EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109341/2021

Held via Cloud Video Platform on 15, 16, 17, 18 and 19 November 2021

Employment Judge Brewer
Tribunal Member Ms V Lockhart
Tribunal Member Mr R Dearle

Mr M Armstrong	**Claimant** **Represented by** **Mr P Kerfoot, Counsel**
Altrad Services Limited	**Respondent** **Represented by** **Ms L Miller**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is:

1. The claimant was dismissed contrary to section 100(1)(a) Employment Rights Act 1996.
2. The claimant shall be reinstated, and the respondent shall pay to the claimant a compensatory award to the date of the hearing of **£16,098.98** consisting of:
    a. Loss of sick pay from 1 January 2021 to 30 May 2021 of **£6,352.83**
    b. Loss of wages from 10 June 2021 to 10 November 2021 - **£4,746.06** and
    c. Loss of bonus of **£5,000.00**.
3. The respondent shall also pay to the claimant ongoing net weekly loss of **£215.73** payable to the date of reinstatement.

4. The Recoupment Regulations apply, and the prescribed element (loss to the date of the hearing) amounts to **£16,098.89**. the monetary award exceeds the prescribed element by the ongoing net weekly loss of **£215.73** per week from 15 November 2021.

REASONS

Introduction

1. This case was heard over 5 days before a full tribunal. The claimant was represented by Mr Kerfoot of counsel and the respondent was represented by Ms Miller of Scottish Engineering. There was an agreed bundle of documents running to some 657 pages. The tribunal heard oral evidence from the claimant and his witness Mr. Fraser, and for the respondent from Mr. T Cairns, senior operations manager, Ms W Gould, senior HR business partner, Mr C Wilkinson, portfolio manager, Mr B Noakes, operations manager offshore, Mr S Larvin, project manager, Mr P Sheves, general manager and Mr P Flowerdew, project manager. Both representatives provided us with detailed written submissions as well as oral submissions and we have taken all of that into account in reaching our judgment.

Relevant law

2. The claimant claims that he has been unfairly dismissed either automatically pursuant to section 100, Employment Rights Act 1996 (ERA) or in any event under s.98 ERA. The respondent accepts that they dismissed the claimant but say they dismissed him fairly by reason of redundancy or in the alternative for some other substantial reason. The relevant law is as follows.

Automatic unfair dismissal – s.100 ERA

3. By s 100 of the ERA it is provided as follows:

> *"**100 Health and safety cases.***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities.

(b) being a representative of workers on matters of health and safety at work or member of a safety committee …

…

(c) being an employee at a place where –

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

Redundancy

4. Redundancy is defined in s.139(1) ERA. The section provides that:

"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."

5. Under s.139(1)(b) it is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant. If fewer employees are needed to do work of a particular kind, there is a redundancy situation (see **McCrea v Cullen and Davison Ltd 1988** IRLR 30, NICA).

6. The EAT has made it clear that there is no need under s.139(1)(b) for an employer to show an economic justification (or business case) for the decision to make redundancies (see **Polyflor Ltd v Old** EAT 0482/02)

7. The test we must apply was set out in **Safeway Stores plc v Burrell** 1997 ICR 523, EAT where Judge Peter Clark set out a simple three-stage test. A tribunal must decide:

   a. was the employee dismissed?
   b. if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
   c. if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

8. The test set out in the **Burrell** case was subsequently endorsed by the House of Lords in **Murray and anor v Foyle Meats Ltd** 1999 ICR 827, HL.

9. For a dismissal to be by reason of redundancy, a redundancy situation must exist. However, it is not for tribunals to investigate the reasons behind such

situations (**Moon and ors v Homeworthy Furniture (Northern) Ltd** 1977 ICR 117, EAT).

10. In **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These were:

    a. whether the selection criteria were objectively chosen and fairly applied
    b. whether employees were warned and consulted about the redundancy
    c. whether, if there was a union, the union's view was sought, and
    d. whether any alternative work was available.

11. However, these guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under s.98(4) ERA. A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair, nor should a tribunal's failure to have regard or give effect to one of the guidelines amount to a misdirection in law. It is also noted that these guidelines represent the view of the lay members of the EAT as to fair industrial relations practice in 1982 and are not immutable. Practices and attitudes change with time and the overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

12. Where there is no customary arrangement or agreed procedure to be considered in determining the pool for selection, employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR 255, CA. the Court of Appeal said that the employer need only show that they have applied their minds to the problem and acted from genuine motives.

13. The tribunal should judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an

employer in the circumstances. As the EAT put it in **Kvaerner Oil and Gas Ltd v Parker and ors** EAT 0444/02:

> *"different people can quite legitimately have different views about what is or is not a fair response to a particular situation… In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band."*

14. In considering whether this was so, the following factors may be relevant:

    a. whether other groups of employees are doing similar work to the group from which selections were made
    b. whether employees' jobs are interchangeable
    c. whether the employee's inclusion in the unit is consistent with his or her previous position, and
    d. whether the selection unit was agreed with any union.

15. In order to ensure fairness, the selection criteria must not be unduly vague or ambiguous, they must be objective; not merely reflecting the personal opinion of the selector but being verifiable by reference to data such as records of attendance, efficiency and length of service.

16. Provided an employer's selection criteria are objective, a tribunal should not subject them or their application to over-minute scrutiny (see **British Aerospace plc v Green and ors** 1995 ICR 1006, CA). Essentially, the task is for the tribunal to satisfy itself that the method of selection was not inherently unfair and that it was applied in the particular case in a reasonable fashion.

17. In order that dismissals on the basis of any particular selection criteria are fair, the application of those criteria must be reasonable.

18. In terms of consultation, in **Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL. In that case, Lord Bridge stated that:

> *"In the case of redundancy… the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."*

19. This was reinforced in **De Grasse v Stockwell Tools Ltd** 1992 IRLR 269, EAT in which it was stated that the size and administrative resources of the respondent, specifically referred to as relevant to the determination of reasonableness in s.98(4) ERA could affect the nature and formality of the consultation process and later cases determined that a total absence of consultation could be excused but only if it could have reasonably been concluded that a proper procedure would be 'utterly useless' or 'futile'.

20. In relation to individual consultation the question is consultation about what? To some extent, the subject matter will depend upon the specific circumstances, but best practice suggests that it should normally include:

    a. an indication (i.e. warning) that the individual has been provisionally selected for redundancy
    b. confirmation of the basis for selection
    c. an opportunity for the employee to comment on his or her redundancy selection assessment
    d. consideration as to what, if any, alternative positions of employment may exist, and
    e. an opportunity for the employee to address any other matters he or she may wish to raise.

21. The purpose of consultation is not only to allow consideration of alternative employment or to see if there is any other way that redundancies can be avoided, it also helps employees to protect themselves against the consequences of being made redundant.

22. In **Thomas and Betts Manufacturing Co v Harding** 1980 IRLR 255, CA, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work.

23. In **Fisher v Hoopoe Finance Ltd EAT 0043/05** the EAT suggested that an employer's responsibility does not necessarily end with drawing the employee's attention to job vacancies that may be suitable. The employer should also provide information about the financial prospects of any vacant alternative positions. A failure to do so may lead to any later redundancy dismissal being found to be unfair. Furthermore, when informing an employee of an available alternative position, the employer should be clear about any eligibility criteria for the role, and the terms on which the role might be offered.

Some other substantial reason – s.98(1)(b) ERA

24. S.98(1)(b) is a catch-all provision covering dismissal for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'. Sir John Brightman in **RS Components Ltd v Irwin** 1973 ICR 535, NIRC, stated that

> *"Parliament may well have intended to set out in [s.98(2)] the common reasons for a dismissal but can hardly have hoped to produce an exhaustive catalogue of all the circumstances in which an employer would be justified in terminating the services of an employee"*.

25. S.98(1)(b) provides a residual potentially fair reason for dismissal that employers may be able to rely on if the reason for dismissal does not fall within the four specific categories in s.98(2).

26. The employer is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is then up to the tribunal to decide whether the employer acted reasonably under s.98(4) in dismissing for that reason. As in all unfair dismissal claims, a tribunal will decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a

reasonable employer might adopt. Depending on the circumstances, this may involve consideration of matters such as whether the employee was consulted, warned and given a hearing, and/or whether the employer searched for suitable alternative employment.

27. In other words, to amount to a substantial reason to dismiss, there must be a finding that the reason *could* — but not necessarily does — justify dismissal (see **Mercia Rubber Mouldings Ltd v Lingwood** 1974 ICR 256, NIRC). Whether the reason, once established, justifies dismissal is to be answered by the tribunal's overall assessment of reasonableness under s.98(4) (see **Gilham and ors v Kent County Council (No.2)** 1985 ICR 233, CA).

28. Mr Kerfoot also sought to rely on the Supreme Court's decision in **Royal Mail Group Ltd v Jhuti** 2019 UKSC 55, SC, in which it was held where the real reason for the dismissal is hidden from the decision-maker behind an invented reason, it is an employment tribunal's duty to look behind the invention rather than to allow it also to infect its own determination. Provided that the invented reason belongs to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

29. The Tribunal notes the decision in ***University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall*** UKEAT/0150/20 (30 June 2021, unreported) in which Judge Tayler in the EAT pointed out that, important as the development was in ***Jhuti***, in allowing a Tribunal to look beyond the mental processes of the dismissing manager in a case where there was another manager acting as an éminence grise in the background procuring the dismissal by misleading the dismissing manager, that development operates as an *exception*. The *rule* remains that normally one looks at the motivation of the dismissing individual or body.

30. *Further, recently in* ***Kong v Gulf International Bank Ltd*** **EA-2020-000357 (10 September 2021) the EAT held as follows:**

> *"I note the following points. First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ [in the Court of Appeal], which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in* ***Jhuti****. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer."*

31. We thus note that the **Jhuti** type case will be exceptional and relatively rare.

Issues

32. The parties agreed a list of issues save for one matter and we have included that as Appendix 1 to this judgment.

Findings in fact

33. We make the following findings in fact (references are to pages in the bundle)

34. The respondent is a business operating mainly in the oil and gas sector, in the supply of skilled labour, supervision, project engineers and project management to clients, both on and offshore. Trades supplied include scaffolders, riggers, insulators, painters, and industrial cleaners. The respondent has three categories of employee being core staff, long term ad hoc staff and short-term ad hoc staff.

35. Core staff are those who are assigned long term to the core team on a client's facility such as an oil rig. Long term ad hoc staff those who are engaged for a long period on a client's facility but who do not form part of the core team.

Short term ad hoc staff all those who are engaged to undertake project work which tends to last for a fairly short period.

36. The claimant was employed by the respondent as a scaffolder from 7 August 2010 until the termination of his employment on 31 December 2020.

37. Clause 3 in the claimant's contract of employment is in the following terms:

> *"Your area office is Aberdeen. You shall in the performance of your duties travel to such place or places as the company from time to time directs."*

38. Clause 4 in the claimant's contract of employment is in the following terms:

> *"You are employed as a scaffolder but you will in the performance of your duties undertake such tasks as are reasonably required by the company from time to time."*

39. The claimant was what is known as an ad hoc member of staff which is to say he was not part of a platform's core team. Notwithstanding that, he had been working on the Dunlin platform for some five years or so at the point the matters we are concerned with began. In that context he was a long-term ad hoc member of staff. During his employment the claimant had acted as both a supervisor and a chargehand. The Dunlin platform was operated by a company called Fairfield Energy ("Fairfield").

40. In 2019 the claimant was asked by Fairfield to, and he agreed to, join the safety committee as a representative, and in that role in June 2019 he began to raise concerns about the emission of diesel fumes into the living quarters of the staff on board the Dunlin platform. He continued to raise those concerns until he resigned from his role as a safety representative. The Respondent was aware that the claimant had been raising these concerns.

41. The claimant stepped down from his role as a safety representative in February 2020 and at that time he raised with his union representative, Mr. Fraser, concerns that he was being treated detrimentally by Fairfield for

raising the diesel exhaust emissions issue and he was concerned that he might be 'no longer required' on board the Dunlin. We should explain that it is open to the company running a platform to designate a contractor's employee as no longer required back which is commonly referred to as 'NRB'. In order that this is used reasonably there is a sector wide agreement made under the auspices of Oil & Gas UK [209 – 210]. This states that among other things that the employer should ask for detailed reasons for the NRB, investigate those reasons so that they may challenge it.

42. On 14 March 2020 the claimant was sent home by Fairfield on the basis that his wife may have been showing signs of having COVID-19. The claimant challenged this decision because, if his wife was suffering COVID-19, and if the claimant could have been infected, then the sensible approach would have been for him to be isolated on the platform, and to put him on a flight with others would be to put those others at risk. However, Fairfield insisted that the claimant go onshore.

43. On or around 16 March 2020 Fairfield was advised that during the helicopter flight on 14 March the claimant had told a fellow passenger that his wife had 'tested positive for COVID' and this apparently caused concern on the flight. The text of a text message sent to Fairfield, and said to have been from an employee of a contractor, states that the claimant's wife was a nurse, and that she had had a COVID test and that she had tested positive, all things which Fairfield knew at the time were in fact, not true [268 – 270].

44. Whilst the claimant was onshore, he was furloughed along with other staff.

45. In May 2020 staff were to be mobilised back to work and the claimant was included on a list of the staff to be mobilised back to the Dunlin. However, Fairfield informed the respondent that the claimant was NRB [211 – 212]. This left the claimant without any work.

46. The respondent says that it challenged the NRB decision with Fairfield who provided a letter detailing the justification for their decision [223 – 228]. Other

than informing the claimant of the basis of the justification there was no further investigation or challenge by the respondent.

47. In fact, after the NRB in May 2020 the claimant was given notice of termination by reason of 'some other substantial reason' but that was rescinded when the claimant was put onto the Serica Bruce platform because the respondent then deemed the claimant at risk of redundancy, and he was formally put at risk of redundancy by the respondent on 25 August 2020. The claimant was given notice to terminate his employment by letter dated 25 September 2020 [314 – 315]. The termination date was originally scheduled to be 10 December 2020. In the event the claimant was found several short-term pieces of work and his notice period was extended to 31 December 2020 at which point his employment terminated.

48. The claimant appealed against his selection for redundancy and his dismissal as well as raising a grievance all of which were unsuccessful.

49. The effective date of termination was 31 December 2020.

50. The claimant undertook early conciliation from 23 March 2021 to 29 April 2021 and he presented his claim form to the Tribunal on 4 May 2021. By that claim form the claimant brings claims of automatic unfair dismissal pursuant to s.100 ERA, or in the alternative ordinary unfair dismissal.

Observations on the evidence

51. The tribunal were impressed by the evidence of the claimant and his witness Mr. Fraser. Neither of them took issue with what was plain from the documentation. Mr. Fraser is an experienced trade union representative, and he accepted the respondent's contention, for example, that in general when seeking redundancies that is usually done by contract or facility. However, he was clear that the ad hoc employees formed a pool which we will discuss further below. We did not consider that the respondent's witness evidence was particularly convincing. This group of what we understand to be fairly

senior managers within the business could not answer some quite straightforward questions such as how many long-term ad hoc staff they employed at the relevant time, how many short-term ad hoc staff they employed at the relevant time nor even how many scaffolders they employed at the relevant time. We also note that their account is somewhat at odds with the contemporaneous documentation which again we will refer to below.

Respondent's submissions

52. Ms Miller's principal submission was that because the claimant was not required back on the Dunlin platform he was without a job. He was given a short-term job on a platform known as the Sereco Bruce but because all the scaffolders on that platform were no longer required, they had already been through a redundancy exercise and had either left the respondents employment all were on notice to leave by reason of redundancy. For that reason, when the claimant was assigned to the Sereco Bruce, he too was at risk of redundancy, and she says was taken through a proper and reasonable redundancy procedure. He was in a pool of one because he was the only scaffolder on the Sereco Bruce who had not been through a redundancy process, and it follows that the issue of selection did not arise. The only procedural question was the search for alternative employment and given that there were fewer jobs generally because of COVID-19 and the need for fewer staff on each platform to enable social distancing, there was no alternative employment available, and the claimant was properly dismissed by reason of redundancy. She says that, in the alternative, the fact of the NRB in relation to the Dunlin platform amounted to a substantial other reason for the claimant's dismissal.

Claimant's submissions

53. Mr Kerfoot's submissions were that on the evidence the reason why the climate was not required the back on the dunlin by Fairfield was because he had raised health and safety matters. He submits that the respondent's decision was so infected that reason the tribunal can look behind what was purportedly in the mind of the decision maker and find that in reality the reason for the dismissal was a health and safety reason under s.100 ERA.

Mr Kerfoot also submits that in any event even if there was a redundancy unfair because there was no or no proper procedure particularly with regards to pooling and the search for alternative employment. Finally, he submitted that if there was a substantial other reason, that is the fact of the NRB by Fairfield, the respondent did not act reasonably because it failed to follow the OGUK guidelines in challenging the NRB.

Decision

54. The tribunal has determined unanimously that the claimant was automatically unfairly dismissed contrary to s.100(1)(a) ERA. We find in the alternative that even if the claimant was not automatically unfairly dismissed, he was unfairly dismissed pursuant to s.98 ERA.

55. The claimant's removal from the Dunlin platform we find was because he raised concerns about the diesel fume emissions. We infer that conclusion from the evidence which is apparent in the bundle of productions.

56. As we have said although it was reported to Fairfield that the claimant had told somebody on the flight on 14 March 2020 that his wife was a nurse and she had tested positive for COVID, it was wholly unreasonable of Fairfield to conclude that the claimant had said those things because it would have required the claimant to have told three deliberate lies for no apparent reason. Those lies being that his wife was a nurse (she was not), that she had a COVID test (she had not at that time had one) and that the test was positive (it could not be as she had not had it). It is perfectly clear from the email from Steve Taylor (Topside Preparation Delivery Manager for Fairfield) of 15 March 2020 [157] that Fairfield knew those things not to be true yet there is no reason given why they believe an unnamed passenger on the same flight. Mr Taylor says in his email:

> *"[The claimant's] wife works in a shop in a hospital and had taken the decision to [self-isolate] on the basis she has a bit of a sore throat (which is not a COVID-19 symptom), she has NOT been tested and NOT conformed as having COVID-19…"*

57. Mr Taylor did not seem to consider that there may have been some confusion, or perhaps that the person who reported the conversation had got the wrong end of the stick, he simply seemed to believe what he was apparently told.

58. Furthermore, without any apparent further investigation or consideration by Fairfield, by 18 March 2020 it is entirely apparent that Fairfield determined that they were no longer going to have the claimant back on the Dunlin. This is clear from the email on page 179 sent by Darren Fielden on 18 March 2020 at 11:28. He says *"after speaking to Steve Taylor earlier this morning it goes without saying that they do not want mark Armstrong back on the Dunlin Alpha".* We conclude that the text complaint was not the reason the claimant was sent home from the Dunlin. That was used as a convenient excuse by Fairfield to remove the claimant who had complained for around 9 months about the diesel emissions issue.

59. It is also apparent from the email on page 179, again from Darren Fielden, timed at 12:26 on 20 March 2020, that the respondent did not believe the allegation set out in the text message said to have been the basis of Fairfield's decision. Mr Fielden says:

> *"personally thinking the alleged text message below carries no weight".*

60. The reference to the alleged text message is to what was reported to Fairfield about what was purportedly said by the claimant on the flight. Despite this, there is no discussion on how best to keep the claimant in employment. Instead, the respondent suspended the claimant from work and the email referred to above goes on to say.

> "We have a client that refuses to take Mark back on their platform, therefore we either find him alternative employment if possible or we finish him and wait for the fallout".

61. The respondent argues of course that they did seek alternative employment for the claimant. The Tribunal finds that they did not. Had they wished to find the claimant work we would have seen detailed evidence of the search. The claimant could, by his contract, be required to work anywhere and had shown a willingness to move around for work. He could have been required to step up to the role of chargehand or supervisor, both roles which he had previously carried out. As we have said, not only was there no documentary evidence of a search for a permanent alternative role for the claimant, but the respondent's witnesses also could not even say how many scaffolders they employed at the relevant time. The best argument they had was that roles were reducing but the evidence we saw flies in the face of that as we will detail below. We find the respondent made no search for alternative employment. Had they done so the witnesses would who dealt with the claimant's appeals would have been aware of that and would have been able to respond to questions about it, but they could not.

62. In reality despite the respondent knowing for certain, in March 2020, that its client, Fairfield, did not want and would not have the claimant back on their platform, instead of spending the time that staff were furloughed finding the claimant alternative work he could come back to at the end of the furlough, a time when it ought to have been relatively easy to swap him with another employee who would mobilise to the Dunlin in the claimant's place, thus freeing up a role for the claimant, the respondent chose to put the claimant's name on the list of employees being mobilised back to the Dunlin knowing full well that he would be rejected, and the Tribunal's view is that this was part of a strategy to ensure that the claimant had no role to mobilise to and from then on it was inevitable that the claimant would not work for them for more than a short period given that there was no intention to find the claimant alternative employment.

63. Thereafter the claimant's fate was sealed. He was in effect strung along with the pretence of a search for alternative employment. It was clear to the Tribunal that the respondent had a closed mind on finding the claimant a

permanent alternative role. We find this because the respondent's witnesses were clear that either there was no job for the claimant at all or, alternatively, he was found in particular a short-term job on the Sereco Bruce platform which the respondent knew, at the point they mobilised him there, was a dead end because, as we have set out above, that platform had already gone through redundancy programmes and all scaffolders had either already left by reason of redundancy or were on notice by reason of redundancy.

64. The tribunal are also unanimous in their view that all the purported challenges to Fairfield's NRB decision which occurred after May 2020 were a sham. There was no proper investigation into Fairfield's decision to NRB the claimant because the respondent had already accepted the position they were in, in March that year. In cross-examination Ms Gould accepted that the respondent did not go through all stages of the OGUK challenge procedure.

65. We also note that a number of scaffolders were newly recruited by the respondent towards the end of 2020, some of whom worked alongside the claimant on the Sereco Bruce platform who were then redeployed to the Rosetti platform to work on, work which the claimant said, and which he was not challenged on, was ongoing at the date of the hearing. These scaffolders roles included supervisor and chargehand roles. No good reason was given by the respondent why the claimant was not put on the Rosetti either alongside or instead of one of those new recruits. It is no answer to that question to say that the claimant was sick during some of his notice period (which was indeed the case). If this was a genuine redundancy and a genuine search for alternative employment had been made then the at-risk employee, the claimant in this case, should have been offered work notwithstanding that he could not start immediately because he was ill. Likewise, it is no argument against offering alternative employment to say that the claimant had booked holiday so could not start when needed because there is no doubt that the claimant would have preferred to have kept his job and lose his holiday rather than the other way around. Significantly, as Mr Fraser pointed out, on the Rosetti the scaffolders would be undertaking two- or three-week rotations

(two or three weeks offshore followed by two or three weeks onshore). This therefore gave the respondent a long window of non-working time into which the claimant could have been slotted. In other words, if he was ill for two-weeks, that time could have been made to correspond with some or all of a role's onshore time and thus no working time would have been missed.

66. So far this gets us to an unfair dismissal. We find that the dismissal was automatically unfair because of the factual nexus between the claimant's removal from the Dunlin, which we have found was for a health and safety reason and the respondent's subsequent behaviour which clearly indicates to the Tribunal they also no longer wanted to employ the claimant. Given that he was a good worker with a clean record and long service, and given that the respondent did not believe the allegation for which he was NRB'd by Fairfield and for which the respondent suspended him, the only reason for what the respondent did next which we can find or infer from the evidence is the same reason that their client no longer wanted the claimant on the Dunlin, that is to say he had become a thorn in their side for raising health and safety issues. It is not sufficient and it is not persuasive for the respondent to say that they were merely responding to the fact that they had a client who no longer wanted the claimant on the Dunlin and they had no work for him beyond that because, as we have set out, there clearly was work available; there was work on the Rosetti which the claimant could have done, but a decision was taken not to give him that work and there seems to the Tribunal to be no reason for that decision to have been taken other than the prohibited reason set out above.

67. For those reasons the claim succeeds.

68. We add, for the avoidance of doubt, that the respondent provided no evidence that it required fewer employees to do work of a particular kind beyond evidence which the claimant accepted, that the need for scaffolders on the Sereco Bruce had ceased or diminished. But first, the employment of a number of contractors during the claimant's notice period, all or some of

whom remain employed, is evidence which flies in the face of the assertion that fewer scaffolders in general were required. Second, we accept the evidence of Mr. Fraser that the ad hoc staff formed a group or to put it in redundancy terms, a pool, and beyond the redundancies on the Sereco Bruce there was no evidence before us of a reduced need for ad hoc scaffolders, and so even if the claimant was not automatically unfairly dismissed he was in any event unfairly dismissed on the basis that the respondent has not shown that there was a redundancy situation or that they had a substantial other reason for dismissal given that they had work which the claimant could have done and which on the evidence we have seen is ongoing.

Remedy

69. In terms of remedy the claimant has sought reinstatement. The only evidence given about that was given by Mr Cairns in paragraph 25 of his witness statement. All Mr Cairns says is that there is no work on the Dunlin but that is irrelevant. The respondent has provided no evidence that it is impracticable to reinstate the claimant. In her submissions Ms Miller argues that the claimant should not be reinstated because trust and confidence has broken down, but she bases that solely upon the fact that the claimant argues that he has been badly treated by the respondent. But that is the respondent seeking to benefit from its own wrongdoing. It amounts to the respondent saying that because it behaved badly the claimant should be should not be reinstated even though he wants to be and that is not an argument which we can accept. If the claimant feels that he can work for the respondent and the respondent has not argued that it does not have trust and confidence in the claimant, then there is no bar to ordering reinstatement and we so order.

70. In terms of compensation the claimant is to be treated as if he had not been dismissed and therefore he is entitled to everything set out in the schedule of loss (see Appendix 2) including the £5000 retention bonus he would have received had he not been unfairly dismissed because he would have remained on the Dunlin until the work had been completed.

Employment Judge M Brewer

Date of Judgement 25 November 2021

Date sent to parties 25 Novemeber 2021

Appendix 1

CASE NO 4109341/2021
MR M ARMSTRONG V ALTRAD SERVICES LTD
LIST OF ISSUES

The following is a list of issues which it is agreed should be determined by the Tribunal. This list however is not binding on the Tribunal as the Tribunal's core duty is to hear and determine this case in accordance with the law and the evidence and not to stick 'slavishly' to the list of issues – Saha v Capita – UKEAT/0080/18

Point 5b is not an agreed issue. The Claimant's position is that the issue raised is an issue that needs to be determined by the Tribunal. The Respondent's position is that 5b is not an issue in this case. All other issues are agreed.

A. Automatically unfair dismissal

1. Was the Claimant automatically unfairly dismissed by the Respondent in terms of section 100 (1) (a) (b) (c) or (e) of the Employment Rights Act 1996?

B. Unfair dismissal

2. Is the Respondent able to show pursuant to section 98(1) Employment Rights Act 1996 that the Claimant was dismissed by reason of redundancy or some other substantial reason, the some other substantial reason(s) being (1) the Respondent's need to realign their workforce with remaining work load, contracts and income generation following the loss of contracts in 2019/2020 and the adverse effects of the pandemic during 2020; or (2) the requirement of the Respondent's

client to remove the Claimant from the installation and the Respondent's inability to secure continued suitable alternative employment for the Claimant with only short-term *ad hoc* positions being available.

3. Was the Claimant's dismissal for either of those reasons fair or unfair in terms of section 98(4) Employment Rights Act 1996?

4. In considering whether the dismissal of the Claimant was fair or unfair in terms of section 98 (4) Employment Rights Act 1996, if the Respondent is able to show that the Claimant was dismissed by reason of redundancy did the Respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant having regard to the circumstances (including the size and administrative resources of the Respondent) and in accordance with equity and the substantial merits of the case? In assessing whether the Respondent acted reasonably or unreasonably:

   a) Was the Respondent correct to place the Claimant in a pool of one for selection purposes or should there have been a wider selection pool?
   b) Did the Respondent carry out fair consultation with the Claimant?
   c) Did the Respondent consider options which would *not* involve making the Claimant redundant, including seeking volunteers, alternative employment, lay-off and short-time working?
   d) Did the Respondent seek suitable alternative employment for the Claimant to include the availability of any vacancies with associated employers and offer that to him if available?
   e) Was a fair procedure followed by the Respondent and in assessing any procedural unfairness did the Respondent follow its own Redundancy Procedure?

5. In considering whether the dismissal of the Claimant was fair or unfair in terms of section 98 (4) Employment Rights Act 1996, if the Respondent is able to show that the Claimant was dismissed by reason of 'some other substantial reason' did the Respondent act reasonably or unreasonably in treating 'some other substantial reason' as a sufficient reason for dismissing the Claimant having regard to the circumstances (including the size and administrative resources of the Respondent) and in accordance with equity and the substantial merits of the case? In assessing whether the Respondent acted reasonably or unreasonably:

   a) Did the Respondent properly challenge their client's decision?
   b) Did the Respondent properly defend the Claimant against the client's decision having regard to the Claimant's contention that he had been "NRB'd" for raising issues in relation to health and safety?
   c) Did the Respondent seek suitable alternative employment for the Claimant to include the availability of any vacancies with associated employers and offer that to him if available?
   d) Was a fair procedure followed by the Respondent?

C. Remedy

6. If the Tribunal finds that the Respondent did unfairly dismiss the Claimant, should the Respondent reinstate/ re-engage the Claimant?

7. Alternatively, to what remedy by way of basic and compensatory awards is the Claimant entitled and if procedurally unfairly dismissed would the Claimant have been dismissed in any event had a fair procedure been followed in which case to what extent, if any, should any awards made be reduced to reflect the same?

Appendix 2

IN THE EMPLOYMENT TRIBUNAL

Case Number: 4109341/2021

BETWEEN

Mark Armstrong

Claimant

-v-

Altrad Services Limited

Respondent

REVISED SCHEDULE OF LOSS

Background Information and Key Dates

The Claimant was employed by the Respondent from 17 February 2010 until his dismissal on the 31 December 2020.

The key dates are as follows:

- Claimant's date of birth – 13/10/1961
- Start of employment – 17/02/2010
- Effective date of termination – 31/12/2020
- Age at date of termination – 59 years
- Continuous service at date of termination – 10 years
- Number of weeks from day after effective date of termination to date of hearing – 45.43 weeks

In the 12- week period prior to dismissal the Claimant received the following payments:

Date	Gross	Net
1 October	£841.68	£643.04
8 October	£1146.29	£868.53
15 October	£1726.81	£1187.10
22 October	£1963.57	£1306.29
29 October	£1963.57	£1306.29
05 November	£948.93	£718.85
19 November	£674.52	£587.37

26 November	£1963.57	£1306.29
03 December	£1963.57	£1306.29
10 December	£1638.83	£1117.64
17 December	£529.94	£517.74
24 December	£3317.39	£2018.97

The average gross weekly pay prior to dismissal was **£1,556.56**. The average net weekly pay prior to dismissal was **£1,078. 95**.

The basic award would be **£8,070.00**. However, the Claimant received a redundancy payment of £8,070.00 on termination of his employment which reduces the basic award to **nil**.

Following the dismissal, the Claimant was unfit for work until May 2021 as he was experiencing symptoms of long covid. Had the Claimant not been dismissed by the Respondent he would have received sick pay of £299.43 gross, £199.62 net for the first 13 weeks and then £625.73 gross, £417.53 net for the following 9 weeks that he was absent from work. Total net £2595.06 + £3757.77 = £**6,352.83**.

During the period from January 2021 to June 2021 the Claimant received ESA in the sum of £296 per month. £296 x 6 = **£1776.00**.

The Claimant started work with Bilfinger on the 30 May 2021 and worked under a temporary contract until 09 June 2021. In this period the Claimant received gross payments of £2,634.63 (£1,756.42 net). This should be deducted from losses claimed for the period up to the date of the hearing.

The Claimant commenced employment with his current employer Bylor Services on 10 June 2021.

The Claimant was last paid on the 29 October 2021. The latest pay slip shows that the Claimant has received the following payments:

- Taxable pay year to date - £24,087.32
- Tax paid year to date - £4,902.80
- National Insurance year to date - £1,912.32

The Claimant thus received net payments of £17,272.20 in the 20- week period from 10 June 2021 to 31 October 2021 ie £863.61per week.

The Claimant's partial weekly net earnings loss at the date of this schedule is **£215.34**.

Had the Claimant **remained on the Dunlin and not been dismissed** he would have become entitled to a £5000 bonus in the first part of 2021, payable by the Respondent's client. Under the terms of the Claimant's contract he had to be working on the 'Dunlin' six months prior to the proposed original 'coldstack' (which was in December 2020) in order to become entitled to the bonus. He would have had to remain until completion which was in October 2021 to receive this bonus.

Remedy

In respect of the unfair dismissal complaints (automatic and ordinary) the Claimant seeks the following:

1. A declaration from the tribunal that the dismissal was unfair.
2. A reinstatement order ie an order from the tribunal requiring the Respondent to treat the Claimant in all respects as if he had never been dismissed ie the Respondent should re-employ the Claimant on the same terms of employment with no loss of pay, pension rights or continuity of employment and with the benefit of any pay rises or other improvements that the Claimant would have received had he not been dismissed.
3. Alternatively, the Claimant seeks a re-engagement order ie an order on such terms, as the tribunal decides, that the Claimant be re-engaged by the Respondent.
4. In the event that the tribunal makes a reinstatement or re-engagement order the Claimant will require the respondent to make up all of the Claimant's lost salary and benefits for the period between the date of dismissal and the date of reinstatement/re-engagement.
5. Alternatively, if the tribunal does not make a reinstatement or re-engagement order the Claimant will seek a compensatory award.

Compensatory award

Past loss of earnings to date of hearing

The Claimant contends that pursuant to s.123(1) ERA it would be just and equitable for him to be awarded compensation for his loss of earnings caused by the dismissal.

In the period from 01 January 2021 to 30 May 2021 the Claimant was unfit for work. Had he not been dismissed the Claimant would have received sick pay of £199.62 net for the first six weeks and then £417.53 net for the following 9 weeks. The Claimant did receive ESA of £296 per month in this period. The Claimant's loss in this period was thus **£6,352.83** and recoupment will apply.

In the period between 30 May 2021 and 09 June 2021 the Claimant received payments from Bilfinger in the sum of £2,634.63 and thus suffered no loss during this period.

In the period from 10 June 2021 to the date of this schedule the Claimant has suffered a partial earnings loss of £215.34 per week. The Claimant has thus suffered loss of earnings in the sum of **£4,746.06** (22 weeks x £215.73).

The Claimant would have received a bonus of £5,000 had he not been dismissed and had remained employed on Dunlin until October 2021.

In summary the Claimant's loss from the date of dismissal to the date of this schedule was as follows:

1. Loss of sick pay from 01 01 2021 to 30 05 2021 - **£6,352.83**.
2. Partial earnings loss from 10 06 2021 to 10 11 2021 - **£4,746.06**.
3. Loss of bonus – disputed between parties as to whether recoverable or not - (due to be paid by client (Fairfield) if Claimant had remained employed on Dunlin till October 2021).
   Total - £11,098.89 or £16,098.89.

Future loss

The Claimant's ongoing partial net weekly loss will be **£215.73**.

The Claimant's position is that he has fully mitigated his loss and that it would in all the circumstances be just and equitable to compensate the Claimant for his ongoing partial loss up to the date of his retirement on 13 October 2028. – **not accepted by Respondent,** which says that continuing obligation to mitigate loss applies as approaching £1,000 net ongoing loss per month is not trivial.

The Claimant claims future loss at the rate of **£215.73/week** – the period for which this should be awarded is disputed.

Details agreed between parties 18.11.21

APPENDIX 2A

SCHEDULE

Case Number: 4109341/2021

THE EMPLOYMENT PROTECTION (RECOUPMENT OF JOB SEEKERS ALLOWANCE AND INCOME SUPPORT) REGULATIONS 1996

The purpose of the Regulations is to enable the Secretary of State to recover from the employer a sum on account of job seekers allowance or income support received by the employee in a period between the termination of his employment and the conclusion of the tribunal proceedings. **THE EFFECT IS THAT THE APPLICANT MAY NOT RECEIVE PAYMENT OF THE WHOLE SUM MENTIONED IN THE DECISION IMMEDIATELY.** The tribunal has made a monetary award as set out in Appendix 2, contained in the monetary award is a prescribed element, being the loss of wages during that period after any deduction made as a result of the employee's contributory fault. The prescribed element in this case amounts to £16,098.89. It relates to the period between 1 January 2021 and 18 November 20921. The monetary award exceeds the prescribed element which is ongoing loss of £215.73 per week **WHICH IS PAYABLE BY THE EMPLOYER TO THE EMPLOYEE IMMEDIATELY**, (unless the employer decides to appeal or ask for a review).

THE EMPLOYER (RESPONDENT) SHOULD NOT PAY THE PRESCRIBED ELEMENT TO THE EMPLOYEE UNTIL HE HAS RECEIVED FROM THE BENEFITS AGENCY/EMPLOYMENT SERVICE JOBCENTRE EITHER A RECOUPMENT (REPAYMENT OF BENEFIT) NOTICE OR WRITTEN NOTIFICATION THAT NO SUCH NOTICE IS TO BE SERVED.

In order to recover a sum on account of benefits paid to the employee, the Secretary of State may serve a notice upon the employer, requiring him to pay to them the whole or part of the prescribed element. The sum contained in any

recruitment (repayment of benefit) notice is a debt due to the Secretary of State. It will not be discharged by payment to the employee. It must be paid to the Department of Social security.

Where the Tribunal announce its decision at the hearing, the Secretary of State is required by the Regulations to serve the recoupment (repayment of benefit) notice, or give written notification that such a notice is not to be served, within the period of 21 days from the hearing or 9 days after the decision is sent to the parties (whichever is the later), or as soon as practicable thereafter. In the case of a reserved decision, the recruitment (repayment of benefit) notice must be served, or written and notification that none is to be served, within 21 days of the decision being sent to the parties or as soon as practicable thereafter.

ONCE A RECRUITMENT (REPAYMENT OF BENEFIT) NOTICE HAS BEEN SERVED UPON HIM, THE EMPLOYER SHOULD PAY TO THE EMPLOYEE ANY DIFFERENCE BETWEEN THE PRESCRIBED ELEMENT AND THE AMOUNT STATED IN THE RECRUITMENT (REPAYMENT OF BENEFIT) NOTICE. IF THE EMPLOYER RECEIVES WRITTEN NOTIFICATION THAT NO RECOUPMENT (REPAYMENT OF BENEFIT) NOTICE IS TO BE SERVED HE SHOULD PAY THE WHOLE OF THE PRESCRIBED ELEMENT TO THE EMPLOYEE. ONCE THE EMPLOYER HAS PAID TO THE EMPLOYEE WHICHEVER OF THESE TWO AMOUNTS IS APPLICABLE, HE SHALL HAVE NO FURTHER LIABILITY TO HIM.

THE EMPLOYEE WILL RECEIVE A COPY OF THE RECOUPMENT NOTICE AND SHOULD INFORM THE BENEFITS AGENCY/EMPLOYMENT SERVICE JOBCENTRE IN WRITING WITHIN 21 DAYS IF HE DISPUTES THE AMOUNT CLAIMED. ANY DISPUTE AS TO THE AMOUNT TO BE RECOUPED IS NOT A MATTER FOR DETERMINATION BY AN EMPLOYMENT TRIBUNAL.