EMPLOYMENT TRIBUNALS

Claimant: Ms D Yates

Respondent: SMG Europe Holdings Limited

Heard at: Manchester Employment Tribunal **On:** 18 and 19 January 2022

Before: Employment Judge Dunlop (sitting alone)

Representation

Claimant: Mr M Tilstone (HR professional)
Respondent: Ms R Levene (counsel)

RESERVED JUDGMENT

The claimant's claim of unfair dismissal is not well-founded. That means it does not succeed.

REASONS

Introduction

1. The respondent company owns and operates the Bridgewater Hall ("the Hall"), a well-known concert venue in Manchester. The claimant, Ms Yates, was employed as Head of Marketing for the Hall. She commenced employment in 2008 and was dismissed, ostensibly by reason of redundancy, on 25 November 2020.

2. Ms Yates claims that that dismissal was unfair. That is the only claim in these proceedings.

The Hearing

3. I heard the case over two days on 18 and 19 January 2022. The hearing was fully in person. There was an agreed bundle of documents of around 300 pages. No further contemporaneous documents were produced in the course of the hearing. I read those documents which were referred to in the

witness statements and which the representatives took me to in cross-examination.

4. I adjourned for two hours on the first morning, and asked the parties to consider the production of a joint chronology detailing covid restrictions affecting the operations of the Hall. A document was produced, and I draw on that, to some extent, in my findings below.

5. After that adjournment I heard from the respondent's witnesses, namely:
   5.1 Mr Andrew Bolt, CEO of the Hall;
   5.2 Ms Jeanette Boss, HR Advisor;
   5.3 Mr Richard Still, Senior Vice President Finance & Administration, Europe

   Each of those witnesses was cross-examined by Mr Tilstone, who is a friend of Ms Yates. Mr Tilstone told me that he is an HR professional and that he has some prior experience of Employment Tribunal litigation, but not in recent times. Mr Tilstone conducted the case in a careful and courteous manner, he was assiduous in putting forward every argument that could be made on Ms Yates' behalf.

6. Ms Yates then gave evidence on her own behalf, and was cross-examined by Ms Levene.

7. Both parties had prepared written submissions and had taken time to research the relevant law and produce copies of legal authorities. I thank and commend both representatives for their thoroughness in this regard. I gave the representatives time to consider each others' written submissions before I heard each of them in oral submissions.

8. The oral submissions concluded at 5pm on the second day, meaning that I had to reserve the Judgment, which I now give in writing.

The Issues

9. I discussed the Issues at the outset of the hearing with the parties. They were agreed to be as follows:

   9.1 Whether the reason for the dismissal was redundancy (the claimant contended that there was not a genuine redundancy situation within s.139(1)(b)(i) Employment Rights Act 1996 ("ERA"));
   9.2 Whether, if this was a redundancy dismissal, it was nonetheless an unfair dismissal applying s.98(4) ERA. In particular, the following issues arise, either as general matters to be considered in redundancy cases, or as matters specifically raised by the claimant in this case:
      9.2.1 whether there was appropriate warning of the redundancy;
      9.2.2 whether there was appropriate consultation;
      9.2.3 whether there was appropriate selection;
      9.2.4 whether there was appropriate consideration of suitable alternative employment;
      9.2.5 whether the respondent ought to have sought volunteers;
      9.2.6 whether the claimant's selection for redundancy was predetermined;

9.2.7 whether the claimant was selected purely because she was the highest paid employee in the marketing department;

9.2.8 whether the alternative structures proposed by the claimant were given proper consideration;

9.2.9 whether proper consideration was given to using furlough as an alternative to dismissal;

9.2.10 whether the claimant should have been given opportunity to challenge evidence obtained by Mr Still following her appeal hearing.

9.3 If this dismissal was unfair, how should the compensation due to Ms Yates be reduced (if at all) to reflect the possibility that she may have been fairly dismissed for redundancy in any event ("the ***Polkey*** point")?

Findings of Fact

10. The respondent group operates 11 venues across the UK, and a number of others in Europe. Each venue is run by a CEO or General Manager. In the case of the Hall, this was Mr Bolt who had taken up the role in 2016. The number of staff employed at each venue varied. The Hall employed around 70 staff and another venue in Aberdeen employed a similar number. All the other venues employed fewer staff, with several employing 20-30, and some less than 10. In addition to these employees, the respondent uses a large number of casual workers to support the events it puts on.

11. Mr Bolt reported to the senior management team of the respondent's European operations. In particular, to John Sharkey, the Executive Vice-President. Mr Still was part of this central management function, as was Ms Catrin Lee, the Human Resources Director. As Head of Marketing, Ms Yates reported directly to Mr Bolt and was part of the senior management team of the Hall. Her salary was slightly below £50,000.

12. There were a number of conflicts in the evidence of Mr Bolt and Ms Yates as to how the marketing department worked on a day-to-day basis before the covid pandemic. Generally, I found that the evidence of Ms Yates was more specific and detailed than that of Mr Bolt. That is perhaps not surprising given their respective roles. I formed the impression that Mr Bolt was an honest witness, who sought to give evidence to the best of his recollection. However, it was notable that a number of his answers did not quite address the point that was being put and that he had a tendency describe matters in broad terms rather than to be confident talking about the specifics.

13. Whilst Ms Yates' evidence demonstrated a much stronger engagement with the day to day work of the team, I did not feel able to take it entirely at face value. There were some aspects of her evidence which were difficult to accept and I formed the impression that, whilst generally credible, she was not above exaggerating her evidence, or emphasizing certain facts above others, where she felt that that better served her case.

14. My account of the roles and workload of the marketing department below represents the most accurate view, in my judgment, taking into account the

evidence of both of the main witnesses as well as the matters which are documented in the bundle.

15. In late 2019, there were three permanent members of the marketing team, all of whom reported to Ms Yates. These were:
    15.1 Louise Deehan, Graphic Designer;
    15.2 Eleanor Higgins, Tessitura Administrator;
    15.3 Simon Holmes, Marketing Campaigns Manager
    Mr Holmes and Ms Higgins salaries were both under £30,000, so significantly lower than Ms Yates's. (I did not hear evidence as to Ms Deehan's salary.)

16. Ms Deehan was a professional graphic designer who completed design work for the respondent's paper copy marketing materials and its digital marketing materials. She occasionally helped out with other tasks being undertaken by the team, but essentially hers was a stand-alone role. The parties agree that Ms Yates could not, and did not, undertake graphic design work, nor could any other members of the team.

17. Ms Higgins had joined the business in autumn 2018. She had commenced maternity leave in May 2019 and no additional maternity cover had been brought in. Her work was covered by the team, but primarily by Ms Yates' herself, in the period from May 2019. "Tessitura" is a software programme which enables venues to manage ticket bookings. It requires specialist skills to operate it, with more skilled/experienced operators being able to engage in more advanced functions and to get more value our of the system and the data it contains. Although used in many London venues, it is not used in many local venues, and so it was difficult to recruit employees with these skills. This could be partially addressed by the purchase of an additional support package from the software vendor. The Hall had that package in place throughout the relevant period, including when Ms Higgins' was in post.

18. I am unconvinced by Mr Bolt's assertion that Ms Higgins' expertise in this software meant that she was much more of a specialist than Ms Yates. I am confident that Ms Yates had good abilities in running Tessitura, as demonstrated by the fact that she covered this role, alongside her own role, during Ms Higgins' maternity period. She is evidently a competent woman, and could easily have developed additional skills in the operation of the software if her role required that of her.

19. Mr Holmes was a long-standing employee with about 14 years' service. As marketing campaigns manager he worked on marketing communications for various events happening at the Hall. The cross-over between his work and Ms Yates' work is discussed further below.

20. In addition, the team had the support of a self-employed freelancer called Jenny Thomas. Ms Thomas assisted with general work in the department and in supporting Ms Yates, particularly whilst she herself was covering Ms Higgins' Tessitura work.

21. Performances at the Hall are put on by promoters. There are some major promoters who run regular series' of events (such as performances by the

Hallé and BBC Philharmonic Orchestras). There are other commercial promoters who may be organising tours for particular shows, or even one-off events. The promoters may predominantly do their own marketing, or may require marketing services from the Hall.

22. The work of the marketing team was, naturally, focused on the calendar of events taking place. The team produced four printed brochures per year, setting out each event in the coming 3-month period. Separate brochures were produced for the "International Series" of concerts. These would be mailed to patrons and distributed widely. In addition, they produced and distributed other material specific to particular events or series of events, and digital material. All of this work involved liaising with other departments at the Hall (Scheduling, Box Office) and with the promoters of the events.

23. There was a dispute as to how much of Ms Yates' work involved working on the brochures. Ms Yates said this was no more 10 working days per year and that other members of the team, particular Ms Deehan, spend much more of their time on this. Mr Bolt estimated that Ms Yates spent up to 60% of her time on the brochures. I suspect that some of this discrepancy can be put down to a different perspective being taken by the witnesses, and that Ms Yates had in mind direct work reading, editing and otherwise working on the document itself, whereas Mr Bolt was taking a wider view of the necessary communications, meetings and so on that indirectly feed into the production of the brochure, which he saw as the major product of the marketing department. I find that the reality most likely sat somewhere between these estimates.

24. The marketing team worked in a very cooperative way, with everyone pulling their weight and covering the tasks that needed to be done at a given time. Where work was specific to a particular event, who took the lead on that was likely to be determined by what the event was (and often who the promoter was). I accept Ms Yates' evidence that, as well as having strategic relationships with executives within the promotion companies, she was the day-to-day contact for many events, including Hallé and BBC philharmonic events. For other events, particularly from 'commercial' promoters, Mr Holmes would tend to take the lead and he had his own relationships with key individuals in those areas. In this area, there was a close correlation between the type of work being done by Mr Holmes and that being done by Ms Yates, who did the work by default would depend on who was the more natural fit with that event, although both would readily cover for each other depending on day-to-day demands and availability. As Ms Yates was also covering for Ms Higgins, as well as coordinating the brochures and doing some other management/coordination work, I find it likely that Mr Holmes spend a significantly higher proportion of his time on this general marketing communication work that Ms Yates did.

25. In addition to doing the general marketing work, alongside the others in the team, as the Head of Marketing Ms Yates coordinated that work. She was part of the Hall's senior management team and attended meetings and worked with Mr Bolt in that capacity. However, the amount of day-to-day work required (particularly during Ms Higgins' maternity absence) meant that, in practice, the strategic and managerial work that Ms Yates could do was limited. She spent no more than 10% of her time on that work.

26. During 2019 Ms Yates and Mr Bolt both considered the amount of time that Ms Yates was spending doing, rather than managing, the marketing workload, to be a problem. In February 2020 a marketing assistant, Ellis Coopey, was recruited. It was hoped that his recruitment would ultimately free-up Ms Yates from the day to day work. Of course, Ms Higgins' return from maternity leave in May 2020 would also have a significant impact on this.

27. Instead, of course, a few weeks after Mr Coopey joined, the respondent was forced to close the Hall and cease all performances due to the Covid-19 pandemic. The Hall closed on the evening of Friday 20 March. Initially, it was hoped that the closure would be relatively short-lived. In particular, I accept Mr Bolt's evidence that there was a Hallé orchestra concert scheduled for 18 April, and in the very early stages of the pandemic, it was hoped that the Hall would be able to reopen in time for that event. Subsequently, hopes focused on an early summer re-opening, perhaps in June 2020. As it transpired, although there were some streamed performances, the Hall did not re-open at all as a live venue until June 2021 (limited capacity), with full capacity performances resuming in September 2021.

28. At the end of March 2020 the respondent sought to place the majority of its employees on furlough. The purpose of the plans was to "protect jobs and the business for the long term". It was emphasised that no redundancies were envisaged and that the management team believed in a future returning business "with everyone in it". Mr Bolt was asked to identify a skeleton team to undertake necessary tasks during the closure period. Mr Bolt chose to keep Ms Yates working and asked her to identify one more person from the marketing team, she chose Ms Deehan. The other members of the team were placed on furlough and the work being done by the freelancer, Ms Thomas, was terminated. Ms Yates agreed to reduce her hours to 80% of her previous hours and reduce her pay to 90% as part of further cost saving adopted across the business for many of those remaining at work.

29. As a major part of the respondent's work at this time involved communicating to its patrons about cancelled shows, with details of rescheduled events, refunds etc, it is unsurprising that the marketing team formed a significant proportion of the employees kept working at this time. This work did not directly correlate to the pre-pandemic work of the department, which, of course, was all about promoting events that were actually happening. However, of the tasks previously undertaken it most closely matched the marketing communications work which had been predominantly done by Mr Holmes and Ms Yates. It also required the continued use of Tessitura.

30. Ms Yates has emphasised that she was kept off furlough in preference to other members of the team as her skills were considered by Mr Bolt to be 'essential' for the work that needed to be done. Mr Bolt acknowledges this, but notes that this was a hugely uncertain, and rapidly changing, situation.

31. From the start of April until early June Ms Yates was engaged in the full range of work required from the department in the new circumstances. The quarterly brochure that had been due to go to press at the end of March was delayed, and then abandoned. No other brochures were created given the on-going cancellations and uncertainty.

32. Shortly before 10 June, Ms Yates was informed that she was to be placed on furlough for three weeks from that date. The reason for this was that the government had announced plans to adapt the job retention scheme to introduce 'flexible furlough'. However, this would apply only to employees who had spent a minimum of three weeks on furlough already. The respondent therefore proposed to furlough certain employees who had not previously been furloughed in order to retain maximum flexibility going forward. The genuineness of this rationale is supported by the documents in the bundle and, as I understand it, is not challenged by Ms Yates. Ms Yates agreed to be furloughed, as did Ms Deehan. Mr Holmes and Ms Higgins were brought back from furlough at this point to cover the work that Ms Yates and Ms Deehan had been doing.

33. Ms Yates expected to hear on Friday 26 June whether she would be returning to work the following week. (The three weeks were due to expire on Wednesday 1 July). Mr Bolt emailed to say that he was not able to provide this information on the Friday, and would advise Ms Yates (and others) on Monday 29th. Ms Yates gave evidence that she chased Mr Bolt for a decision on Monday 29th and was reassured that she and Ms Deehan were his "preferred team" and would be returning to work. Mr Bolt's evidence was that he did not remember any such conversation. Whilst I accept that such a call may have taken place and that Mr Bolt may well have sought to be reassuring, I do not accept that Mr Bolt would have stated categorically that Ms Yates and Ms Deehan were his preferred team, and would definitely be returning. That seems inherently unlikely in view of the events that followed.

34. On Tuesday 30 June Mr Bolt telephone Ms Yates and told her that she would be remaining on furlough. Ms Yates has said that Mr Bolt's tone was very sombre and she felt like he was talking to her as if someone had died. With hindsight, she believes this was because he knew at this point that she was going to be made redundant. Broadly, I accept her evidence as to Mr Bolt's tone, and that she found the conversation worrying.

35. Mr Bolt gave evidence that "around the first or second week of July" he "received the call from John Sharkey that [he] had been dreading", informing him that there would have to be redundancies across the business. Overall, Mr Bolt was told the respondent was looking to cut around one third of its labour costs, and he was asked to propose redundancies at the Hall in line with this. The statement goes on to say that "over the next few days" he produced a proposal for the removal of 18 roles.

36. That timeline needs to be scrutinized against the document at page 121-122 of the bundle, which is a screenshot of a phone message from Catrin Lee to Mr Bolt dated Monday 6 July. Ms Lee is sending Mr Bolt photographs of her notes "from our meeting on Friday" i.e. Friday 3 July. The notes include a list of the 18 names put forward by Mr Bolt, including Ms Yates'

name. This means that Mr Bolt had prepared his proposal and shared it with Mr Sharkey and Ms Lee in a call on Friday 3 July. Evidently, he did not come up with these names 'off the cuff' in the call. Most likely, as per his witness statement, he took a few days to come up with them. That means that the initial call from Mr Sharkey took place not in the first or second week of July, but most likely during the week ending 26 June, or at the very latest on 29 or 30 June.

37. I pause to note that the version of the list of names in the bundle had been redacted so that only Ms Yates' name was visible. This resulted in an exchange between Mr Tilstone and Mr Bolt during which Mr Tilstone attempted to establish that this was, indeed, a list of name of those selected (or proposed to be selected) for redundancy and Mr Bolt appeared to experience some difficulty in commenting on, essentially, a blank piece of paper. Following my intervention, it was clarified by Ms Levene, on instructions, that it was indeed a handwritten list of eighteen names of those proposed to be selected for redundancy by Mr Bolt. The fact that there was such a list of names, particularly as it was attached to a dated phone message was a relevant piece of evidence in the case. It was not appropriate for it to be redacted in such a way which caused uncertainty as to what it was. It was not suggested by Mr Tilstone (and I do not suggest) any degree of bad faith in the respondent's actions, which were motivated by a desire to maintain confidentiality in the personal data of other employees. However, that principle must not be allowed to obstruct the disclosure of relevant evidence in litigation. The respondent's representatives should, in future, give more careful consideration as to whether redaction is truly necessary where the information is limited, for example, to the name of a co-worker. If it is thought to be essential, thought must then be given to how it can be done in a way which preserves the character of the evidence whilst protecting the identities of the unrelated parties.

38. In Mr Bolt's evidence, he asserted that the decision to keep Ms Yates on furlough was unconnected with the redundancy selection. It had become apparent, he asserted, that the on-going workload of the department had changed, as there was going to be no swift resumption of the event programme. The roles of Mr Holmes in liaising with promoters and Ms Higgins in managing Tessitura were more relevant than Ms Yates' role at that time.

39. I do not accept that evidence. When the timeline is examined closely the irresistible conclusion is that Mr Bolt knew, or suspected, that redundancies were imminent at the time when Ms Yates was due to return. He also knew (because it was his decision) that she was likely to be selected, and for reasons connected to that he decided she should remain on furlough. Those reasons, however, were essentially the same reasons. The immediate 'panic' of March 2020, which required leadership, and a core team with the broadest skillset, had given way to a more stable situation where there was a 'churn' of day-to-day marketing work to be done as shows were cancelled, but both the broad functions of the pre-covid department and the need for a strategic emergency response had subsided.

40. The 'proposal' put forward by Mr Bolt to Mr Sharkey and Ms Lee on 3 July was simply the list of names. There was no accompanying justification as to how Mr Bolt had reached his decision, or any comparison of how the new structure would operate in comparison with the old one, whether in relation to the marketing department or elsewhere. It may have been that some justification was provided in the phone call, but there is no evidence that the business sought or required that. The simple requirement was for a blunt cut in labour costs, and the burden fell on Mr Bolt to provide that.

41. Of course, the background and context for this requirement was an unprecedented and existential threat to the existence of the Hall itself, as well as to the broader live music industry. I am satisfied that Mr Bolt was truthful in saying that he had "dreaded" the call from Mr Sharkey and that selecting the names for his list was a very painful task, reflected in his sombre tone when he spoke to Ms Yates on Tuesday 30 June. I am also satisfied that he acted genuinely in selecting the roles, including Ms Yates', which in his view represented the least-bad solution as to how the Hall could make the requisite cuts to its wage bill. Whether this selection was fair within the meaning of the law is a different question, considered further below.

42. During the course of July Ms Yates remained on furlough. Mr Coupey, the Marketing Assistant, was also on Mr Bolt's list. He had less than two years' service and was invited to a meeting at which he was dismissed for redundancy. Mr Bolt did not consult with Ms Yates, as Head of Marketing, as to the decision to make Mr Coupey redundant.

43. For those employees with more than two years' service, Ms Boss worked with Mr Bolt to prepare a schedule of initial consultation meetings, scripts for Mr Bolt to use during those meetings and letters and an FAQ document to be issued following the meetings. Initial meetings were scheduled to take place between 28 and 31 July, with follow-up meetings between 3 and 6 August.

44. On 27 July, Ms Yates was invited to a meeting on 30 July. As is common, she was not told in advance that this was a redundancy consultation meeting, as the purpose of the meeting was to notify her that she was at risk of redundancy, and thereby start the consultation process.

45. The scripts and letters were personalised to include a justification of why each particular role had been identified as redundant. In relation to Ms Yates' role, this was:

> *"We have identified that the responsibilities of the Head of Marketing can be absorbed by other roles within the Venue's Marketing Department and the senior management team."*

46. Ms Yates has complained that the letter issued following this meeting commenced "I write to provide a summary of our discussions" when, in fact, the letter had been drafted before the meeting. I do not consider this complaint to be justified. The purpose of that meeting was to notify employees of their provisional selection, with a view to consultation happening in future meetings. The meeting was scripted and, although Ms Yates asked some questions, her meeting largely followed the script. The letter reflected that script, which is entirely appropriate given employees will

not necessarily take in the detail of what they are told in these difficult circumstances.

47. The next meeting took place on 5 August. In that meeting Ms Yates asked for more information as to why her post had been selected as redundant. Mr Bolt set out that the "prognosis for the future is that there is no sign of reopening" and that as a result "the type and amount of work has dropped". He commented "Do we need a very senior role right now in Marketing? Not right now, and not in the medium term." Mr Bolt when on to explain that he considered Mr Holmes was "capable enough" to manage the communications needed in the current situation, Ms Higgins was an expert in Tessitura so able to cover that work, with Mr Bolt himself having enough expertise to make high-level decisions where needed.

48. Ms Yates pressed, suggesting, "so you don't need them to operate at the level that I operate at?" Mr Bolt responded "The overriding factor is that we have to reduce the salary levels. There is not income." There was then a discussion about selection pools, and Ms Boss stated that these would usually be used when looking to reduce the number of employees at a particular level with the same responsibilities.

49. On 10 August 2020 Ms Yates sent a detailed email to Mr Bolt following up from the meeting. She raised various point, the most significant of which was a proposal that, rather than simply making her redundant, the respondent should define three roles required in the new structure and select between all the existing members of the marketing team for recruitment into those roles. She went on to propose that "one of the roles going forward is designated a "first among equals" and receives an enhanced salary to act as a coordinator and contact point. The clear implication of this proposal, although not expressly stated, is that Ms Yates expected to fill the coordinator role, but also that she anticipated that this was likely to pay less than her current role. The email also made various further points, including criticising the respondent's use of the statutory redundancy calculation (as opposed to an enhanced calculation) and criticising the use of furlough payments during notice periods, rather than the use of pay in lieu of notice. There is no real acknowledgment in her email of the catastrophic loss of income which has resulted from the Hall's on-going closure.

50. As a result of the email, the next consultation meeting was delayed. Mr Bolt sent a substantive, and equally detailed, reply on 20 August 2020. In summary, Mr Bolt explained that it was not appropriate to place the entire team at risk and make a selection between them because the downturn in work had disproportionately affected the "*senior elements*" of the work, which he identified as being "*coordinating, supervising the editing and checking of the publication of the venue season brochures including that of the International Concert Series; dealing with the clients on a strategic level who are actively engaged towards the presentation of events at the venue, and the preparation of MCHL Board reports*." He went on to explain that he considered the work of Ms Deehan (in design), Ms Higgins (in Tessitura) and Mr Holmes was continuing. In regard to the latter he stated "*Simon in his role is well placed to continue to speak to clients regarding cancellations, reschedules and on-sales and to work with the other two team members to*

handle public information work that continues as an important aspect of their roles." Mr Bolt went on to explain that a supervisory function of any sort was not required given the limited nature of the work being undertaken, and his own availability to provide any management input required. Finally, he pointed out that the removal of Ms Yates' role resulted in the greatest cost saving and "*whilst this is not the principal reason"* he considered it a valid consideration in the circumstances. For those reasons, the alternative proposal was rejected. The letter then went on to address the ancillary points raised.

51. There was a further long email from Ms Yates on 23 August and a further consultation meeting on 26 August. Essentially, however, this was simply an opportunity for a restatement of both sides' positions. At a final consultation meeting on 2 September 2020, Ms Yates was given notice of her dismissal for redundancy, due to expire on 25 November 2020. She was to remain on furlough during this period. The others in the team were now on flexible furlough, working two days per week, so the drastic reduction in work volume did continue to affect the whole team.

52. On 3 September Ms Yates submitted a subject access request, seeking documents which might provide more information on the rationale for her selection for redundancy. On 7 September she submitted an appeal against dismissal. The appeal contended, broadly, that Ms Yates had made a viable proposal for an alternative to redundancy and the respondent had not explained why this was not acceptable or preferable. It made related points that she ought to have been 'pooled' with the others in the marketing team and that volunteers should have been sought before, if necessary, making selections from that pool and that her redundancy was 'pre-determined'. The latter point was based on the fact that she had been asked to remain on furlough at the end of June and, in relation to that, that a comment had been relayed to her by Simon Holmes that he had been told that he could expect to "be busy" before Ms Yates had been informed that she was at risk of redundancy.

53. The appeal was heard by Mr Still on 25 November 2020. As a member of the European-level tier of management (and specifically the finance function), Mr Still would have had little knowledge of the specific working arrangements of the Hall's marketing team. During the meeting there was discussion about Ms Yates alternative proposal. The meeting notes suggest that Mr Still believed that Ms Yates could have put together a more specific, written and costed, proposal for her alternative, which was also a comment he made in his evidence. This seems a little rich in circumstances where all that was required from Mr Bolt in making his original proposals was a handwritten list of 18 names.

54. Following the meeting, Mr Still spoke to both Mr Bolt and Mr Holmes. Given his lack of personal knowledge about the marketing department, this was an entirely reasonable, perhaps even obvious, step. He rejected the appeal and his letter includes reference to further information/comments he had taken from the other two employees.

Relevant Legal Principles

55. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

56. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (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 sub-section if it … is that the employee was redundant …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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".**

57. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

> **"(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 … have ceased or diminished or are expected to cease or diminish".**

58. The proper application of the general test of fairness in section 98(4) has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

59. The reason for the dismissal is the set of facts known to, or beliefs held by, the employer, which cause it to dismiss the employee (per Cairns LJ in **Abernethy v Mott Hay and Anderson [1974] ICR 323**).

60. A historical conflict between the 'contract' and 'function' tests for determining whether a redundancy situation was established was resolved by the EAT in **Safeway Stores plc v Burrell [1997] ICR 523**, later approved by the House of Lords in **Murray v Foyle Meats Ltd [1999] ICR 827**. Both those cases recognise that the question of whether there is a diminution in the employer's requirement for employees to carry out work of a particular kind is distinct from the subsequent question of whether the dismissal of the claimant employee was wholly or mainly attributable to that diminution.

61. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

62. The same case also lays down the (now settled) principle that:

> **"it is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted."**

63. On the question of selection pools, this, as with other points, is simply part of the over-arching consideration of reasonableness. It has long been established that an employer has a wide measure of flexibility in how pools should be determined, and long as that determination is reasonable (in a "band of reasonable responses" sense). One expression of this principle which is often cited, is the dicta of Mummery J in **Taymech v Ryan [1994] EAT/663/94**:

> **There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a question for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem."**

What is to be taken from that dicta, is not simply that it will be hard for a claimant to challenge an employer's decision as to the pool, but that, in order to benefit from the wide margin of discretion, the employer must genuine apply its mind to the question of the pool. There are a number of other cases on this point, many of which are discussed in the case of **Capita Hartshead Ltd v Byard 2012 UKEAT/0445/11/RN** which was discussed during the parties' submissions.

64. Mr Tilstone relied heavily on the EAT case of **Fulcrum Pharma (Europe) Ltd v Bonassera UKEAT/0198/10/DM**. This case concerned the redundancy of a Human Resources Manager in circumstances where the Tribunal found no proper consideration had been given to the possibility of

"pooling" the claimant with a more junior employee who was also employed in the HR function. The EAT upheld the ET's decision in relation to the consideration given to pooling, but determined that the Tribunal had substituted its own view by determining that a pool of two should have been used. The matter was remitted to be reheard by a different Tribunal.

65. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

> **"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant … when he said:**
>
> **'Fair consultation means:**
>
> **(a) consultation when the proposals are still at a formative stage;**
>
> **(b) adequate information on which to respond;**
>
> **(c) adequate time in which to respond;**
>
> **(d) conscientious consideration by an authority of the response to consultation".**

66. On the question of whether an employer ought to offer a potentially redundant employee an alternative role at a more junior level, I was referred to **Lionel Leventhal Ltd v North, EAT 2014** and the factors set out by Bean J. including whether there is a vacancy, how different the jobs are and the different in remuneration. This case is also discussed in the **Bonaserra** case, discussed above.

67. A fair appeal process is not as fundamental in redundancy dismissal as it is in other types of dismissal, particulary misconduct. The EAT in **Taskforce (#Finishing and Handling) Ltd v Love UKEAT/001/05** has held that there is no rule that "*a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one.*"

Submissions

68. I am grateful to both Ms Levene and to Mr Tilstone for their written and oral submissions. Mr Tilstone was meticulous in his research and brought to the attention of the Tribunal a number of cases which, in his contention, demonstrated that Ms Yates' dismissal was unfair. A number of these were first instance decisions of other Employment Tribunals. Ms Levene similarly put forward some first-instance decisions to illustrate certain principles in relation to furlough. Whilst I did consider all of these cases, they represent the decisions of separate Tribunals on the facts of individual cases, and do

not seek to lay down principles of law to assist Tribunals in making decisions in other cases.

69. In summary, Ms Levene submitted that this was clearly a redundancy situation. She invited me to prefer Mr Bolt's evidence to Ms Yates' on the distribution of work within the marketing department, and endorsed his evidence generally as straightforward, credible and believable. Ms Levene warned against a "substitution mindset" and argued that it was reasonable for Mr Bolt to select Ms Yates for redundancy given that hers was a unique role and the other members of the team were much more junior. It made perfect sense to leave them in place and strip out a tier of management that had become unnecessary (at least in the medium term) due to the pandemic. Cost was a secondary consideration, she submitted, demonstrated by the fact that the most junior member of the department had been selected as well as the most senior. Also, redundancies in other parts of the organization were not all of those in senior positions. She went on to argue that the consultation process was lengthy and went "above and beyond" what was required by reasonableness.

70. Mr Tilstone submitted that the decision to dismiss Ms Yates was impermissibly driven by cost. This was apparent from the fact that she had been deemed "essential" at the start of lockdown and had been kept working in preference to the more junior team members who were placed on furlough. Although Mr Tilstone accepted that the work of the marketing team had reduced in general, he strongly disputed the suggestion that Ms Yates' work had diminished more than that of other team members, and asked me to accept her evidence on these points, as she was the person best placed to understand the work of the department and how it had changed. He argued that without clear evidence of a reduction in work specifically linked to Ms Yates' role, that I should find there was no redundancy within the s.139 definition and, instead, find that the reason for dismissal was the "arbitrary" decision to impose a one third cut in labour costs. As regards selection, he emphasised that the work done by members of the department was interchangeable and that Ms Yates was able to perform the work done by Ms Higgins and Mr Holmes at least as well as they could themselves. (He accepted this was not the case for Ms Deehan's design work). In those circumstances he argued it was incumbent for the respondent to pool those employees together, if not the whole department, in order to make their selection. In a related point, he submitted that all of the roles had changed, reflecting the department's role in managing the rescheduling of the programme. In those circumstances the respondent was obliged to consider all the on-going roles as 'new' roles and select from the existing team as to who should be recruited into them. He emphasised that Ms Yates had been "pre-selected" for redundancy, some weeks before being placed at risk, and argued that in those circumstances the consultation process was essentially meaningless – as demonstrated by the fact that Mr Bolt gave vague, high-level answers when challenged by Ms Yates on various points in these meetings. Mr Tilstone also submitted that no proper consideration had been given as to whether Ms Yates could be retained on furlough, as an alternative to dismissal. Finally, he criticised the process followed at the appeal stage, when he said Mr Still was required to give Ms yates opportunity to challenge the evidence which he had obtained from Mr Bolt and Mr Holmes.

Discussion and conclusions

71. At the outset, I have no difficulty in finding that Ms Yates' dismissal was by reason of redundancy as defined in s.139(1)(b)(i). As a result of the pandemic, the previous work of the marketing team – carrying out marketing activities to promote current and forthcoming live events at the Hall – had almost entirely vanished. Instead, the team were carrying out related but different tasks arising from the on-going process of cancelling and rescheduling events as the projected date for re-opening moved back again and again. The amount of workload required fluctuated to an extent but, overall, I am satisfied it was drastically reduced from the pre-Covid requirements. Furthermore, where an employer genuinely decides to reduce the number of employees doing work for financial reasons (even if the work is still there to be done) this still falls within the s.139 definition, so Mr Tilstone's reference to the "arbitrary" target of cutting labour expenses by one third do not take him any further. Further, no ulterior motive has ever been suggested for the dismissal. Whichever way it is considered, this was a dismissal due to redundancy.

72. The only question which then arises is whether the respondent acted reasonably or unreasonably in its decision to dismiss Ms Yates on the grounds of redundancy. The guidance from innumerable higher court authorities as to how that question should be answered is both important and helpful, but I remind myself that I must not lose focus on that central, statutory question. With that in mind, I found it helpful to consider the (many) arguments developed in this case in four broad, thematic groups.

Timing points – including warning and "pre-selection"

73. As noted in my findings of fact, I am satisfied that Ms Yates' role was identified as being one of those 'in the frame' for redundancy during the final days of June/first days of July, and I am satisfied that the fact she was asked to remain on furlough was likely to be related to that, at least in the sense that the same causes were operating on Mr Bolt's mind.

74. Handling redundancies is a sensitive process and there must, as a matter of logic, be an elapse of time between a decision maker identifying a role as potentially redundant, and the relevant employee being informed of that at the outset of a consultation process. There is likely to be, as in this case, material to be prepared in the form of meeting scripts and follow-up letters, and time must be made in diaries for meetings and so forth. Where there is a relatively large-scale exercise, as in this case, any number of factors might lead to a delay in starting the process - from annual leave booked by a key player, to waiting for legal advice, to waiting for a particular business event to happen before the prospect of redundancies are announced. Sometimes, for no particular reason, it just takes a period of time to get matters organised.

75. In this case, I see no reason to criticise the delay of around four weeks from provisional selection to the initial consultation meetings during which employees (including Ms Yates) were informed they had been selected. It is unfortunate that the respondent was not (at least retrospectively) more

open about the exact chronology of the decision, as that may have led to reduced suspicion on the part of Ms Yates, but there is nothing inherently wrong with the timeline itself. If Mr Bolt's knowledge that he had proposed Ms Yates' role for redundancy inadvertently seeped into the tone or content of his conversations with her or her colleagues in this period then that is unfortunate, but it does not, of itself, mean that the selection was unlawful or inappropriate. Nor does it mean that the consultation process, when it commences will not be genuine. Both of those are matters which must be considered on their own merits.

76. One particular point raised by Mr Tilstone was the argument that the decision to leave Ms Yates on furlough at the end of June rather than recalling her to work, as had initially been envisaged, meant that the redundancy was predetermined and the supposed consultation process was meaningless. In making this argument he relied on the case of **Thomas v BNP Paribas Real estate Advisory and Property Management UK Ltd 2016 UKEAT/0134/16/JOJ** in which an employee with 40 years' service was placed on "garden leave" at the outset of a redundancy consultation process. The Tribunal found this consultation process was "perfunctory and insensitive" but nonetheless reasonable. The EAT were unsatisfied with this conclusion and remitted the case to a different Tribunal to be reconsidered. I do not detect any point of principle in this case that placing an employee on garden leave at the start of a consultation process is incorrect or will mean that dismissal is predetermined – that was just one part of a substandard process. Further, furlough is not the same as garden leave. There is, all other things being equal, an expectation that a furloughed employee will return to work, and the opposite expectation when an employee is placed on "garden leave".

77. I did not find Mr Bolt's evidence as to why Ms Yates was kept on furlough particularly transparent or easy to follow. However, I accept that it was his prerogative to manage the Hall through this difficult period, using the tool of furlough as he saw fit, with the agreement of the relevant individuals. I further accept that the fact that he had considered Ms Yates to be essential in the panic and uncertainty of late March 2020 does not mean that she would necessarily continue to be essential throughout the pandemic. I do not find that Ms Yates being on furlough during this specific period had any broader implication on the redundancy consultation process, or on the prospects of her ultimately being dismissed or continuing in employment.

78. In cases where there is no selection pool (or a 'pool of one'), the distinction between being provisionally selected for redundancy, or placed at risk, and being finally selected for redundancy might well be a fine one. If the selection of Ms Yates was appropriate (a matter discussed below) then the question is whether the respondent embarked on consultation in a genuine sense and with a necessary open mind again, a matter discussed below. Provided they did, then the dismissal is not "pre-determined" in an impermissible sense, even if it might be, in practical terms, difficult or impossible to avoid. For the reasons set out above, I do not consider that the four week period between Mr Bolt making his proposal and Ms Yates being informed of it detracts from the respondent's ability to say that it entered into the consultation process genuinely.

79. The issue of sufficient warning is one which will be considered in all redundancy cases. It was not a point pushed by Mr Tilstone, and in my view rightly so. This process was not conducted with undue haste, and Ms Yates had sufficient time to put forward the points she wished to make in consultation and to investigate alternative work (notwithstanding the very difficult circumstances of the pandemic).

Selection

80. Mr Tilstone's key attack in this case was on Mr Bolt's decision to use a selection pool of one. Provided this decision was legitimate, then Ms Yates necessarily faced an uphill battle in putting forward anything during the consultation process which would have averted the need for redundancy. This is particularly the case given that the backdrop for the redundancies in the Marketing Team was cost-cutting redundancies across the entire organisation.

81. Many of the points Ms Yates made during the consultation meetings, and in her evidence, amounted to an argument that she could do Ms Higgins' role and Mr Holmes' role just as well as they could. She complained, I consider with some justification, that Mr Bolt had been unable to give her a straight answer when she challenged him on what Mr Holmes could do that she couldn't. I have listened to all the evidence, related at some length above, about brochures, Tessitura, contacts with promoters and the changing work resulting from the pandemic and how this was managed both in the initial phase (by Ms Yates and Ms Deehan) and subsequently, by other members of the team. I am entirely satisfied that Ms Yates could have performed all aspects of Mr Holmes' role, at least as successfully as he could. I am also satisfied that she could perform Ms Higgins' role. To the extent that Ms Higgins' skill and expertise on aspects of Tessitura may have been slightly better, the difference was minimal and Ms Yates was more than capable of making up the ground as and when required.

82. However, this fact alone is not sufficient to lead to the conclusion that the respondent was required to place all of these roles (possibly also including Ms Deehan and/or Mr Coupey) into a selection pool and that, by failing to do so, Mr Bolt acted unreasonably.

83. The respondent did itself no favours by recording the rationale for redundancies at the Hall in minimal handwritten meeting notes, which captured only a list of names. Despite this, I am satisfied that the question of pooling was considered by Mr Bolt and Ms Boss. This is partly based on evidence they gave that they thought they may have to adopt a selection pool to choose two out of three stage-hands for redundancy, but in the end this wasn't needed as all three were made redundant. That evidence is complemented by the respondent's "FAQ" sheet issued to Ms Yates and other employees selected for redundancy, which explains the concept of pooling. Finally, the issue of pooling was explicitly raised by Ms Yates during the consultation process, and I am satisfied that Mr Bolt, supported by Ms Boss, turned his mind to it at that point. Their conclusion was that pooling was appropriate where there were a group of employees at the same level.

84. Mr Bolt was satisfied that it was appropriate to place Ms Yates in a pool of one and I am content that that decision was reasonable in all the circumstances. Ms Yates title, salary and status were all commensurate with a senior position. However, the senior and strategic elements of her role had been squeezed prior to lockdown by the competing demands of the day-to-day marketing work. During lockdown and the subsequent phases of the pandemic, they were further reduced to the extent of being entirely absorbable by Mr Bolt himself. Although in practice Ms Yates was doing work that was interchangeable with that of Mr Holmes and Ms Higgins that was as a result of the fact that the on-going covid-related cancellation work was really work at their level, rather than at hers. It was legitimate for Mr Bolt to take the view that hers was a stand-alone position, and that (given a situation that neither he nor anyone else would have anticipated or wanted), it was legitimate to remove that role from the business without creating the uncertainty and anxiety that would be caused by putting everyone in the department at risk.

85. I have reflected carefully on the **Bonaserra** case relied on by Mr Tilstone, which suggests that there will be cases where employers are obliged to consider a "vertical" pool, where managerial employees are pooled alongside their subordinates. I see this as an approach which is likely to give rise to practical difficulties in many cases. Whilst it might have been unreasonable for the managers in **Bonaserra** not to take that approach, I do not think it was unreasonable for Mr Bolt. There is a distinction between the situation in **Bonassera** which involved a two-person department with a senior and a junior HR role and the more complex situation here, which involved a marketing department of six (at its height) with distinctly different tiers of responsibility. If there was to be a pool constructed, would Ms Deehan be excluded due to her unique design skills, or would those be reflected in the selection criterion? Would Mr Coupey have been part of the pool too? What would be the relevance of jobs or skills that individuals had utilised pre-covid, that were not needed in the medium term given the reduced scope of work? The fact that there are no obvious answers to these questions demonstrates that this was a more complex situation than appears to have been the case in **Bonassera**, which lends support to Mr Bolt's approach.

86. I adopt an observation from HHJ McMullen in the EAT case of **Halpin v Sandpiper Books Ltd UKEAT/0171/11/LA** (one of the numerous authorities handed in by the parties which I have not explicitly referred to above): "Selection only operates, where fairness is concerned, where there is a number of similarly qualified possible targets for redundancy." Here, the targets were not similarly qualified. Ms Yates' position sat at an entirely different tier within the organization. She was the only employee at that level within the marketing department and, despite his rather 'off the cuff' method of reaching the conclusion that this role was potentially redundant without a selection pool, Mr Bolt's decision itself stands up to scrutiny.

87. In effect, I consider that the alternative proposed by Ms Yates really amounted to a proposal that either Mr Holmes or Ms Higgins' should be 'bumped' into redundancy in order that her own role could be saved. This sort of 'bumping' may be reasonable; but that does not mean it will be unreasonable if an employer chooses not to do so. In this case, Mr Holmes

was an even more long-serving employee that Ms Yates, and Ms Higgins had recently returned from maternity leave. I accept the genuineness of Mr Bolt's evidence that he felt it would have been "more unfair" to dismiss either of these employees in circumstances where the work at their level was continuing. That was a reasonable view to take.

88. In a related argument, Mr Tilstone submitted that, as Ms Yates could perform all the work done by Mr Holmes and Ms Higgins, her selection was on the ground of cost alone, and was therefore impermissible. As noted above, I accept that essentially Ms Yates could perform all of that work. There is surprisingly little authority on the degree to which cost is a permissible factor in redundancies. As Mr Still memorably commented in his evidence "*if redundancies could have nothing to do with saving costs, nobody would do them"*. Here, the decision was taken to select Ms Yates for redundancy without creating a selection pool involving other members o the department. I have found that decision to be reasonable on the basis of her seniority within the department, and her much greater pay is a facet of that seniority. However, I accept Mr Bolt's evidence that this was not a case of an employer simply looking to target the most expensive employees, as demonstrated by the fact that employees in a range of roles (including Mr Coupey, who was the lowest paid employee in marketing) were selected.

89. I also reject the suggestion that the respondent was obliged to seek volunteers for redundancy. It could have done so, but there is nothing in the authorities put forward by the parties to support the proposition that it needed to do so in the circumstances of this case.

Consultation

90. Ms Levene described the consultation process in this case as going "over and above" what would normally be expected. To some extent, she is justified in that submission, and no criticism can be made of the number of meetings or of the timescale over which they were conducted. The respondent was flexible, and prepared to delay matters to accommodate Ms Yates in various respects. That is to its credit.

91. I accept that Mr Bolt was genuine in his assertion that Ms Yates' selection for redundancy was "provisional" and subject to change during the consultation process. Given my finding that it was appropriate to have a selection pool of one, and given the backdrop of the catastrophic impact of the pandemic on the Hall, and the wider redundancies being made, it is realistic to acknowledge that the prospect of the consultation process reaching some conclusion other than redundancy was slim. Sadly, that will be the reality in many redundancy exercises and it does not mean that the consultation is not genuine. Although Mr Bolt could have been clearer with his answers on some points, I am satisfied that he did engage with the points put forward by Ms Yates, particularly in his email of 20 August. The fact that he took a different view to her is not, of itself, a fault in the consultation process.

Alternatives to redundancy

92. I have already dealt with Ms Yates' suggestion for an alternative selection mechanism. Generally, a Tribunal will consider whether a respondent has given appropriate consideration to redeploying a redundancy employee into an alternative role. In this case, in view of the on-going closure of the Hall and the wide-ranging redundancy exercise, there has been no suggestion by either side that there were vacancies at any level for which Ms Yates could have been considered. A slightly different point was made, however, about the use of furlough.

93. Mr Tilstone argued that the furlough scheme was there to enable employers to continue the employment of employees for whom there was no work due to the pandemic. In those circumstances, he said, even it was accepted that Ms Yates' work had gone, this was a temporary state of affairs until the pandemic subsided and the Hall could re-open, and that was exactly what the furlough scheme was there to cover. Although he accepted that employees do not have the right to be furloughed, he proposed that there was an obligation in a redundancy situation for the employer to at least turn its mind to the possibility of furlough and to give it proper consideration. This obligation subsisted, in his view, throughout the notice period (as the obligation to look for suitable alternative employment would) and it was relevant that in autumn 2020 the furlough scheme had been extended, and not ended, as had been envisaged at one stage.

94. It is worth noting, in this respect, that the costs to employers of having employees on furlough increased through August 2020 (when NI and pension contributions had to be covered by employers), September 2020 (when those contributions along with 10% of salary costs had to be covered) and October 2020 (contributions plus 20% of salary costs). It was expected that the scheme would come to an end at the end of October. In fact, however, due to a rise in cases, it was extended into November in a form which eventually continued until June 2021. The requirements during this phase were for employers to contribute NI and pension contributions, but not contributions towards salary costs (save for periods of time the employee was actually working).

95. In support of this argument Mr Tilstone relied on the first-instance decision of the Reading Tribunal in a case called **Mhindurwa v Lovingangels Care Ltd 3311636/2020**. That case appears to have involved a small and informal employer operating in the care sector. The claimant was dismissed for redundancy towards the start of the pandemic, without ever having been furloughed. It does not lay down any principles, it is simply a finding of the judge in that case that that employer had not acted reasonably. In this case, I am satisfied that the respondent was much more sophisticated. They were operating in a sector which was particularly hard-hit by the pandemic and were using furlough appropriately to sustain the organisation and its workforce. I accept that they were concerned to be scrupulous in its use. I also accept that there were continuous discussions at senior management levels about the changing furlough provisions, and that the costs of retaining staff on furlough (albeit much reduced by the scheme) were a concern in circumstances where the income of the business had simply disappeared, and there could be no certainty around when it would return.

96. I am satisfied that appropriate decisions were taken on a level of general principle, as to the need to move to redundancies rather than simply relying on furlough. Notwithstanding the changing position (particularly in November 2020) I do not think it was incumbent on Mr Still, as the appeal officer, to rescind Ms Yates' redundancy in favour of furlough because the rules had changed. There were sound reasons for the decision to proceed with redundancies and the long-term outlook for the Hall, with the onset of a winter wave of covid, had become more bleak rather than less.

Procedural criticisms

97. As noted above, there was a specific criticism made of Mr Still in the appeal process. This was that he had spoken to Mr Bolt and Mr Holmes after the appeal meeting and relied on responses from them in formulating his outcome letter, rather than going back to Ms Yates or allowing her to challenge the 'evidence' put forward. I do not consider this criticism is merited, particularly in view of the less stringent standard of scrutiny applied to redundancy appeals as against misconduct appeals. It was well within the bounds of reasonableness for Mr Still to take his concerns to those two individuals and then reach his own conclusions having given consideration to what they said alongside what Ms Yates had said in her appeal. I an content that he acted genuinely in doing so.

Polkey

98. I record for completeness that I heard arguments from the parties as to what reduction, if any, should be made to any compensatory award to reflect the possibility that the claimant would be fairly dismissed in any event. As I have found that the dismissal was not unfair, I have not made any determination of these arguments.

Conclusion

99. For the reasons set out above, I find that the claimant's claim of unfair dismissal is not well-founded. At the end of the hearing a date (25 May 2022) was provisionally identified for a further hearing to determine remedy. That hearing will no longer be needed and is cancelled

Employment Judge Dunlop
Date: 26 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
27 January 2022

FOR EMPLOYMENT TRIBUNALS