Case No: 3311048/2020

EMPLOYMENT TRIBUNALS

Claimant: Matthew Dorrough

Respondent: Asme Engineering Ltd

Heard at: **Watford** **On:** **15th and 16th November 2021**

Before: **Employment Judge Dick**

Representation
Claimant: In person
Respondent: Mr Bennison (counsel)

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed by the Respondent. The claim for unfair dismissal is dismissed.

2. The Respondent did not make an unauthorised deduction from the Claimant's wages for the days during his furlough and notice period which were not bank holidays and which were not treated as paid holiday. The claim for an unauthorised deduction is dismissed.

3. The claim for redundancy pay is dismissed upon withdrawal.

4. The claim for bank holiday pay and for holiday pay during the Claimant's furlough is dismissed upon withdrawal.

5. The Respondent was in breach of contract in failing to pay the Claimant for 14.5 hours' overtime done in 2019. By consent, the Respondent must pay the Claimant £ 348.55, being damages for the breach of contract.

6. The Respondent was in breach of contract in failing to pay the Claimant the full amount due for one day's work on 31st March 2020. By consent, the Respondent must pay the Claimant £ 192.31, being damages for the breach of contract.

7. The Respondent is ordered to pay to the Claimant compensation of £1088 pursuant to section 38 Employment Act 2002 for failure to provide the Claimant with a written statement of changes to his employment particulars.

REASONS

Key to references: [x] = page of agreed bundle, {x} = paragraph number in witness statement (of the witness I am referring to unless otherwise recorded).

INTRODUCTION

1. The Claimant Mr Dorrough was employed as a Project Manager by the Respondent, a steel engineering company. In the early part of 2020 the Respondent was one of many businesses adversely affected by the worldwide COVID-19 pandemic. The Respondent took various cost-cutting measures, including, in March, placing the Claimant and a number of other employees on "furlough" at a reduced rate of pay. On 3rd June 2020, following a consultation period, the Claimant was given notice that he was to be dismissed from his employment, his last day being 3rd July 2020. The reason given for that dismissal was redundancy. The principal, though not the only, claim in this case is that the dismissal was unfair.

CLAIMS AND ISSUES

2. By the time I was to give judgment, the live issues were as follows. For the avoidance of confusion I use the same lettering system which was used in the "Note of Issues" document prepared and agreed at the start of the hearing before me.

   A - Unfair dismissal - Was the Claimant unfairly dismissed?

   i. What was the principal reason for dismissal? The Respondent said redundancy, or in the alternative, some other substantial reason (business reorganisation). The Claimant accepted there was some need for reorganisation but was not in a position to accept that his redundancy was required. He suggested three other potential reasons for his dismissal, which I deal with in detail below.
   ii. If the reason was redundancy (or some other substantial reason) did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
   iii. If the dismissal was "procedurally unfair", would the same outcome have been reached had the procedure been fair? If so, should any financial award be reduced and if so by how much?

   B - Notice period – was the Claimant properly paid for the 14 "standard" days during his notice period? "Standard" days meant the weekdays during the notice period which were not bank holidays or which were not treated as paid holidays which the Claimant had accrued, i.e. all the days during the notice period not dealt with under head **C** below.

   i. The Claimant's case was that he was entitled to be paid at his "contractual rate" (i.e. the rate applicable before he was furloughed), rather than the "furlough rate" which he was in fact paid at, and that the Respondent had therefore made an unauthorised deduction from his wages by failing to pay him the higher amount.

ii. The Respondent's case was that the Claimant was only entitled to be paid at the "furlough rate", so no unauthorised deduction was made.

F – Failure to provide updated particulars.

The Claimant claimed the Respondent failed to provide him with written particulars of changes to his employment in relation to an increase in salary and change in role around January 2020. The Respondent said that he would have been provided with these in the normal course of things.

3. The following had initially also been identified as issues, but by the conclusion of the evidence and submissions the orders I was to make were no longer in dispute:

C - Holiday pay

i. 4 bank holidays had fallen during the Claimant's furlough. The Claimant's case was that he should have been paid at the "contractual" rate but was only paid at the "furlough" rate.

ii. By the end of the Claimant's employment, both parties were agreed he had accrued 8 days' holiday, due under his contract. As authorised by the contract, the Claimant was asked to and was deemed to have taken these days during his notice period. The Claimant's case was that he should have been paid at the "contractual" rate but was only paid at the "furlough" rate.

In respect of both (i) and (ii), during the course of the hearing the Respondent's witnesses were able to point out, on the Claimant's payslips, that although the slips showed the Claimant had been paid the "furlough rate", he was also paid separate top-up payments which took the total to the "contractual rate". The Claimant accepted this and withdrew this part of his claim.

D - Overtime pay

The Claimant had claimed not to have been paid for a number of hours of overtime done in the months up to August 2019. On the first day of the hearing it was conceded on the Respondent's behalf that the Claimant was entitled to the revised amount he was now claiming.

E - Unpaid absence

The Claimant claimed that he should have been paid for what was his last day before furlough, having spent the day delivering his laptop back to the Respondent on his line manger's instructions. On the first day of the hearing it was conceded on the Respondent's behalf that he was entitled to what he claimed.

Redundancy pay

The Claimant had originally claimed for redundancy pay which he said was never received. By the time of the hearing, all were agreed that he had received payment in the correct amount and so this part of the claim was withdrawn.

PROCEDURE, EVIDENCE etc.

4. The case was heard over two days on the Cloud Video Platform, all the participants (bar me) appearing remotely. Mr Dorrough represented himself and the Respondent was represented by counsel Mr Bennison.

5. At the beginning of the hearing, in order to prepare the list of issues to which I have already referred, I confirmed that the following facts, evident to me from the ET1 (claim form), ET3 (response) and witness statements, were not in dispute:
    a. The claim and response were in time and the parties were correctly identified.
    b. The Claimant had been employed for more than two years.
    c. The Claimant was "furloughed" on 30th March 2020, remaining in that position until the end of his employment on 3rd July 2020. Over that period, during which he remained on furlough, and which included his notice period, he was paid at the reduced "furlough rate" (save for on the holiday days I have referred to above, where he was paid at the original "contractual" rate). The Claimant took no issue with the decision to put him on furlough.
    d. The Claimant was dismissed on 3rd June 2020. The Effective Date of Termination was 3rd July 2020.

6. We then discussed the live issues in the case, resulting in the agreed list of issues which both parties had the opportunity to consider before we began. I also explained that the tribunal had no power to award the damages for "emotional financial distress" sought by the Claimant.

7. I also considered with the Claimant complaints which he had outlined in brief (at {19}) about things that the Respondent had done over the course of his employment but before the redundancy process begun. He did not plead these as reasons for the dismissal; they were included in his statement by way of background. He had never raised them as grievances with the Claimant and he agreed, therefore, that they could not have had a bearing on the decision to dismiss. As such I did not consider them relevant to the case and (while noting that the Respondent took issue with them) I did not require them to be explored in any detail in the evidence.

8. Before the evidence was heard I explained the procedure to the parties and told them that I would read the witness statements but they should not assume that I had read any of the documents in the 291 page joint bundle unless I was specifically referred to them in the course of evidence or submissions.

9. After taking time to read the statements, I heard evidence from the following people. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined:
    a. Sandra Perkins – Technical Director of the Respondent and the person who decided to dismiss the Claimant;
    b. Susan Gibbons – Finance Director of the Respondent;
    c. Mr Dorrough, the Claimant.

10. Before hearing submissions, I invited counsel for the Respondent, for the avoidance of doubt, to put in writing what the Respondent said the Claimant's daily/monthly/annual rates of pay were – "contractual" and "furlough", gross and net. This did not require any fresh evidence to be called, as it had been dealt with in substance in the evidence of Mrs

Perkins. The Claimant, having had the opportunity to consider the figures, was able to agree they were correct. I then heard submissions, first from counsel for the Respondent and then from the Claimant. Finding insufficient time in which to complete my judgment by the end of the hearing's allotted time, I reserved judgment with a view to listing a separate remedy hearing should I find that The Claimant's dismissal was unfair. Should I not find that the dismissal was unfair, it was agreed that I would not need to hear further submissions regarding remedy before ruling finally upon the other claims.

FACT FINDINGS

8. The Claimant was employed from 11th July 2016. His employment contract (originally signed in September 2016), under the heading "Pay arrangements" said: "Your salary is £ 3,333.33 a month. Payment is made monthly…" [27]. It provided for set hours of work, with potential for the Claimant to be required to work additional hours. Holiday pay was to be "at [the Claimant's] normal basic rate." The notice period applicable to the Claimant was 1 month [29]. The contract also provided: "Any agreed amendments that materially alter the terms and conditions contained in your contract will be notified to you in writing and shall take precedence over the terms in this statement." An employee handbook [35] contains a short passage headed "Redundancy Policy"; since it has not been suggested that there were any breaches of this policy I do not set it out here. Neither document, unsurprisingly, made any explicit provision for furlough.

9. At some point the Claimant's role changed from site manager/project manager to project manager. This change was accompanied by an increase in salary. The Claimant was unable to recall exactly when that was, but it must have been during or before January 2020, because on 22nd January 2020 the Claimant attached a copy of the job specification for the new role in an email to his line manager Eugen Dinu [75], referring to the fact that he had not been provided with an updated version of his contract. The job specification, as Mrs Perkins conceded in evidence, would not have specified the Claimant's new salary; an updated contract would of course have done. While Mrs Perkins thought that the Claimant would have been provided with the updated contract by somebody in the usual course of things, she was unable to point to any record of this. The Claimant's evidence, which I accept, was that he never was provided with this updated contract, despite his requests.

10. In the year ending 31st December 2019, the Respondent had made healthy profits. The COVID-19 pandemic, which began in early 2020, had a substantial impact upon that situation – the Respondent fell into loss. While the Claimant took some issue with the interpretation of figures provided by the Respondent, there was no dispute that the company faced a precarious situation.

11. At the start of the pandemic the Claimant, like very many other people, taking account of the Government's guidance, began working from home. Though this was initially without the Respondent's explicit agreement, I accept Mrs Perkins' evidence to the effect that the Respondent was prepared to accommodate this. Nothing in the evidence I have seen or heard suggests that this caused the management at the Respondent any ill-feeling towards the Claimant.

12. Following a meeting on 30th March 2020, the Claimant agreed to go on "furlough" from the following day. The Respondent was making use of the government's Coronavirus Job Retention Scheme. The terms were set out in a letter from the Respondent to the

Claimant dated 31st March [79]. So far as is relevant, the letter recorded that "during the period of furlough" the Respondent "would make payments" of 80% of the Claimant's wages or £ 2,500 per month, whichever was lower. (The latter figure applied to the Claimant.) It also said: "During the period of furlough, you must not do any work for the Company, but remain an employee of the Company and as such you must hold yourself available for work". The Claimant signed the following declaration at the foot of the letter: "I agree to the contents of this letter and in particular to being designated as a 'furloughed worker' until the company lifts this restriction." The Claimant's signature is dated 6th April 2020, though it emerged in evidence that he had backdated it, having actually signed it and returned it on 6th May 2020 [92]. (Nothing turns on this point; there was no dispute that he had agreed verbally to be furloughed from the start and in any case the actual date of signature still predates the Claimant's notice period.) The letter did not mention notice pay.

13. On his last working day, the Claimant spent the day delivering his laptop back to the Respondent on Mr Dinu's instructions. On the Claimant's payslip of 31st March 2020 [70], the Respondent made a deduction of £ 192.31 for "Unpaid Absence", which appears to have been in relation to that day. As the Respondent now concedes, that deduction should not have been made – the Claimant was working, not on furlough or otherwise absent.

14. During the period of his furlough, as required by the terms of the scheme, the Claimant did not work for the company but formally speaking was available for work. He was paid a monthly rate of £2,500. In addition, for each bank holiday or other holiday day during the period, he was paid a top-up payment of £ 76.92 so as to ensure that for those days he was paid at the rate at which he would have been paid before being on furlough.

15. On 22nd April 2020, the Respondent issued a letter to all its employees to the effect that salaries would be reduced by 20 or 30% on a temporary basis. Employees were invited to sign and send back the letter to confirm their agreement to this. It is clear from the correspondence I have seen, and also from the Claimant's evidence on the point, which I accept, that the Claimant was concerned that the reduction would apply to him, i.e. that there was to be a reduction of his salary beyond the furlough reduction already in place. The Claimant did not sign that letter. However, I also accept the evidence of Ms Perkins that though the letter was sent to all the employees of the company, the reduction was not intended to apply to those on furlough. The letter did not spell that out and so that might well not have been obvious to the letter's recipients.

16. By early May 2020, as well as the furloughing of some employees and the reductions in salaries of others, the Respondent had also taken other cost-cutting measures including cuts in overtime and hours. I accept Mrs Perkins' and Mrs Gibbons' evidence, which was to the effect that the Respondent was now running on a skeleton staff. Even then, the directors took the view that the measures I have just mentioned were not sufficient and that redundancies would have to happen. The Respondent's HR manager was one of the "furloughed" employees, so the Directors were operating without that person's assistance

17. Consultations on redundancies began. A letter was sent out to the Claimant on 13th May 2020 informing him that his role was at risk of redundancy [104]. The letter set out those steps which the Respondent had already taken to cut costs and invited the Claimant to a meeting. Sandra Perkins held the meeting remotely with the Claimant on 15th May. The

undisputed minutes of that meeting are at [126]. The Claimant was told that it was proposed to shut his department and the reasons were explained. He was told there were no vacancies (i.e. alternative employment) as the purpose of the measures was to reduce the size of the workforce. The Claimant reminded Mrs Perkins of his skills as "Appointed Person, Site Management" was well as in Project Management. He made clear that he would wish to be considered for any other roles and asked whether he might be kept on furlough instead of being made redundant. He set out the profound effect that redundancy would have upon him (see the following paragraph). The Claimant asked how many others were being made redundant, but Mrs Perkins told him she could not discuss this as others had not been consulted yet. The Claimant did however accept in evidence that he understood that closure of his department would mean redundancy for himself and the other member of staff in the department.

18. On 18th May 2020 [115] the Claimant emailed the Respondent "following up" from the meeting. He reiterated his willingness to take on any available positions and his request to be left on furlough for longer if not. As an Australian citizen, he said, he was entitled to be in the UK on a work visa sponsored by the Respondent; in the event of redundancy he would have to leave the country within 60 days. His partner, who was a UK citizen and due to have his baby, would not be entitled to join him in Australia. He would also be prepared to accept any further pay cuts which came about under the furlough scheme.

19. On 29th May the Respondent emailed the Claimant a letter [123] setting out what had been said at the meeting and summarising the Claimant's email. The letter notes that that present at that meeting was Eugen Dinu, "the Contracts Manager". The letter explained that the Directors had reviewed the matter, considered the Claimant's suggestions and concluded (i) the Claimant's suggestion of alternative employment as a site manager or AP [Appointed person] was "not viable" as there were no such vacancies (ii) the Respondent did not consider continuing the Claimant's furlough to be a viable option. It also made clear that the Respondent was still of the view that the size of the workforce would have to be reduced. The Claimant was invited to a second meeting.

20. The second meeting took place on 2nd June with Mrs Perkins (the undisputed minutes are at [131]). The Claimant was informed that his concerns had been taken into account but there were still no other alternative jobs available. A final discussion would take place amongst the directors before a final decision was made, though it was made clear that redundancy was now all-but inevitable. The Claimant expressed his disappointment that he would have to wait to formally learn his fate and did not raise any new issues. The eventual decision, made shortly after the second meeting, was that the Project Management Department (where the Claimant worked) and the Buying Department would be closed and the employees in those departments made redundant.

21. A letter was sent on 3rd June 2020, confirming that the Claimant was to be made redundant [138]. The Claimant was made aware that he could appeal the decision. He did not do that, explaining in his evidence that this was because, at the time, he took no issue with the process, believing it to have been conducted in good faith.

22. The Claimant completed his notice period on furlough until 3rd July 2020. His pay continued, as before, until that point.

23. As to the decision to dismiss, I find the following:

a. By the time the consultancy process began, and up until the Claimant left employment, there was a reduced requirement for the work that the Claimant was doing, i.e. project management, as result of the pandemic. The need had not entirely ceased, but it had diminished significantly; the directors and other employees were to "take up the slack" for the foreseeable future. There was no serious challenge to the evidence of the Respondent's witnesses on this point. Having already taken numerous cost-cutting measures, the directors of the Respondent considered that it was necessary to close the Claimant's department. I find that this was the reason the directors decided to dismiss the Claimant.
b. I accept Mrs Perkins' evidence that the fact that the Claimant was just short of another year's service (and hence almost eligible for a larger redundancy payment) did not enter into her or the Respondent's judgement, either in relation to the need to make the Claimant redundant or to the speed of the process. The other employee in the Claimant's department was dismissed on the same timescales as the Claimant.
c. I also accept Mrs Perkins' evidence that the Claimant's "failure" to sign the letter referred to above played no part in the decision to dismiss him, and nor did the Claimant's previous actions in working from home without explicit consent.
d. I accept the evidence of the Respondent's witnesses that at the time of the dismissal there were no other roles available for the Claimant; the size of the workforce was being reduced. As is evident from what I say above, at the time he was dismissed, the Claimant accepted that was the case.
e. As was pointed out by the Claimant in the course of the evidence, as well as having employees, the Respondent also paid some people to work as contractors. While the Claimant suggested that these people's contracts might have been terminated before the Claimant resorted to making employees redundant, I accept the evidence of Mrs Perkins that the directors of the Respondent took the view that the work being done by the contractors was still essential and so this was not a realistic option.
f. I accept the evidence of Mrs Perkins that the Respondent took the view that, there being now a diminished requirement for the work the Claimant was doing, it would not be appropriate to keep him on whilst claiming government support to cover his wages.
g. The Respondent regretted having to dismiss the Claimant – as Mrs Perkins said, he was a good employee and the Respondent had spent a significant amount of money in training him and assisting his efforts to secure a work visa.
h. I accept Mrs Perkins' evidence that there were only two employees in the Claimant's department at the relevant time. Eugen Dinu was not one of these, having been promoted some time beforehand to contracts manager, a role still required even after the Projects Department was shut down. Though none of the witnesses could remember precisely when Mr Dinu was promoted, he was referred to by his new job title in, for example, the minutes of the 15th May meeting.

24. So far as the claims relating to pay etc. are concerned, I can record the following uncontested facts:
    a. The Claimant was paid throughout his time on furlough, including his notice period, at the furlough rate of £ 2,500 per month gross. In addition, the Claimant was paid 12 "top-up payments", reflecting the difference between the daily "contractual" rate and the daily "furlough" rate. Four of these were to account for the bank holidays during furlough and 8 were to account for the holiday the

Claimant had accrued which was deemed taken during the Claimant's notice period while he remained on furlough.

b. The Claimant was paid the appropriate redundancy payment.
c. The Claimant has not yet been paid for the 14.5 hours' overtime or the unpaid absence deduction (see para 3 D and E above) which the Respondent now accepts he is owed. The agreed amounts are £ 348.55 and £ 192.31 respectively.

25. After he left the Respondent's employment, the Claimant became aware that two men were subsequently employed by the Respondent, as site managers – not the role he was in at the time his employment ended, but one he had previously held (see above) and one which, during the consultation, he had indicated his willingness to take up again.

26. The first man was Dino Zamperoni, who did not give evidence but did provide a letter [186], which I take into account. Mr Zamperoni says he was contacted in July 2020, interviewed on the following days and employed by the Respondent, though not for very long. Mrs Perkins told me that on 31st July a site manager left the Respondent unexpectedly, with an uncertain date of return, for personal reasons. Although the Respondent had another site manager who could have been taken off furlough as a replacement, he was on annual leave for August. As such, the Respondent needed to hire a replacement in a hurry, and Mr Zamperoni was hired on 3rd August 2020, leaving the Respondent's employment on 22nd September 2020. The Claimant submitted that, if Mr Zamperoni and Mrs Perkins are both right, Mr Zamperoni can only have been contacted on the 31st (a Friday) and was already hired by (Monday) the 3rd, which the Claimant further submitted seemed suspiciously swift. In my judgment Mr Zamperoni's letter is not inconsistent with Mrs Perkins' evidence, given that the very point of the process was to hire a replacement swiftly. I therefore accept Mrs Perkins' evidence on the point.

27. The second man was a Mr Shelly, who was employed on 21st September 2020, in part as a result of another site manager having left on 4th September 2020 without much warning. I accept Mrs Perkins' uncontradicted evidence on this point.

28. In respect of the employment of both Mr Zamperoni and Mr Shelly, while understanding how it may have looked to the Claimant with the limited information he had available, I find that the roles they took on arose only after the Claimant had left the Respondent's employment and that before the Claimant's employment ended the Respondent could not have been aware that the roles were likely to arise. So far as it is relevant, I accept Mrs Perkins' evidence to the effect that the Respondent did not consider contacting the Claimant about taking on the roles since his immigration status, so far as the Respondent was aware, would have precluded the Respondent from re-hiring him swiftly, which was what would have been required in the circumstances.

LAW

Unfair Dismissal

29. Section 94 of the Employment Rights Act 1996 "ERA" confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. There is no issue with time limits in this case. The employee must show that he was dismissed by the employer (see s 95 ERA), but in this case the Respondent admits that it dismissed the Claimant.

30. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

31. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> > (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it— …
>
> > (c) is that the employee was redundant,…

32. So in this case it is for the Respondent to prove (i) that the principal reason for the Claimant's dismissal was redundancy (i.e. a reason falling within ss (2) or, failing that, (ii) that the principal reason was business re-organisation, this being a substantial reason of a kind such as to justify the dismissal of an employee holding the Claimant's position.

33. Redundancy is defined by s 139 ERA*,* which provides, again so far as is relevant:

> (1) … an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—…
> (b) the fact that the requirements of that business—
> (i) for employees to carry out work of a particular kind…
> have ceased or diminished or are expected to cease or diminish.
> …
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

34. In *James W Cook and Co (Wivenhoe) Ltd* v *Tipper and ors* 1990 ICR 716, the Court of Appeal stressed that Employment Tribunals are not at liberty to investigate the commercial and economic reasons behind a decision to close (i.e. to create a redundancy situation). In short, as the authors of the IDS Employment Law Handbooks ("IDS") put it (Vol 9, 8.4) a Tribunal is entitled only to ask whether the decision to make redundancies was genuine, not whether it was wise.

35. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

36. In deciding fairness, I therefore must have regard to the reason shown by the Respondent and to the resources etc. of the Respondent. In general, my assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I must determine whether in the particular circumstances of this case the decision to dismiss the Claimant fell within the band of reasonable responses open to a reasonable employer.

37. In the specific case of redundancy, in *Williams and ors* v *Compair Maxam Ltd* 1982 ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These are summarised at Vol 9 8.81 IDS:
    - whether the selection criteria were objectively chosen and fairly applied
    - whether employees were warned and consulted about the redundancy
    - whether, if there was a union, the union's view was sought, [not an issue in this case] and
    - whether any alternative work was available.

38. In the same case the EAT made two other points which I also take into account. First, the guidelines are not principles of law but standards of behaviour that can inform the reasonableness test under S.98(4). A departure from these guidelines on the part of the employer does not lead to the automatic conclusion that a dismissal is unfair. Secondly, the guidelines represent fair industrial relations practice in 1982 and are not immutable. The overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

39. In the event that the dismissal was unfair, I would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* [1987] UKHL 8.

Wages Claims

40. Claim B (notice period) is brought under s 13(1) ERA, which provides that an employer shall not make an unauthorised deduction from wages of a worker employed by him (except as authorised in circumstances which are not relevant to this case). Paying less than is due under the contract is one example of such a deduction. An employee has a right under s 23 ERA to complain to an Employment Tribunal of an unauthorised deduction. Such a claim must be presented to an employment tribunal within 3 months beginning with the date of payment.

41. The issue for me on Claim B will be what rate was the Claimant entitled, under the terms of his contract, to be paid at during the relevant 14 days of his notice period – i.e. should he have been paid at the "contractual" or the "furlough" rate. The terms of a contract of employment may be changed in a number of ways. This can happen by explicit agreement between employer and employee, or the employee may accept a change by conduct, e.g. by carrying on working under the changed contract without protest. The question in this

case will be whether the contract was modified by the Claimant agreeing to go on furlough, and if so, how. (I should stress here that while "contractual rate" was a useful shorthand to use during the hearing, it might more properly have been called the "pre-furlough contractual rate" since, if the contract was modified by the furlough agreement, the new contractual rate would now be what was referred to in the hearing as the "furlough rate".)

42. An Employment Tribunal may construe a contract of employment where necessary to decide if a sum is properly payable - *Agarwal* v *Cardiff University* [2019] IRLR 657. In construing the contract the Tribunal may consider both the individual contract and general rules of contract law – *Cleeve Link Ltd* v *Bryla* [2014] IRLR 86.

Breach of Contract

43. Given what has been agreed in this case, I need not consider the law relating to the Claims C, D and E in detail. I do however record the following:
    a. Claim D (overtime from 2019) would have been out of time under the s 13 ERA provisions. It was therefore brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Art 3, as a claim for breach of contract outstanding on the termination of the Claimant's employment, on the basis that the Claimant was not paid the sum due under the contract for the overtime. Mr Bennison for the Respondent confirmed that, the Claimant having raised the matter with his line manager before the end of his employment, there was no issue that the claim was in time.
    b. I will treat the Claim E (the Claimant not being paid for one full day's work) in the same manner, given again that the Respondent's liability was not in dispute.

Section 38 Employment Act 2002

44. By s 1 ERA, an employer is under a duty to provide an employee with a written statement of particulars which include the scale of remuneration. By s 4 ERA, if there is a change in any of those particulars, the employer must give the employee a written statement containing particulars of the change. Where a Tribunal finds in favour of an employee in a complaint of unauthorised deductions from wages, breach of contract or unfair dismissal, and the Tribunal finds that at the time proceedings begun the employer was in breach of their duty under s 1 or s 4, the Tribunal must award the employee an additional two weeks' pay, unless there are exceptional circumstances which would make that unjust or inequitable, and may, if it considers it just and equitable in all the circumstances, award an additional four weeks' pay (Employment Act 2002, s 38 and Schedule 5). One week's pay is to be calculated in accordance with Chapter 2 of Part 14 of ERA (i.e. ss 220 to 229), subject to the cap under s 227, currently £ 544 per week (s 38(6) EA).

CONCLUSIONS

Unfair Dismissal

45. I was urged on behalf of the Respondent to conclude that Claimant's attitude by 2nd June (see para 17 above) indicated that he agreed with the need for redundancies. However in my judgment the Claimant's approach simply reflected his realistic assessment that by now his redundancy was very likely. Similarly, though it was also suggested that I should

take account of the Claimant's initial acceptance (i.e. before he heard about the employment of the two new site managers) of the redundancy and his decision not to appeal it, I did not find that of assistance in coming to my conclusions, which must be based upon the actions of the Respondent rather than upon what the Claimant's view might have been of them at the time.

46. My findings at para 23(a) above lead me to the conclusion that the Respondent has proved that the reason for the Claimant's dismissal was redundancy, i.e. a reason falling within s 98(2) ERA, the reason for the dismissal being wholly attributable to the fact that the requirements of the business for employees to carry out work of the kind done by the Claimant had diminished. For the reasons given above, I find that there were no other reasons for the dismissal and in particular I reject the three potential reasons suggested by the Claimant as set out at para 23(b) and (c) above.

47. Taking account of the (reduced) size and administrative resources of the employer's undertaking at the time the decision was made and having regard to the reason shown by the employer, in all the circumstances the Claimant's dismissal was fair in my judgment. In treating redundancy as a sufficient reason for dismissing the Claimant, the Respondent acted reasonably, within the band of reasonable responses open to the Respondent. This applies both to the decision to dismiss the Claimant and to the process by which that decision was made.

48. The decision to close the Claimant's department was genuine, and a business decision the Respondent was entitled to take in the difficult circumstances in which the company found itself as a result of the pandemic. The decision was only taken after other cost-cutting measures had been taken which had not, unfortunately, resolved the problem. It is not for me to consider whether or not the decision was wise, though I have seen nothing to suggest anything other than that the management were making decisions in good faith in difficult circumstances. While that alone would not make a dismissal fair, the following other considerations do also lead me to the conclusion that it was fair.

49. Since the whole of the Claimant's department (and another) was closed, it was reasonable for the Respondent not to have used, for example, a points system in selecting those who would be made redundant, albeit that the department consisted of only two employees. The Claimant was warned of the closure of his department and was consulted, being given the opportunity to make alternative suggestions. While none of his suggestions were taken up, I am satisfied that they were considered in good faith and that the Respondent reasonably concluded that despite the suggestions there was no realistic alternative to the Claimant's redundancy. No alternative employment was available, as the whole point of the Claimant's actions was to reduce the workforce. Though some positions opened up later, that was well after the Claimant's employment had ended. The letter of 22nd April 2020 (see above) understandably and unfortunately caused the Claimant some concern, but I am satisfied that his refusal to sign it had no bearing either upon the reasons for his dismissal or upon the fairness of the procedure. The process was carried out fairly quickly, but in the circumstances this was reasonable. While of course the whole point of the government's furlough scheme was to keep people in work when demand for their work had temporarily been reduced, the Respondent was entitled in my view to take the view that in these circumstances it would not be appropriate to keep the Claimant on furlough when the reality was that his role was now redundant. This was particularly so when, as Mrs Perkins pointed out, the scheme was soon to change, reducing the proportion of wages which the government would pay. The decision to keep on some contractors even

while employees were made redundant was a decision which the management was reasonably entitled to take.

50. Having concluded that the dismissal was fair, Claim A must fail and I need not go on to consider the "Polkey" point (see para 39).

Pay for Notice Period

51. Although I was not referred to it in the course of submissions, I have considered whether the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020/814, "the Regulations", apply to this case. The Regulations are potentially significant since, *where they do apply*, Reg 4 provides that in calculating pay, the amount which is payable, in relation to any period during which an employee "E" is furloughed, is to be calculated disregarding any reduction in the amount payable as a result of E being furloughed – in other words, the "contractual" rather than the "furlough" rate is payable. (Reg 4 caters for the situation where remuneration for employment in normal working hours does not vary with the amount of work done; there are comparable regulations for other situations.) The Regulations do apply *in certain circumstances* to notice pay. Specifically, to the calculation of a week's pay under ERA *where E is entitled to payment under Part 9* of ERA as a result of a notice to terminate given on or after the date on which E became furloughed (Reg 3). Part 9 of ERA (ss 86 to 93) deals with minimum payments for notice periods upon termination of employment. However, by s 87(4), the Part 9 provisions do not apply where the contractual notice period is at least one week more than the statutory notice period. C's contractual notice period (one month) was at least one week more than his statutory notice period (3 weeks). The Part 9 ERA provisions, and so also the Regulations, therefore do not apply in C's case (even before considering any argument as to whether they could apply retrospectively).

52. Where the Regulations do not apply, then, it must in my judgment be a matter of construing the terms of the employment contract. I therefore proceed upon the basis which was agreed with the parties and construe the employment contract applying the principles set out at para 41 above. In my judgment, the Claimant's employment contract was amended, by agreement, as reflected in the letter of 31st March 2020. It was clearly the intent of the parties that it was now a term of the Claimant's contract that he would be paid £ 2,500 per month while the furlough situation persisted. The fact that the Claimant began working out his notice period did not materially affect the situation in any way – he still remained an employee holding himself available for work. Had the Respondent had any work for him, he would have had to do it (and would have been taken off furlough and been entitled to pay at the original contractual rate). That was not the case and so he was, I find, entitled only to be paid at the "furlough" rate during those days on which he saw out his notice period. This aspect of the Claimant's claim therefore fails.

53. Since the Respondent had in fact paid the Claimant for his holiday pay at the higher "contractual" rate (and therefore Claim C was withdrawn) there is no need for me to consider whether the Respondent was in fact obliged to pay the Claimant at that higher rate for his holiday days.

Breach of Contract

54. The Respondent has conceded that the Claimant was not paid for, but was contractually entitled to be paid for, 14.5 hours' overtime done in 2019 (agreed amount £ 348.55) and the £ 192.31 which appeared as a deduction on his payslip of 31st March 2020 [70] for "unpaid absence". These claims were outstanding upon the Claimant's termination and I therefore conclude that, following the Respondent's breach of contract, the Claimant is entitled to damages in those agreed amounts. The damages are calculated on the basis of the gross amount due before any deductions for income tax and national insurance.

Failure to Provide Employment Particulars

55. The Claimant was never in my judgment provided with employment particulars specifying his new rate of pay following his promotion around January 2020. Mr Bennison argued on the Respondent's behalf, though not if I may say so with quite the vigour that characterised the rest of his submissions, that I might construe the payslips issued to D as amounting to the written particulars required by s 4 ERA. I reject that argument. In this context it seems to me that the point of the Claimant having written particulars of the change to his pay rate would be to enable him to check that each month he was paid the correct amount – I cannot see how a payslip could serve that purpose without independent confirmation of what the correct amount was. A payslip does not, in the words of s 4, "contain particulars of the change [to pay]", it merely confirms how much an employee was paid on a particular month. I therefore find that the Claimant was in breach of its duty under s 4 ERA at the time the proceedings were began for the claim for breach of contract, which has succeeded. I apply s 38 Employment Act 2002 and, in the absence, as I find there to be, of any exceptional circumstances, must award two weeks' pay. I do not exercise my discretion to award four weeks' pay, since the breach was, it seems to me relatively minor – it is evident that the Claimant did receive a document setting out some of the required particulars of his employment and it does not appear that the Claimant was ever actually left in doubt as to what his new salary was. I also note that an award of four weeks' pay would be considerably larger than the amount the Claimant has been awarded for those of his claims which were successful.

56. I do not need to decide whether the 2 weeks' pay should be calculated at the "furlough" or the "contractual" rate, since it is clear that either result would be over the statutory cap. (The Claimant's furlough pay was £ 2500 per month. Multiplying by 12 and then dividing that annual amount by 52 gives a weekly figure of £ 576.92.) I therefore award twice the statutory weekly cap of £ 544, i.e. £ 1088.

Employment Judge **Dick**

Date: 16th December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/12/2021

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FOR THE TRIBUNAL OFFICE