EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr M Riley	v	Farringdon (T) Hairdressing Limited T/A Toni & Guy

Heard at: London Central (via CVP) **On:** 9 & 10 December 2021

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr M Lewis (lay representative)
For the respondent: Mr S Wyeth (of Counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The Claimant's claim in respect of redundancy pay is not well-founded and is dismissed.

3. The Claimant's claim in respect of notice pay is not well-founded and is dismissed.

4. The Claimant's claim in respect of holiday pay is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as an acting salon manager at the Toni & Guy salon at Farringdon until a redundancy process led to his dismissal on 7 December 2020.

2. The claimant claims that his dismissal was unfair within section 98 of the Employment Rights Act 1996 because he had the right to return to a previous role

at the respondent's Covent Garden premises, and he was denied the opportunity to return.

3. He also claims that the incorrect length of service and the incorrect weekly pay figure were used to calculate his redundancy payment. He claims the same incorrect weekly pay figure was used to calculate his notice pay and pay for accrued but untaken annual leave.

4. Consequently, he claims that he has been underpaid for the redundancy pay, notice pay, and holiday pay he received following his dismissal.

5. The respondent contests all of the claimant's claims. It says that the claimant was fairly dismissed by reason of redundancy, following a fair redundancy process where the salon within which the claimant was employed as an acting manager was closed, and where no alternative role was available. It says that the Claimant has not been underpaid, as it used the correct length of service and an enhanced weekly pay figure when calculating redundancy pay, notice pay and holiday pay. The respondent's grounds of resistance did request that some of the claimant's claims should be struck out, but Mr Wyeth for the respondent confirmed at the start of the hearing that these arguments were not to be pursued.

6. The claimant entered ACAS early conciliation on 17 January 2021 and the ACAS Certificate was issued on 18 January 2021. The claimant's claim form was received by the Employment Tribunal on 8 February 2021. The claims are in time.

7. The claimant was represented by his step-father, Mr Lewis, and gave evidence in support of his claims. The Respondent was represented by Mr Wyeth, Counsel, who called evidence from Mr Graeme Samson, Salon Operation Manager, Mr Graham Pepper, Human Resources Officer, and Mr Stephen Richardson, Head of Human Resources. All witnesses gave evidence after giving an affirmation to the tribunal.

Issues to be decided

8. At the outset of the hearing, there was a discussion about the issues to be decided. My Wyeth had prepared a list of issues to deal with the claims relating to unfair dismissal and redundancy pay. It became apparent that the claimant intended to pursue claims for notice pay and holiday which, although signalled in the ET1, did not appear to be advanced from the evidence provided by the claimant. Mr Lewis clarified that the issue with notice pay and holiday pay stemmed potentially from the gross weekly pay figure of £508.17. The claimant did not have confidence in this figure and was not sure it was correct. It was agreed that issues surrounding this figure could be dealt with at the hearing on the evidence available to the tribunal. The issues to be decided were, therefore, as follows.

9. In relation to the claim for unfair dismissal:

    9.1 Was the claimant dismissed for the potentially fair reason of redundancy?

9.2 Was the claimant's dismissal unfair because the claimant was not permitted to return to the previous role at Covent Garden?

9.3 Was the redundancy process itself unfair?

9.4 If the claimant was unfairly dismissed:

9.4.1 Has the claimant taken appropriate steps to mitigate his loss?

9.4.2 Should any compensation awarded be reduced on the ground that the claimant would have been dismissed in any event?

10. In relation to the calculation of redundancy pay:

10.1 Should the gross weekly pay figure used have been an amount greater than £508.17?

10.2 Should the continuous employment date used for calculating statutory redundancy pay pre-date 30 November 2010?

11. In relation to the calculation of notice pay, should the gross weekly pay figure used have been an amount greater than £508.17?

12. In relation to the calculation of holiday pay, should the gross weekly pay figure used have been an amount greater than £508.17?

Findings of fact

13. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are references to the agreed bundle of documents.

Employment in Toni & Guy branded salons

14. At the time of his dismissal, the claimant had been working within various legal entities branded as Toni & Guy salons since around 2003. There is a disagreement about whether or not these entities are related to those he came to be employed by from 30 November 2010, and therefore to the respondent. The respondent contends that these earlier entities are not related to it and relies on its records of employment in doing so. The claimant contends that there is a relationship under the Toni & Guy banner. He did, though, accept in cross examination that there was a franchise model which he became aware of and that, further, those earlier salons he worked in had been owned by individuals and not, ultimately, by any entity of the Toni & Guy group of companies. Consequently, I find that that these earlier entities where the claimant worked prior to 30 November 2010 were independent franchises and were not part of Toni & Guy group of companies.

15. It is agreed that, on 30 November 2010, the claimant came to be employed as a stylist by Essensuals (Camden 2) Ltd (**"Essensuals"**), which was the company

running the Toni & Guy branded salon at Camden. The signed contract of employment between the Claimant and Essensuals states, at clause 1.1 (page 38):

> *"Your employment with…* [Essensuals] *began on 30/10/2010, which is the date of commencement of your period of continuous employment. No period of employment with any previous employer will count as part of your period of continuous employment with…* [Essensuals]*."*

16. From 26 October 2013, the claimant was employed by Mascolo Ltd t/a Toni & Guy and moved to work as a stylist at a Toni & Guy salon in Covent Garden. He was advised in a letter dated 26 November 2013 that this change of employer had no effect on his continuous service and that his *"continuous service date remains 30th November 2010"* (page 49). The letter also explains that he would be paid 30% commission on his sales per month. The claimant was happy in this role, built a client base, and was taking home around £1,900 per month with his commission-calculated salary.

17. All of Essensuals, Mascolo Ltd and the respondent are related to each other through being a part of the Toni & Guy group of companies. I therefore find that the claimant's date of continuous service with the respondent began on 30 October 2010, as outlined in the contract that the claimant signed.

Nature of promotion to Acting Salon Manager at Farringdon

18. On 4 November 2019, the claimant was employed by the respondent as Acting Salon Manager at a Toni & Guy salon in Farringdon. There was a short period of confusion about the terms and conditions of the new role. The claimant queried his pay and payment dates by email on 14 November 2019, and the issue was acknowledged by reply on 17 October 2019 (pages 58-59). The parties still differ over the nature of the promotion to 'Acting Salon Manager', most relevantly in relation to the salary for the role and the mechanism by which it would be made permanent or be removed from the claimant.

19. The claimant claims that this employment was always going to be subject to a successful appraisal at the end of a three-month trial period. Indeed, he states he was told that he would have the option of reverting back to his previous role at the end of the three months. During the redundancy process, he asserted that he had a contractual right to return to his role at Covent Garden after three months if he wished to, saying he *"has this in writing in my Contract"* (page 105).

20. Under cross examination, the claimant did not deviate from his witness statement on the subject, where he said: *"it was explained to me that there would be an appraisal after three months, and at this point I would be able to request my return"*. He also said that that there was a *"promise that I would be £500.00 better off"*, but that actually *"I was £900 worse off that* [sic] *I had been promised"*. The claimant did, though, go on to admit in cross examination that he had produced no documentary evidence to support these assertions and that no correspondence existed which might assist his case on these points. It was put to

him that the contemporaneous written evidence present (which he signed) opposes his assertions.

21. The respondent disagrees with the claimant's assessment of the nature of his employment and relies upon its witness evidence supported by the contemporaneous correspondence and documentation surrounding the claimant's move to the Farringdon salon. It says that the claimant had vacated his role at Covent Garden and that it was intended for the move to be permanent, subject to the possibility of the respondent terminating the appointment during the first three months if necessary.

22. Turning to the contemporaneous documentary evidence, I see that the respondent issued a letter on 20 November 2019 (page 61) titled *"Change to Terms and Conditions of Employment"*. This letter confirmed his place of employment as the Farringdon salon, that his pay date would change from 29th of the month to the 8th of the month, and that his holiday plan would remain the same as previously.

23. On the same date, the respondent issued another letter (page 60) bearing the same title which confirmed the claimant's promotion into the Farringdon salon to work 40 hours per week over 5 days. It advises that the claimant's *"salary will remain the same but* [he] *will receive an Acting Managers bonus of £500 per month"*.

24. The letter also outlines how the respondent envisaged the role would become permanent:

> *"This promotion is subject to a 3-month trial period during which the situation will be continually monitored to ensure that it is beneficial to both parties. The Company reserves the right to discontinue or vary this arrangement if it proves unsuitable for either party. Should this decision be made, we will endeavour to return you to your original role, however you should be aware that we may be recruiting to fill your original role, so you may have to find an alternative. It is hoped that you will excel in your new role, and this will not prove to be necessary, however."*

25. The claimant signed a copy of this letter to signify his agreement to the variations detailed, including those relating to pay and to the basis of the three-month trial.

26. In my view, in the absence of any contemporaneous supporting evidence to the contrary, the arrangement was to be as set out in the letters dated 20 November 2019. The claimant would be paid according to the same basis as previously, 30% commission, with an additional £500 managers' bonus. The respondent alone was able to terminate the employment within the first three months if either party found it unsuitable but, if not terminated, the position would become permanent at the end of the three months.

27. There was not, in my judgment, any requirement for a formal appraisal to confirm the appointment, and the claimant did not have the ability to demand and enforce a return to Covent Garden. In any case, the claimant was clearly told that he had

vacated his position at Covent Garden and that that position may have been filled such that it would not be available to return to at the end of the trial period.

28. I therefore prefer the respondent's evidence in relation to the nature of the claimant's employment with it at the Farringdon salon. I do accept that the claimant suffered a reduction in take home pay upon his move to Farringdon, but this was, as he appeared to accept in cross examination, due to a reduction in his commission earnings from sales rather than a reduction to the proportion of his commission that he earned, which formed the basis of his salary calculation.

29. There is further divergence between the parties in that the claimant later suggests he should have reverted back to a role at Covent Garden because there were problems at Farringdon. The respondent considers the claimant's three-month trial to have been successful. I have seen no evidence that the claimant was unhappy with his job role at Farringdon. There were, as outlined above, issues initially with terms and conditions and salary. However, on the basis of the evidence before me, I do not find that the claimant ever asked to return to Covent Garden prior to the redundancy process beginning. Consequently, as the respondent had no cause to consider ending the trial-period, the claimant's promotion to salon manager at the respondent became a permanent arrangement on 4 February 2020.

Covid-19 and Furlough

30. Following the emergence of and Government response to Covid-19, the Respondent was forced to close its public facing operations in March 2020. On 30 March 2020, the respondent wrote to the claimant to inform him that his role was furloughed until further notice with effect from 23 March 2020 (pages 65-66).

31. On 31 July 2020, the Respondent wrote to the claimant to inform him that his role was placed on to flexible furlough and he may be asked to work some of his usual contracted hours (pages 71-72). The claimant was ultimately not asked to return and he queried when he might be able to return to work on 3 August 2020 (page 73).

Redundancy process

32. The pandemic and subsequent closure had an extremely negative affect on the respondent's business. This element of the respondent's witness evidence was not challenged by the claimant. Indeed, none of the respondent's evidence in relation to the redundancy proposal and consultation which led to the dismissal was challenged by the claimant and so, taken together with the documentary evidence in the bundle, I accept it in full and find as facts the matters outlined below.

33. The respondent was forced to consider making redundancies to reduce its cost base. On 7 September 2020, Nigel Darwin, the CEO of Toni & Guy, announced to the salon teams that there would be a need for redundancies within the salon. On 14 September 2020, Mr Pepper on behalf of the respondent informed the

claimant that his role was placed at risk of redundancy (pages 74-77). The claimant was informed by letter and e-mail that a period of one to two weeks individual consultation would begin to explore ways that the claimant could avoid redundancy and to mitigate the impact of any redundancy.

Redundancy consultation

34. The claimant's first redundancy consultation meeting took place on 16 September 2020, chaired by Mr Graham Pepper. Mr Graeme Samson was also present. A transcript of the recording of the meeting was provided at pages 78 to 82. Mr Samson explained to the claimant how the pandemic had affected the respondent in terms of generating the need reduce costs. The claimant was keen to know why he was not returned to work following transition to flexible furlough and was unhappy with the lack of communication to date about a decision he felt had been taken months previously. He also requested to be placed on a list for redundancy because he was unhappy with the situation and his client base had gone elsewhere since he was furloughed (page 80). When Mr Pepper told him that he has *"9 years and 9 months continuous service because you started on 30 November 2010"*, the claimant agreed with him (page 81).

35. Mr Pepper provided the claimant with proposed redundancy figures in the first redundancy consultation meeting. He explained that the claimant was entitled to 9 weeks' redundancy pay, calculated using a weekly gross figure of £328. This was expressed to be an averaged weekly figure over the previous 12 months. This gave a redundancy pay of £2,952. Taken with notice pay and accrued but untaken holiday, the claimant was told his total redundancy package would be £6,822.40 ("**Initial Calculation**"). This was expressed as a 'draft'. At the conclusion of the meeting, it was agreed that the claimant would be provided the proposed redundancy package over e-mail. The claimant felt that it was best for him to leave the business on a good note, and he was told that another consultation meeting would follow.

36. Mr Pepper invited the claimant to the second redundancy consultation meeting by an email sent on the afternoon of 16 September 2020 (page 86). The email informed that claimant that one result following this second meeting may be that the claimant would be given notice of termination of employment due to redundancy. The meeting was initially scheduled to take place on 21 September 2020.

37. The claimant wrote to Mr Pepper on 17 November 2020 objecting to the calculation of the money he would receive in the event he was made redundant (pages 85 to 86). He set out his position which he has carried through to this claim: that he began working for Toni & Guy in 2003; that he had a probationary period as manager at Farringdon; that he never had an appraisal confirming the probationary placement permanent; and that he understood he would return to Covent Garden. He felt that the redundancy process was a *"poorly disguised constructive dismissal"*.

38. Mr Pepper replied on 21 September 2020 initially to postpone the proposed meeting so he could look into the matters raised. He then wrote a fuller response

in early afternoon of 21 September explaining that the claimant's continuous service ran from 30 November 2010 and that, as the claimant had remained in post as manager at Farringdon beyond the initial three-month period, the arrangement was considered 'successful' (page 84). He also said that he had discovered that the gross weekly pay figure used for the Initial Calculation was based only on earnings at Farringdon. Mr Pepper had subsequently asked for the weekly pay calculation to be based on the claimant's combined earnings from both Farringdon and Covent Garden. This amount came to £508.17 per week, giving a new total redundancy/notice/holiday pay figure of £11,078.52 ("**Second Calculation**").

39. The claimant's second redundancy consultation meeting took place on 15 October 2020, chaired by Mr Stephen Richardson. A transcript of the recording of this meeting was provided at pages 90 to 94. The claimant explained that there had been emails exchanged in relation to the consultation and calculations for potential redundancy package payments. Mr Richardson apologised for the delay following the first consultation meeting and explained that he had stepped in to deal with the redundancy consultation with salon managers. He told the claimant that he also had a proposal to consult with the claimant about. He explained that there could be an alternative role created for one individual to manage both the Farringdon salon and the Kensington salon, and that both current managers would be pooled together and a selection criteria applied for one of the two candidates to take the new role.

40. The claimant felt upset and disheartened by the situation he was in, and was unhappy that others seemed to have concluded that he was going to be dismissed. In relation to the proposal itself, the claimant intimated that any selection criteria would favour the other candidate, based on how he felt he had been treated. He then said *"I know, to be honest I'm not really one to be sitting here and battling someone for a job"*. Mr Richardson asked the claimant if he wanted to go away and think about the proposal. The claimant said he would but reiterated that he was not keen to compete with someone else for a job. The Second Calculation was also discussed. Mr Richardson said that he would look at the basis for calculation again so that he could explain them to the claimant in a detailed breakdown after the call. This information was sent by e-mail on the same evening (page 99).

41. On 18 October 2020, the claimant wrote to Mr Richardson to explain that he had taken legal advice, which he shared part of (page 98). The advice, expressed to be based upon the claimant's description, was to the effect that: TUPE would have applied to the claimant's whole employment within Toni & Guy branded salons; the claimant should have the opportunity to return to the Covent Garden salon; and that this does not seem to be a bona fide redundancy such that talk of compulsory redundancy was premature. The claimant requested that the payment proposal in the event of redundancy be increased to reflect the advice he had been given.

42. The claimant's third redundancy consultation meeting took place on 10 November 2020, chaired by Mr Richardson. There were no transcript or minutes of this meeting in the bundle, but the matters relating to it were described in Mr

Richardson's witness evidence and this evidence was not challenged by Mr Lewis on behalf of the claimant. At this meeting, Mr Richardson confirmed that the Farringdon salon was to close permanently. Consequently, it was no longer possible to consider a potential dual role for the claimant across Farringdon and any other salon.

43. Mr Richardson then wrote to the claimant on 11 November 2020 (page 100) to confirm what he had said the previous day, and advised that the claimant's role was *"likely to be confirmed as compulsorily redundant"*. Mr Richardson also attached a third financial statement (page 102) and copies of payslips from December 2019 to February 2020. It was explained that the average weekly gross pay figure from these three payslips was £416.98. Mr Richardson said that, because this was less than the £508.17 figure provided previously, it had been agreed as a goodwill gesture to use the higher weekly figure given previously. The total payment was to be £10,518.72.

44. The claimant replied on 11 November 2020 (page 105 to 106) expressing confusion at having received three different redundancy proposals with three separate amounts. He also asserted again that his continuity of service should be counted from 2003 and that he should have been allowed to return to work at the Covent Garden salon. He explicitly asserted that this was not, in his view, *"a bona fide redundancy"* and then said he understood that he could only made redundant if all possible job roles he might fill had been made redundant.

45. On 7 December 2020, Mr Richardson and the claimant met to discuss the matters raised in the claimant's e-mail of 11 November 2020. This was the final meeting in the consultation phase. A transcript of the recording of this meeting was provided at pages 109 to 112. Mr Richardson confirmed that the Farringdon salon would definitely close. Mr Richardson also responded to the claimant's e-mail of 18 October 2020 (mentioned in paragraph 41 above). He explained to the claimant that the respondent's records show no transfer to Essensuals in November 2010, but that he appeared to have left a previous employer and joined separately. The claimant then asserted that the employers were associated to each other. Mr Richardson confirmed that the respondent would not calculate continuity of service from before 30 November 2010 and the claimant agreed that he could consult with Acas if he disagreed.

46. During the final meeting, the claimant asserted that the respondent had decided to remove him in July 2020 and that the redundancy process was a means to put that into effect (page 110). Mr Richardson disagreed with this and pointed out that, if that was the case, the claimant would have been dismissed in July 2020. In relation to other potential roles, Mr Richardson noted that the Farringdon salon was to close and so there were no other options within that salon. The claimant was upset about being included in the redundancy process but agreed to receive a finalised redundancy proposal after the meeting. Mr Richardson explained to the claimant that the redundancy payments would normally be calculated on the basis of three full months' pay prior to the claimant going on to furlough.

Dismissal and appeal

47. After the meeting on 7 December 2020, Mr Richardson wrote to the claimant to confirm that his role was now redundant (page 113). He confirmed that the respondent would honour its goodwill commitment to use the figure of £508.17 as weekly gross pay rather than a lower figure which would have been calculated in the usual way. The letter outlining redundancy informed the claimant that his employment was effective from 7 December 2020 and that he would be paid 10 weeks' pay in lieu of notice. It also informed him of his right to appeal (page 114). The financial statement attached to the letter stated that £12,094.37 in total would be paid in respect of redundancy pay, notice pay and holiday pay. The increase in this last calculation was caused by the claimant accruing 10 years' complete service during the consultation period and to take account of an additional holiday entitlement.

48. The claimant was paid his furlough pay as usual on 8 December 2020 as his dismissal was made after payroll had been processed.

49. On 12 December 2020, the claimant wrote to appeal the decision to dismiss him (pages 116 to 117), outlining all of the grievances against the respondent that he had mentioned previously. Mr Richardson invited the claimant to an appeal hearing to take place on 18 December 2020, and advised that the appeal would be chaired by Mr Samson with Mr Pepper in attendance.

50. A transcript of the recording of the appeal meeting was provided in the bundle at pages 120 to 130. The claimant raised the same issues he had throughout the consultation process and Mr Samson restated the respondent's position on those points. Mr Samson asked the claimant when he had ever raised that he was unhappy in his role at Farringdon prior to furlough. The claimant stated that he had spoken to other colleagues and had emails about the problems (page 121 to 123). The claimant was also asked about his employment prior to 30 November 2010, and whether or not he had any documents or tax documents relating to that employment.

51. In cross examination, the claimant was asked about why the emails and documents referred to above have never been provided. He explained that some emails and documents may have been lost, and that others did not say quite what he recalled them to say.

52. On 8 January 2021, Mr Samson wrote to the claimant informing him that his appeal against dismissal had been unsuccessful. Mr Samson found that: there were no errors in the claimant's continuation date; the average weekly salary figure could not be further amended; and the claimant had no right to return to a role at the Covent Garden salon following the closure of the Farringdon salon.

53. The claimant's final payslip on 8 January 2021 shows a recovery for furlough overpaid after 8 December 2020. The claimant's final pay upon redundancy included:

    53.1 Redundancy pay - £5081.70;

    53.2 Notice pay - £5081.70; and

53.3 Holiday accrued - £1930.97.

Applicable law – unfair dismissal

54. Under s98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of redundancy. Redundancy is a potentially fair reason falling within section 98(2).

55. Section 139(1)(b)(i) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

56. In *Murray v Foyle Meats Ltd [1999] ICR 827*, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell [1997] ICR 523* and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or of the various states of affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have diminished or ceased. The second question is of causation: whether the dismissal is wholly or mainly attributable to that state of affairs.

57. The requirement for employees to do work of a particular kind is what is significant when considering redundancy. The fact that 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 (*McCrea v Cullen and Davison Ltd [1988] IRLR 30*). A redundancy situation will therefore arise where an employer reorganises and redistributes the work so that it can be done by fewer employees. There is also no requirement for an employer to show an economic justification for the decision to make redundancies (*Polyflor Ltd v Old [2003] UKEAT 0482/02*).

58. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, section 98(4) of the Employment Rights Act 1996 states that the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with the equity and substantial merits of the case.

59. In *Williams v Compare Maxim Ltd [1982] ICR 156*, the Employment Appeal Tribunal laid down matters which a reasonable employer might be expected to consider in making redundancy dismissals:

59.1 Whether the selection criteria were objectively chosen and fairly applied;

59.2 Whether employees were given as much warning as possible and consulted about the redundancy;

59.3 Whether, if there was a union, the union's view was sought;

59.4 Whether any alternative work was available.

60. However, when determining the employer's reasonableness, the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead, the question is whether the decision of the employer to dismiss lay within the range of conduct which a reasonable employer could have adopted. The Tribunal should also keep in mind that the matters outlined in *Compare Maxim* are not a strict checklist and that a failure of the employer to act in accordance with one or more of these principles does not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

61. Employers have a great deal of flexibility in defining the pool from which they will select employees for dismissal. In *Thomas & Betts Manufacturing Ltd v Harding [1980] IRLR 255* it was held that employers need only show that they have applied their minds to the problem and acted from genuine motives. Provided the employer has genuinely applied its mind to who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it *Capita Hartshead Ltd v Byard [2012] IRLR 814*.

62. Where the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, they believe was available and give evidence to the effect that he would have taken such a job as this is something that is within their primary knowledge (*Virgin Media Ltd v Seddington and Eland [2009] UKEAT/539/08*).

Applicable law – calculation of weekly pay for redundancy pay, notice pay and holiday pay

63. Where an individual is paid commission as a regular part of earnings, it is remuneration which can be apportioned as the tribunal deems appropriate (*Weevsmay Ltd v Kings [1977] ICR 244; J and S Bickley Ltd v Washer [1977] ICR 425)*.

64. Where remuneration varies according to the amount of the work done during normal working hours but not according to the time or days of work done, then an individual will be a piece worker. A week's pay for piece workers is normally calculated by taking the average hourly rate for the normal working hours over the previous twelve weeks *(section 221(3) Employment Rights Act 1996).*

65. Where a piece worker is furloughed prior to their employment terminating, then weekly pay is to be calculated for redundancy purposes with reference to the normal full pay, rather than the furloughed hours, over the twelve weeks up to the calculation date (*Article 5 The Employment Rights Act 1996 (Coronavirus,*

Calculation of a Week's Pay) Regulations 2020). Commission payments are explicitly caught by those regulations under *Article 2(4)*.

66. The common theme across the legislation and regulations is that the calculation of a week's pay for purposes relating to the ending of an employment should be taken across the twelve weeks immediately prior to the employment being ended.

Discussion and conclusion – unfair dismissal

67. The claimant asserted that he had the right to return to the Covent Garden salon and that a failure to allow this meant that his dismissal was ultimately unfair. I have found that the claimant's move to the Farringdon salon was a permanent arrangement by the time of his dismissal and he had no right of return. Consequently, this argument from the claimant fails.

68. I should still consider whether the claimant's dismissal was unfair for other reasons. Considering the authorities and the facts found above, it is clear to me that the pandemic necessitated a reduction in headcount for the respondent. The respondent could not function in the lockdown, was losing money, and the need for people to do the work the claimant did ceased for a time, and then diminished. The respondent therefore needed to make redundancies, and did make multiple redundancies, to the point where it closed salons as part of its cost-cutting exercise. It is clear to me that the claimant was caught in a genuine redundancy scenario.

69. The claimant was warned about the prospect of redundancy and was invited to go through a period of consultation involving multiple meetings. The respondent explored possibilities for him to stay in employment, although these possibilities never came to fruition. The conversations held during the consultation process show that (1) there was indeed consultation, (2) the claimant had the chance to inform the consultation, (3) the respondent responded to the claimant's views in the consultation (particularly in relation to the redundancy package), and (4) the respondent did consider options to find alternative employment for the claimant.

70. The respondent had a wide discretion in terms of selecting roles for redundancy, and it is clear from the evidence that there was a process of considering options and adjusting the restructuring plan to take account of current factors. The claimant's role was caught because there was a diminished need for salon managers, and then ultimately it was decided to close the salon that he worked at entirely. It is also notable, in my view, that the claimant did not appear keen to compete for an alternative employment or redeployment in the face of the circumstances. He expressed a desire to leave the respondent's employment during the process and it appears from the evidence that he did not strongly deviate from that position.

71. When considering the reasonableness of the respondent's actions of these points, I must not fall into the substitutionary mindset. I must decide whether the decision to include the claimant's role in this way and to ultimately dismiss him was within the band of reasonable responses open to a reasonable employer in the circumstances. In my judgment, the respondent clearly acted within the range of

reasonable responses when deciding to dismiss the claimant. I have the same view in relation to the matters pertaining to the appeal and its outcome. The claimant had no right to return to a previous role, which formed the basis of his appeal in respect of this head of claim.

72. Ultimately, I conclude that the claimant was dismissed for the reason of redundancy, that the dismissal was fair after the respondent followed a fair process. The claimant's claim for unfair dismissal is consequently unsuccessful.

Discussion and conclusion – redundancy pay

73. I have found that the claimant's continuous service for redundancy purposes began on 30 October 2010 and not earlier as the claimant argued. As a result, there was no error to the years of service element used to calculate the claimant's redundancy pay.

74. The respondent used the weekly figure of £508.17 per week to calculate the claimant's redundancy pay, notice pay, and pay for accrued but untaken holiday. These were calculated using a period of time where the claimant had higher earnings than during the period set out by the legislation for such a calculation. The respondent clearly explained this to the claimant but said it would pay the higher figure regardless as a goodwill gesture.

75. As a result, the claimant's weekly pay figure used for his redundancy calculate was greater than that to which he was strictly entitled. He has already been paid more than he was due under this head of claim and so this claim cannot succeed and is dismissed.

Discussion and conclusion – notice pay

76. For the same reason as with the weekly pay calculation in relation to redundancy pay above, this claim cannot succeed and is dismissed.

Discussion and conclusion – holiday pay

77. For the same reason as with the weekly pay calculation in relation to redundancy pay and notice pay above, this claim cannot succeed and is dismissed.

Employment Judge Fredericks
4 January 2022

Sent to the parties on:

24/01/2022
For the Tribunal Office:

……..……..