EMPLOYMENT TRIBUNALS

Claimant: **Ms S Collins**

Respondents: **Mr R Marshall**
Mr R Anderson
Mr R Dyson
Mr P Gay
(all Trustees of Caerphilly Golf Club (an unincorporated association)

Heard at: **Cardiff via CVP** **On: 24 September 2021**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:
Claimant: Ms D Wilce (Newport CAB)
Respondent: Mr D Bheemah (Counsel)

JUDGMENT having been sent to the parties on 27 September 2021 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. The Claimant has brought a claim of unfair dismissal which arises from her redundancy by the Respondent. The Tribunal finds that she was not unfairly dismissed.

Background

2. The Claimant was employed as a Clerical Assistant, though it is accepted that during her 28 hours a week that she worked for the Respondent, she carried out 8 hours of bar work. The Respondent is a golf club. There are a number of activities undertaken at the golf club - the playing of golf on the

course, a bar which is available to members and presumably their guests, and social functions at the golf club. All involved agreed in the course of their evidence that the large part of the Claimant's role involved dealing with the administrative matters surrounding such functions, though her administrative duties entailed more than just this. The Respondent found itself in serious financial difficulties following the start of the pandemic in March 2020. Its activities were at times stopped completely and severely curtailed for the rest of the period relevant to this case.

3. The Claimant's employment started at some point in June 2014, but the parties do not agree the start date of the employment; this was not a matter that ultimately required a determination by the Tribunal. The critical date is that in March 2020, the COVID-19 pandemic struck the world and led in the United Kingdom to a closure of all hospitality and leisure premises. The Claimant never returned to work for the Respondent following this event; she was placed on furlough on or around April 2020 when the UK scheme became operational.

4. When I use the phrase "*furlough*", I refer to what is officially known as the Coronavirus Job Retention Scheme. Having considered all the evidence before the Tribunal, it was the operation of this scheme by the Westminster Government in the autumn of 2020 that led to the Claimant's job no longer being retained and her dismissal taking effect on 1 November 2020. The Government changed the plan in relation to furlough on 31 October 2020, and long after the Respondent had given the Claimant her notice.

5. The Claimant received 100% of her pay in April 2020 but after this received the 80% that was due under the furlough scheme as the Respondent was unable to continue to afford to top up her wages.

6. Caerphilly was an area of the country that was particularly hard hit by the coronavirus. This meant that while the Respondent's bar re-opened on 13 July 2020 [49], by early September 2020 Caerphilly itself entered additional restrictions. The bar shut completely in October/November 2020 for a period of 17 days [59] and between July 2020 until April 2021, the bar was open and closed depending on the restrictions in place. There is no dispute that it was trading at less than the pre-COVID levels and the number of permitted customers was seriously reduced by social distancing and the legal requirements hospitality was operating under. It was also implied, though it was never openly stated by anybody in their evidence, that the bar was an important source of income by the golf club. It is a matter that I am willing to accept on the basis of logic, if nothing else.

7. The parties accepted that functions were cancelled completely initially due to the coronavirus, and in particular the functions that had been booked in September 2020 were cancelled. The parties agreed that there was at least

one wake that took place at the Respondent between March 2020 and the dismissal of the Claimant. The Claimant thought that it was likely that there may have been one or two small funerals that were dealt with by the Respondent; this was not challenged. It was more likely than not in my view that any functions at the Respondent were likely to be total less than five wakes of a small nature.

The redundancy

8. Matters did not improve for the Respondent due to the opening and closing of the hospitality side of its business. Ultimately, on 10 September 2020, the House and Finance Committee of the Respondent, knowing that the furlough scheme was at that point due to end on 31 October 2020, recommended that the Claimant was retained on furlough until it ended and then was made redundant on the basis that her role effectively no longer existed and no further support was available [50]. That decision was ratified by the Executive Committee on 16 September 2020 [52]. There is no dispute by the parties that by 16 September 2020, the decision had been made to make the Claimant redundant.

9. The Claimant was not given any warning of the redundancy proposal and attended a meeting on 21 September 2020 with Mr Howard Mallett (the honorary secretary) and Mr Glyn Glover (chair of the House and Finance Committee), both of whom I heard from in the course of today [54].

10. At that meeting, all accept that the Claimant was told that she would remain on the furlough scheme until it ended on 31 October, and she would then be made redundant. She was told that the reason for her redundancy was because of COVID and the significant financial impact that it had on the Respondent, who was unable to have functions (which was the core of the Claimant's role).

11. It appears that after the redundancy meeting, the Claimant sat at a different table to Mr Glover and Mr Mallett on the patio and had a drink [54]. Despite the best efforts of Mr Bheemah, on behalf of the Respondent, dwelling on this drink as being important, it was a point that I regard as irrelevant. The reasons why people may have a drink with those that they have worked with for a number of years, particularly in a community environment, are manifold and does not mean that they do not feel hard done by or that something has not gone wrong. It is human nature to try and end things positively and I place no weight at all on the fact there was a drink in these circumstances after the meeting.

12. The Respondent provided the Claimant with details of her redundancy package in writing [55]. A few weeks later, after taking advice, the Claimant signed to say she accepted. Within that letter, there was no express right of

appeal to challenge the fairness of the redundancy set out. Mr Bheemah drew my attention to the fact that the letter said, "*Should you have any questions please contact me immediately".* In my view, those words do not constitute notification of a formal right of appeal as one would expect and is consistent with the guidance given by ACAS. A question is not an appeal.

13. However, the Claimant, through Newport Citizens' Advice Bureau, wrote on 21 October 2020 [56 – 57] and raised queries - it was described as a formal grievance rather than an appeal against redundancy, but it is clear from reading that letter that the Claimant did not accept there was a genuine redundancy situation, that she had a number of criticisms about the process they had used and there were specific financial issues about the notice pay that had been proposed. The Respondent responded to this letter on or around 2 November 2020 [58]. Within that response, the Respondent outlined why there was a genuine redundancy situation and no suitable alternative employment, and accepted it was at fault in relation to the notice pay and rectified that point.

14. The parties entered into ACAS Conciliation from 26 November 2020 to 8 January 2021, and the claim was presented on 2 February 2021.

The hearing

15. I had the benefit from hearing orally from Mr Mallett, Mr Glover and the Claimant herself, as well as considering their witness statements. When there was a dispute about factual matters, and there were two key factual matters that were disputed between the parties, I preferred the evidence that I heard from the Respondents' witnesses.

16. Mr Glover was a particularly impressive witness; he had a very detailed recall of the situation, the financial position and the difficulties the Respondent faced as the Chair of the House and Finance Committee. Both he and Mr Mallett easily made concessions that were potentially adverse to the Respondent's case. There was no attempt on their part to claim that there had been consideration of matters where plainly there had not, for example whether the Claimant could do bar work only for a few hours. They conceded that the decision to make the Claimant redundant had been made by 16 September 2020; they conceded that the Claimant had not been warned.

17. In contrast, the Claimant did not make such concessions and at points had to have evidence almost dragged out of her. Her oral evidence conflicted with the contents of her witness statement at times. There was a point that I will return to on the subject of her refusing to do bar work while on furlough (but in summary, the Claimant's statement denied this entirely and under cross-examination had to accept this was not accurate). As an example of

her unwillingness to concede the obvious, the Claimant found it very difficult to concede that during a pandemic, when hospitality was subject to severe restrictions, the number of customers who could come into the bar was reduced, and only one person could safely and legally work behind the bar due to its size, this inevitably was a diminishing of bar work. The Claimant struggled to accept that if you have less people in the bar, there is less work for bar staff.

18. I also noted that the Respondent's witnesses' account was supported by the contemporaneous evidence within the bundle, while at various points assertions made by the Claimant was not supported by any evidence at all, such as allegations that new staff members had been hired. There was no evidence that I can rely on from the Claimant that satisfies the burden of proof that new staff were hired after she lost her job.

19. In contrast, the Respondent's witnesses gave a clear account of the use of a pool of casual workers, how it operated and who got offered what work and why. They explained that due to the restrictions, there was additional work of glass collecting in the bar.

The law/findings

20. The Claimant is able to bring a claim of unfair dismissal under s94 and s98 of the Employment Rights Act 1996 (edited for relevance):

*"**94 The right***
(1) An employee has the right not to be unfairly dismissed by his employer.
…

98 General
(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, or
…
(4) Where the employer has fulfilled the requirements of subsection (1), 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."

21. Turning to the legal questions, the first question I must ask is, was the reason for dismissal redundancy? It is for the Respondent to demonstrate the reason for dismissal. Section 139 of the Employment Rights Act 1996 says (edited for relevance):

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

(a) …

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

(i) for employees to carry out work of a particular kind, or

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

…

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

22. The evidence in this regard is overwhelming - there was a genuine redundancy situation. Due to the pandemic, parts of the Respondent's business was shut down entirely for large periods of time in 2020. The club stopped having functions, with the exception of a handful of funerals. The bar was shut. At various points, people were unable to play golf; when they were able to play golf I am told they had to play a "*two ball*", which indicates a reduction of capacity.

23. The Claimant accepted that her office work had diminished due to the effect of the pandemic, particularly on functions, and the remaining administration that was being left was being undertaken by the Honorary Secretary, Mr Mallett. His oral evidence that he acted on a voluntary unpaid basis, without so much as a discounted fee as a member.

24. The Claimant unwillingly ultimately did accept that the amount of work in the bar had reduced; it is evident from the evidence that has been given before me that it did. The bar when it was open was very limited in how it could

trade, it was open 30 hours a week and the Bar Manager, whose job was to be in the bar and manage it, undertook the vast majority of the available hours in the bar. The work of the particular kind carried out by the Claimant, whether it is office or bar, had diminished.

25. The question therefore is not whether there is a genuine redundancy situation, which I find that there is, it is whether the Respondent acted reasonably in ultimately deciding that it was the Claimant who must be made redundant. The questions that I have to answer are well established, arising from the case of Williams v Compare Maxam Ltd [1982] IRLR 83. I do not need to dwell on the issue of the union view, as there was not one in place. However, as Ms Wilce, who represented the Claimant, made clear, I do must consider the issues of warning, consultation, suitable alternative employment and process.

26. The Claimant had nothing to say about her selection. This is understandable as, the Claimant herself accepted, she had a unique role. She was the only clerical assistant; her evidence was that she was not able to do the work of the other permanent employees. There were only three other permanent employees before the Claimant was made redundant; a Bar Manager and two Greenkeepers. There was no suggestion by the Claimant that the Bar Manager should be bumped from his role to make space for her or that she could have performed his role. Ms Wilce suggested that the remaining zero-hour workers potentially could have been dismissed in favour of the Claimant who was a permanent employee, but there was no evidence on this point that there was much work of this nature available at the time of dismissal.

27. The decision was made by the Respondent on 16 September 2020 through its Executive Committee to make the Claimant redundant; it was not communicated to the Claimant until 21 September 2020. There was no warning, and having considered all the evidence, it is not clear why there was no warning. It was possible to have warned the Claimant between 10 & 16 September 2020 of the proposal.

28. This is an area where there was a factual dispute between the parties. The Claimant's account was that Mr Mallett told her about three weeks before 21 September that there was a proposal she worked reduced hours. Mr Mallett was never challenged on this key issue in his cross-examination. As a matter of logic, it does not make sense why Mr Mallett, who by this point knew that the Claimant was likely to be made redundant (as his witness statement sets out that he was consulted before the House and Finance Committee meeting and this was unchallenged in cross-examination), would tell the Claimant something that would be demonstrably wrong shortly after this alleged conversation took place.

29. The Claimant's account is inconsistent with the contemporaneous documents of the Respondent and the decisions made by the various committees. It conflicts with the whole way that the Respondent has conducted itself in dealing with the redundancy process which has been transparent, if not wholly in accordance with the expected redundancy process. The evidence before me shows that the Respondent offered what it understood to be the correct amount in terms of settlement, who was willing to discuss the reasons for the redundancy, and when it was pointed out that it had made a mistake regarding notice pay immediately rectified that mistake. I do not accept the Claimant's evidence in the regard that Mr Mallett told her that there was a proposal for her to work reduced hours going before the Executive Committee, rather than the actual proposal, which was to make her redundant.

30. Was the consultation carried out on 21 September 2020 meaningful? The word "*meaningful*" must be viewed within the context of the facts as they existed at the time of the decision. There was a genuine redundancy situation. There was no requirement for an employee to do office work on behalf of the Respondent. The amount of bar work that was available had reduced significantly because of a global pandemic. Matters were not likely to improve imminently.

31. In the circumstances, given the explanation given to the Claimant as to why she was being made redundant and the decision to keep her in employment until the furlough scheme ended and only then make her redundant, in my view means that the meeting with Claimant was meaningful in the sense of discussing the situation with her and explaining why she was being made redundant.

32. However, the failure to give prior warning was not appropriate or reasonable, but not on its own enough to render the dismissal unfair. It had no effect on the outcome in my view. Ultimately, in the Tribunal's judgment and on the basis of the evidence I have seen and heard, a warning and further consultation was futile. What more could the Respondent do? The Claimant was redundant. Her role had ceased or diminished. The case of Polkey v AE Dayton Services Ltd [1987] UKHL 8 supports the point that failure to warn or consult does not automatically render a dismissal unfair – the question is whether the Respondent acted reasonably in treating redundancy as sufficient reason to dismiss the Claimant and the consequences of failure are relevant to that determination. The judgment of Lord MacKay accepts that at times if there is a procedural failing but it would have been "*utterly useless*" or "*futile*" in the view of the employer, failure to take that step may be reasonable and render the dismissal fair. What I must ask is if the procedural steps in certain exceptional circumstances would reasonably be seen as futile by the employer based on what was known to it at the time of dismissal and were not taken as they could not alter the

decision to dismiss? If so, I may find that it was reasonable in the circumstances for the employer to dispense with the full procedural steps. In the case of Duffy v Yeomans and Partners [1995] ICR 1CA**,** the Court confirmed that a Respondent acting reasonably could decide that using the formal procedure was futile and the dismissal could be fair.

33. I am not considering a case where there has been a total absence of a reasonable process; the identified failure is the absence of a warning. I consider this point at paragraphs 40-41 below.

34. Another relevant finding is that at the point that the Claimant was given notice, the Respondent reasonably could not have predicted that the Government, who had at this point repeatedly said furlough would end on 31 October 2020, would perform a last-minute policy U-turn on that date. The effective date of termination was 1 November 2020 – the change of plan by the Government was hours before the dismissal took effect.

35. What about suitable alternative employment? There was no suitable alternative employment, even according to the Claimant's own evidence. However, this point leads the Tribunal to the other factual dispute between the parties. The Claimant says she could have done some bar work, even if it was less than eight hours a week. The Respondent says the Claimant had been previously offered only bar work in the summer of 2020 (either July or August) and refused to do the work, preferring to remain on furlough.

36. I prefer the account that I have had from the Respondent. Though Mr Mallett was not able to recall in his oral evidence exactly what was said, he was clear in his statement that the offer had been made and rejected. Neither of the Respondent's witnesses were challenged on this point. The Claimant's own account is that she accepted initially her position when she was on furlough was that she wanted 28 hours of work or to stay on furlough. Her witness statement denied that at any point she refused to carry out work in the bar but under cross examination, she admitted that she had refused to carry out work in the bar in August 2020 for the "*festival of golf*". She wanted to attend her son's 30th birthday party, which is understandable. However, this evidence conflicts with her initial denial of refusing work and it confirms the Respondent's evidence that the Claimant did refuse bar work and only wanted 28 hours of work or nothing. It is difficult to see in the circumstances what suitable alternative employment existed that the Claimant could have performed or would have accepted.

37. I thought about whether an argument could be made that once the Government U-turn had taken place, whether the Respondent should have kept the Claimant on furlough as a suitable alternative role. This was not an argument advanced before me and therefore I engage with it with care. My conclusion is furlough is not alternative employment. It is staying at home

and receiving the percentage of your pay that is allotted under the scheme. Furlough as a scheme does protect the existence of the role, but if there is no role, an employer is entitled to make the employee redundant. There was no evidence about the Claimant moving to a zero-hour role.

38. That leaves the issue of process. Ms Wilce submitted that there was no process. In my view, this is an unfair criticism; there was a process. The Claimant was invited to a discussion about the redundancy, where the reasons for the redundancy was explained to her. The package that she was going to be offered was discussed with her. I accept that there was no warning before the meeting and that the letter setting out the redundancy does not expressly offer the Claimant a right of appeal. I do though bear in mind that when the Claimant, through the CAB, wrote to the Respondent effectively her letter was appealing the redundancy, despite being called a grievance. What that letter was saying was that the redundancy was unfair and the reasons why; it is in reality an appeal. That letter was answered by the Respondent, explaining why there was no job for the Claimant as there have no work for her to undertake in either the office or the bar, and corrected the notice pay issue. This is an appeal response.

39. This is a very small Respondent. It had four permanent employees at the time of dismissal and was operated and managed by Trustees and volunteers through a committee system. I also bear in mind the case of Gwynedd Council v Barratt and Hughes [2021] EWCA Civ 1322 (raised with the parties), which says that the absence of an appeal is not in itself determinative of the fairness of the dismissal; in other words, not being offered or given the ability to appeal the redundancy is one of the many factors to be considered when determining fairness. In reality though, there was an appeal and it was reasonably dealt with by the Respondent.

40. The case of Polkey says that whether a failing makes any difference or not is a question to be dealt with in remedy, not liability, with the exception of whether a process would have been wholly futile. The other point that I raised during submissions is the case of Duffy v Yeomans and Partners (cited above) which says that a Respondent acting reasonably can fail to use the formal procedure on the basis that it was futile. What reasonably could be seen as futile by an employer must be based on what was known to it at the time of dismissal.

41. What the Respondent knew was that COVID-19 remained a significant issue, that it was having a substantial impact on all parts of its business, there was no administration work for the Claimant to carry out, that its requirement for bar staff had significantly diminished, and that the Claimant wanted 28 hours a week or to stay on furlough. The other thing that the Respondent knew is there was no alternative. There was nothing that it could do to improve matters. I find that this case is one of exceptional

circumstances based on what the Respondent knew and the pandemic itself and that it would have been wholly futile to give the Claimant a warning. It would not have made any difference. It would have been futile to do any further consultation because there was nothing to consult about.

42. If I am wrong on that and the failure to warn renders the dismissal unfair, the application of the ***Polkey*** case would lead to 100% deduction because that failure made no difference to the chances that the Claimant would be dismissed. I am satisfied that the Claimant was not unfairly dismissed.

43. **Postscript**: the Judge apologises for the delay in providing these written reasons. The administration has explained to the Claimant and her representative the reason for the delay (namely that it overlooked the email, which did request the written reasons within 14 days as required by the Rules) and the Judge has prioritised its preparation once she was informed in early December 2021 that written reasons had been requested.

Employment Judge C Sharp
Dated: 21 December 2021

REASONS SENT TO THE PARTIES ON 11 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche