sites. There were other sites where longer serving employees were made redundant.

37. At the time the respondent notified the claimant that she was at risk of redundancy and at her dismissal, the respondent mistakenly considered the claimant to be a 'short service' employee, who would reach 2 years' service on 15 October 2020. The respondent had records of the claimant's earlier start date, which is also the date on her payslips, but maintained its view until the first day of the hearing. In her witness statement JM stated that the claimant was selected for redundancy on the basis of her length of service (JM witness statement, para 5).

38. The respondent did not give evidence of the date on which the claimant was identified as being at risk of redundancy. The Ecobank contract had not been terminated. The decision to treat the claimant as being at risk of redundancy was made because another member of staff working on a different contract was at risk of redundancy. No details were given about that contract or the employee, other than that the employee at risk had 11 years' service.

39. The redundancy process from notifying the claimant of the risk of redundancy to giving her notice took a matter of days. Although the respondent had been developing and implementing a redundancy policy since July 2020, the respondent had not held any consultation with the claimant before telling her she was at risk on 01 October 2020. The claimant was given 1 week notice at the consultation meeting on 05 October 2020.

40. The letters sent to the claimant about furlough contained a general reference to furlough being a way to avoid redundancy but this did not amount to informing the claimant that she was at risk of redundancy. The letter dated 08 April 2020 said that the claimant was being placed on furlough to prevent potential redundancy and the situation would be kept under review(p131-132). An updating letter dated 16 July 2021 dealt with taking annual leave while on furlough. It did not refer to redundancy (p133). The letter recalling the claimant from furlough did not mention redundancy. It said that there was a requirement for work to continue at the site but if circumstances changed the claimant may be placed on furlough again (p134).

41. In preparation for the at risk meeting LG provided PO with a document setting out the background and suggesting answers to potential questions (p144-146) and a template for a record of the meeting, anticipating a meeting by phone (p147-148). The claimant was the only person identified in this background document as a short service employee at the Ecobank site. She was placed in a selection pool of 1 person only.

42. PO had intended to conduct the meeting by phone on 30 September 2020 but this did not happen as the claimant did not answer her phone. PO decided to attend the Ecobank site to conduct the meeting in person on 01 October 2020 (email p150-151). LG's response to being notified of this states: 'As this is short service we only need to do the at risk and consultation (we can advise the outcome at the consultation).' (p150).The missed call at 18:30 on 30 September 2020 is noted in the claimant's evidence at exhibit 5 to her witness statement.

43. In her witness statement the claimant denies that she was told she was at risk of redundancy at a meeting on 01 October 2020 (para 24). At the hearing, the claimant says that PO and EF came to see her at work but all that happened was that she showed them the medication she was taking. She said that she did not raise this with LG when she received the 'at risk' letter as she did not expect to get a good outcome if she did so. PO says that she attended the Tower 42 site on 01 October 2020 where she and EF conducted the at risk meeting with the claimant during her shift. I find that the meeting did take place and that the claimant was told that she was at risk of redundancy. However, I find that the meeting was brief, as described by both the claimant and PO in their evidence. PO gave the information set out in the prepared note of the meeting but did not stay to make sure that the claimant understood what had been said. In her

evidence, PO said that TLC and EF both spoke the claimant's first language so she asked them to talk to the claimant to explain in more detail. By email at 10:29 on 01 October 2020 (p150), PO confirmed to LG that she had held the 'at risk' meeting.

44. Following the meeting, LG emailed the 'at risk' letter to the claimant at 15:50 on 01 October 2020. The letter (p152) is signed by PO and says it is confirmation that it is likely the claimant's position is at risk. The process to be followed, which is consistent with the prepared script for the 'at risk' meeting, is set out in the letter:

> As part of the consultation process, I have made arrangements to hold another meeting with you with a view to discussing alternatives whereby your employment could be protected. I would also ask you to personally consider and put forward alternative proposals and suggestions at the consultation meeting which you feel are relevant to the aim of avoiding redundancy.
>
> The consultation meeting has been arranged for Monday 5th October 2020. You are entitled, if you so wish, to be accompanied by a fellow employee or a Trade Union representative. If you wish to exercise this right, then I would point out it is your responsibility to make the necessary arrangements. If you do decide to bring a union member, please can you let me know by Friday 2nd October 2020 so I can arrange the meeting accordingly.

45. LG provided PO with a template for the consultation meeting on 05 October 2020, which appears to have been added to after the meeting as it includes a comment made by the claimant (p154-155). In her witness statement the claimant denies that the consultation meeting took place. She says that EF approached her and told her she could not continue to work unless she was willing to do the additional work. She was asked to hand over her pass and leave the building, which she did (para 25). At the hearing the claimant clarified that she wished to amend the statement to add that PO was present when she was asked to return her pass. PO says that the meeting took place as a consultation meeting. She informed the claimant that her employment was being terminated with one week's notice. There is nothing to suggest that the claimant was asked if she wished to put forward any alternative. The letter giving the claimant notice said that she was not required to work her notice (p156).

46. I prefer the evidence of the respondent on this point. It was a feature of the claimant's evidence at the hearing that her initial response was to say that the various meetings described above did not happen at all or that she did not receive documents. On further questioning and being shown the relevant documents in the bundle and the exhibits to her own witness statement the claimant then said that she had met EF and/or PO but that it had not happened the way they said it did or she said that she hadn't opened a message or an email at the time. The template/record of the meeting includes a comment by the claimant that 'I don't think you or the company is following the government's advice when they said to fire people in this period'. There is no reason for the respondent to make up a comment from the claimant. The respondent had already decided that the outcome of the redundancy consultation was that the claimant would be dismissed (email, p150). Although the respondent later conceded that the claimant had more than 2 years' service, at the time of making the decision it considered that the claimant had less than 2 years' service and it could therefore dismiss her with 1 weeks' notice, timed to end just before she reached 2 years' service. There was no need for the respondent to take a different approach on 05 October 2020 and dismiss the claimant without notice for some other reason.

47. The claimant was mistakenly identified as a short service employee and placed in a redundancy pool of just one person on that basis. She was given notice of being at risk of redundancy on 01 October 2020. She was given notice to terminate her employment because of redundancy on 05 October 2020. Her employment ended on 12 October 2020. She was dismissed so that the respondent could keep an employee from another site in employment by giving her the claimant's job. The other employee was made redundant some months later.

ACAS

48. The claimant notified ACAS under the early conciliation process of a potential claim. The ACAS Early Conciliation Certificate was issued on 21 December 2020. The claim was presented on 04 January 2021.

The law

Unfair dismissal

49. This is a two-stage process. Section 98 of the Employment Rights Act 1996 (ERA) identifies a number of potentially fair reasons for dismissal which include at s98(2)(c) that the employee was redundant.

50. The second stage as set out at s98(4) of the Employment Rights Act 1996 is to consider whether the dismissal was fair. In a case of dismissal for redundancy this involves a consideration of the redundancy process and specifically whether there was a fair process involving (i) warning and consultation (ii) a fair basis for selection, (iii) consideration of alternative employment and (iv) an opportunity to appeal (Polkey v A E Dayton Services [1987] IRLR 503).

51. In Williams v Compair Maxam Ltd [1982] IRLR 83 the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

> "… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:
>
> a. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
> b. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.
> c. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
> d. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.
> e. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

52. Section 139(1) Employment Rights Act 1996 (ERA) provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him.

53. In Halpin v Sandpiper Books Ltd UKEAT/0171/11, the Employment Appeal Tribunal (EAT) held that it was reasonable for a respondent to have a selection pool for redundancy of one person, but if doing so it must show that it genuinely applied its mind to the issue. It is not the function of the tribunal to decide whether another pool might have been fairer, the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted, Capita Hartshead Ltd v Byard (2012) UKEAT/0445/11

54. In Safeway Stores v Burrell [1997] IRLR 200 the EAT held that a 'bumping' dismissal may be a dismissal by way of redundancy. A bumping redundancy dismissal is where employee A's job disappears and employee A is moved to employee B's job and employee B is dismissed.

55. A dismissal is automatically unfair if an employee is dismissed for asserting a statutory right, s104 ERA. In this claim the statutory right asserted is that the claimant raised her concerns about her contractual conditions and her health and safety at work.

Breach of contract (failure to give notice)

56. Section 86(1)(b) ERA provides that the notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for two years or more but less than 12 years is not less than one week's notice for each year of continuous employment.

Conclusions

Unfair dismissal

57. The question I need to answer is whether the dismissal was fair or unfair. As noted above, this is a two-stage process. The first stage is for the respondent to show a potentially fair reason for dismissal, and secondly if that is achieved, the question then arises whether dismissal is fair or unfair.

58. Redundancy is a potentially fair reason. I am satisfied on the evidence that the claimant was dismissed by reason of redundancy. The claimant's submissions are that the real reason for the dismissal is that the claimant raised a grievance about being asked to carry out unpaid work. It cannot be a co-incidence that the claimant was placed in a redundancy pool of one and dismissed within days of raising a grievance about unpaid work. I do not accept this. I found that the claimant had not been asked to work beyond her contractual hours and that she could be required to work at other sites. She had been asked to work at another site within the Tower 42 estate. She was not asked to carry out work that required her to undertake an additional journey or undertake work of a different nature to the work she did at the Ecobank site. It was reasonable for the respondent to investigate and ask for more information about the claimant's health problems. The respondent dealt with this at the operational management level: the instruction to do this work came via PO and the investigation into the concerns raised by the claimant was carried out by PO. This was within scope of her authority as operations manager for the Tower 42 estate and the various contracts on the estate. The claimant had not yet provided the information requested in the follow up email to the meeting of 29 September 2020. I found that the investigation had not reached a stage where PO would have to refer it to the central HR department. I accept that this

process was being handled by PO locally. Redundancies were being dealt with by the central HR department.

59. As to the redundancy process, it was managed by the HR department. The HR department identified the short service employees and the employees at risk of redundancy. The HR department instructed local manages to conduct the consultation. PO was instructed to hold the consultation meeting with the claimant.

60. It is not the role of the tribunal to consider or challenge the business decision of the respondent and I find that the respondent has satisfied s139(1) Employment Rights Act 1996 in that it has shown that the requirements of the business for an employee to carry out work of a particular kind had ceased or diminished and the dismissal of the claimant is attributable to that. The respondent has shown that by July 2020 the impact of the pandemic was that clients were cancelling their contracts or failing to pay and remaining clients did not know when their own staff would return to work in offices. In the circumstances there was an urgent need to make savings, leading to a reduction in employee numbers at several sites. The respondent began to make redundancies in July 2020. There was no settled position situation in July 2020. The need for redundancies was kept under review from July to October and beyond.

61. Turning to the second stage, was the dismissal fair? The claimant submits that none of the criteria of (i) warning and consultation (ii) a fair basis for selection, (iii) consideration of alternative employment or (iv) an opportunity to appeal were met.

62. Consultation should involve (i) consultation when the proposals are still at a formative stage (ii) adequate information on which to respond (iii) adequate time in which to respond and (iv) conscientious consideration of the response to consultation (R v Gwent County Council ex parte Bryant, [1988] Crown Office Digest p.19, R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price [1994] IRLR 72).

63. There was no warning about the implementation of a redundancy process across the organisation. The claimant had been placed on furlough but had been recalled as there was a need for her to carry out her work at Ecobank, her usual place of work. The claimant was not warned that there was an organisation-wide redundancy policy in place from July. She was not warned before the at-risk meeting that the respondent considered her to be a short service employee and thus at risk of redundancy under the redundancy policy. This meant she had no reason to tell the respondent it was wrong about her start date and she was not within the respondent's definition of short service employee. She was not warned that, although there was work at Ecobank, she was potentially affected by the policy to make short service employees redundant if a longer service employee based at a different site was at risk of redundancy.

64. The consultation period set by the respondent lasted from 01 October 2020 to 05 October 2020 and included a weekend. This did not give the claimant sufficient time to respond. This haste reflects the respondent's view that the claimant would become a longer serving employee on 15 October 2020. She would no longer fall within the policy to make short service employees redundant.

65. I accept that this was a fast-changing situation for the respondent. It is a business that was suffering a large financial impact due to the pandemic. However, it did not engage in a meaningful consultation process with the claimant. The claimant was given no information about the role that was at risk elsewhere to help her understand why she was now in a pool of one. She was not given any information to help her to suggest alternatives to redundancy. She was given no meaningful information on which to respond. The respondent had already decided that the claimant would be made redundant on 05 October 2020, see LG's email to PO of on 30 September 2020, in particular the comment 'we can advise the outcome at the consultation' (p150).

66. The claimant was in a selection pool of one. This is possible but the claimant was placed in a pool of one having been wrongly identified as a short service employee and as the only short service employee in this particular redundancy. The only criterion stated by the respondent was length of service of under 2 years. This criterion was mistakenly applied to the claimant. The respondent said in evidence that there were other factors in the policy but did not set these out. The claimant was not given any information about them. The respondent did not provide the details of how a selection pool would be chosen when there were no short service employees or any evidence to show that that the claimant would still have been in a pool of one if it had considered the criterion it was applying to employees with more than 2 years' service.

67. The hasty way in which the consultation process was carried out was because of the respondent's view at the time that the claimant was a short service employee who was about to reach 2 years' service. At that point she would become a longer service employee and be entitled to a redundancy payment.

68. Although there was a genuine redundancy situation permitting the respondent to treat redundancy as a sufficient reason for dismissing the claimant, the respondent followed an unfair procedure and the dismissal is unfair.

Breach of contract (failure to give notice)

69. The respondent admits this breach of contract. The claimant was entitled to 2 weeks' notice of dismissal. She was given I weeks' notice. She is entitled to damages for that breach of contract. The intention of damages is to put the claimant in the position she would have been if the contract had been performed correctly, i.e. if she had been given the correct notice.

Remedy

70. It was not possible in the time available on the third day of the hearing to hear submissions on remedy. There will be a remedy hearing to consider all elements of the award to the claimant, including submissions on whether, had a fair procedure been followed, the claimant might still have been fairly dismissed at the time or at a later date. The parties indicated at the hearing that, if I decided that the dismissal was unfair, they would be able to narrow the issues as to the remedy. The parties must notify the Tribunal by 15 December 2021 if they need a remedy hearing. If the parties agree a settlement before the date of any remedy hearing, they must inform the Tribunal so that the hearing can be vacated.

_____ _____
Employment Judge Smailes
22 November 2021

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JUDGMENT SENT TO THE PARTIES ON
23 November 2021

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