EMPLOYMENT TRIBUNALS

Claimant: Mr Thomas Shorey

Respondent: Complete Sports Solutions Limited

Heard at: Cardiff **On:** 14th – 17th February 2020

Before: Employment Judge Grubb
(sitting alone)

REPRESENTATION:

Claimant: Ms B Davies (Counsel) **Respondent:** Mr Islam-Choudhury (Counsel)

Reasons

Introduction

1. These are the written reasons for the judgement handed down on 16th February 2022. Written reasons having been requested at the hearing.

2. This is a claim by the Claimant for unfair dismissal and unlawful deduction of wages. Essentially, the Claimant claims that he was dismissed so the Respondent could avoid making payments of salary, bonus and shares to the Claimant. The Claimant further claims that the dismissal was procedurally unfair in that there was inadequate warning, consultation, or discussion of alternatives to redundancy.

3. The Respondent denies unlawful dismissal stating that the dismissal was on ground of redundancy due to the disastrous effect the Covid 19 pandemic had on the travel industry. It contends that its approach was fair in all the circumstances.

4. The Respondent deducted some £15,000 from the Claimant's notice pay which were sums the Respondent says was still outstanding under a loan agreement between the Claimant and Respondent. The Respondent contends that even if those sums were wrongfully deducted at the time, then any award should be adjusted to account for the £15,000 on the basis the sums under the loan agreement remain outstanding.

5. The Claimant says that the Respondent was not entitled to make those deductions on the basis that there was no written consent/agreement to do so. In any event, the parties had already agreed that £10k of the loan had already been repaid having been offset against a bonus period for the year ending October 2019. The Claimant contends that the tribunal has no power to set off sums against an unlawful deduction of wages claim including in the manner asserted on behalf of the respondent.

Issues

6. The issues to be determined by the Tribunal were agreed at the outset of the hearing as those identified at the case management hearing on 1st June 2021 beginning at page 46 of the bundle, less those that had fallen away by amendment or concession. Since the case management hearing the Respondent had made up the sums outstanding in respect of the Claimant's redundancy payment such as would extinguish any basic award, the claim in respect of car allowance and deduction of loan payments had been amended to an unlawful deduction of wages claim and the Respondent had accepted that the car allowance was properly payable and that an order should be made accordingly.

7. The remaining issues at the outset of the hearing were agreed to be:

a What was the principal reason for dismissal?

b If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular whether:

i the Respondent adequately warned the Claimant;

ii the Respondent adopted a reasonable selection decision, including its approach to a selection pool;

iii the Respondent took reasonable steps to find the Claimant suitable alternative employment; and

iv dismissal was within the range of reasonable responses.

c If the principal reason was not redundancy was there a substantial reason capable of justifying dismissal, namely business reorganisation?

d Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

e If the Claimant was unfairly dismissed, on the basis that the procedure was unfair, should there be a reduction under the principles of: **Polkey v AE Dayton Services Ltd [1987] IRLR 503.**

f What should the compensatory award be?

g Did the Respondent make an unauthorised deduction from wages and if so how much as deducted?

i Was any deduction required or authorised by statute?

ii Was any deduction required or authorised by a written term of the contract?

iii Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

iv Did the Claimant agree in writing to the deduction before it was made?

v How much is the Claimant owed?

h Is the tribunal permitted to deduct any sums awarded for unlawful deduction of wages against the sums outstanding under the loan agreement? If so, should it?

Procedure

8. The hearing was conducted wholly remotely via CVP as previously agreed by the parties and set out in the case management order of 1st June 2021.

9. The tribunal had before it the following documents:

a Hearing bundle of 568 pages.

b Witness statements from:

i The Claimant

ii Bryan Faint (W/s & w/s1), Office and tour manager with the Respondent until his resignation in July 2019.

iii Bryan Llorente, head of operations at the Respondent until July 2020.

iv Jamie Digwood, Director of the Respondent

v Hayley Digwood, Director of the Respondent

10. On behalf of the Respondent, the tribunal heard evidence from Mr and Mrs Digwood.

11. On behalf of the Claimant, the tribunal heard oral evidence from him alone. The tribunal took account statements of Bryan Llorente and Brian Faint, but as they did not give oral evidence these statements were given little weight. This was particularly so

in the case of the statement of Bryan Llorente which was not verified by a statement of truth. In any event, both statements did not have a material bearing on the main issues before the tribunal.

12. On the morning of the second day of the hearing, the Respondent made an application to admit into evidence the following documents:

c Report of the Directors and unaudited financial statements for Complete Sports Solutions Limited for Year End 31st October 2019

d Report of the Directors and unaudited financial statements for Complete Sports Solutions Limited for Year End 31st October 2020

e Report of the Directors and unaudited financial statements for Complete Sports Solutions Transport Limited for Year End 31st October 2019

f Report of the Directors and unaudited financial statements for Complete Sports Solutions Transport Limited for Year End 31st October 2020

g Letter from Mitten Clarke, dated 10th February 2022.

13. Claimant's counsel agreed to these documents being admitted on the basis that they were directly relevant to questions she had been putting to the Respondent's witness the previous day.

14. The application to admit this evidence was allowed on the basis that it would help to clarify issues between the parties and there was no prejudice to the Claimant doing so.

15. The tribunal received written submissions on behalf of the Claimant and Respondent at the close of the second day of the hearing. Such submissions having also been copied to the other side.

16. The tribunal further the heard oral submissions from both counsel the following morning.

Relevant Findings of Fact

17. The Respondent is a travel agency, specialising in group travel for schools on activity breaks and sports tours to international destinations. At the beginning of 2020, the Respondent employed 4 members of staff in the UK in addition to its two directors Jamie and Hayley Digwood.

18. Claimant was employed by the Respondent from 1st November 2016 until 18th November 2020. At the time of the termination of his employment the Claimant's job title was Commercial and Partnership Director. His annual salary was £70,000.

19. In 2017 Claimant received a £15,000 loan from the Respondent for which the signed loan agreement, dated 7th July 2017 can be found at pp 110 - 116 of the trial

bundle. The agreement expressly states in the background section that it is offered by the Lender as an incident to employment. Paragraph 3, of the loan agreement sets out the terms relating to repayment of the loan:

"3. Until such time as the loan is repaid in full, the amount of the Loan not repaid will remain outstanding. Repayment of the loan by the Borrower will be via one or more of the following mechanisms:

…

3.1.2 Any other mechanism that the Lender decides to put in place with the agreement of the Borrower to ensure full repayment of the Loan including but not limited to an agreed bonus for achieving a gross profit target for the financial year ending on 31st October 2018. The details of any such further bonus sacrifice can be agreed in writing at a later date between the two parties.

3.1.3 In the event that the Borrower ceases to be an employee of the Lender, any amount of the Loan not repaid in full within 28 days, unless agreed otherwise by the lender.

3.1.4 In the event that the Lender has a short-term cash flow requirement (less than £100K of working capital) and the Borrower has the means to repay the loan, and amount of the Loan not repaid shall be repayable in full within 28 days of receiving notification in writing by the Lender."

20. Whilst the Respondent's working capital did fall below £100K, the lender did not give notice in writing seeking repayment of the loan. It is accepted that the loan did become repayable on 16th December 2020, being 28 days after the termination of the Claimant's employment on 18th November.

21. In or around 19th June 2018 it was agreed by exchange of emails that if the Respondent made gross profit after TOMS of 900,000 or more in the year end 2019, then the Claimant would be entitled to a bonus of £10,000 with the option of gaining up to 1% shares in the company. TOMS stand for the Tour Operator's Margin Scheme. Essentially, profit after TOMS broadly means the profit after the VAT is deducted.

22. In July 2018 Mr and Mrs Digwood moved to live in Portugal.

23. On 31st October 2018 the Claimant entered into a share option agreement, entitling him to exercise the option of purchasing up to 3 shares for the financial year ending October 2019 provided the *'exercise conditions'* in Schedule 1 of the agreement were met. The *'exercise conditions'* were that gross profits of *'the Company*' after TOMS had to equal or exceeded £900,000 and net profit equal or exceeded £370,000. The Company in the contract was defined as *Complete Sports Solutions* ('CSS') Limited and the tribunal consequently finds that the profit was to be

calculated solely in relation to CSS as opposed to CSS *and* the sister company (Complete Sports Solutions Transport) together.

24. Clause 4.3 States it is for the board to determine whether the conditions to exercise the option had been satisfied. Paragraph 4 provides the option to the board to vary or wave any exercise condition under certain conditions.

25. There is no reference to the terms of the share option agreement also applying to the bonus agreement.

26. Throughout 2018 and 2019 there is correspondence between the Claimant and Mr Digwood in which Claimant is seeking to negotiate and increase in remuneration either by way of salary or bonus. As part of this correspondence, the Claimant also sought confirmation that he had achieved his bonus and conditions for exercising his share option. This began to irritate Mr Digwood as is plain from his responses to some of the Claimant's emails. It did not however result in a breakdown of relationship as is clear from the continued correspondence between Mr Digwood and the Claimant.

27. On 15th November 2019 the Claimant emailed Mr Digwood stating that it appeared that financial targets will be surpassed by a reasonably good margin for y/e 2019 and seeking conformation that he has achieved his bonus. Mr Digwood responds the same day saying: *"It seems as though we have hit our target, Darrien doing the finer details, but I don't envisage many changes.*" The email goes on to say: *"The bonus and EMI will stand Tom, (this will never be in doubt as we have it written in stone) so once Darien has finalised the numbers, we can firm up everything as discussed."*

28. On 14th February 2020 Jamie Digwood informs the Claimant that he has earned a bonus of £10,000 to be set off against the £15,000 outstanding under the loan. His email states:

"so there is a (sic) 10,000 bonus that is now paying off your loan in which you OWE the company £5,000."

29. This was again an exchange of emails on 17th and 24th February 2020. On 17th February the Claimant emails Mr Digwood asking at point 5:

"You are confirming the £10K bonus earned in 2019 will go towards payment down on the loan rather than paying the loan via the agreed mechanisms in Clause 3.1.1 & 3.1.2 of the loan agreement…"

30. By email of 24th February 2020 Mr Digwood responds writing:

"The net payable bonus will be deducted from the loan of 15K."

31. There was no evidence before the tribunal that the Claimant accepted this position at the time.

32. On 27th February 2020 the Respondent stopped paying the Claimant £500 per month car allowance.

33. On 23rd March 2020 the UK went into the first lockdown as a result of the Covid 19 pandemic. The travel industry ground to a halt, but there was a lot to do by way or arranging cancellations and refunds. There was no new business coming in, but there were some outstanding queries relating to prospective bookings for later in the year.

34. On 26th March 2020 Jamie Digwood sent an email to all staff stating an intention to put them on furlough. This email said that for the programme to come into place employees needed to agree to the scheme. If there was no agreement then *"you will need to have an open discussion with me regarding next steps."*

35. The Claimant wrote to Mr Digwood on 26th March stating he did not believe that the decision to furlough staff was in the best decisions of the Respondent. Mr Digwood responded by email stating that if the Claimant felt he could not accept furlough, then they would have to discuss redundancy.

36. On 29th March the Claimant wrote to Mr Digwood stating he was willing to accept being temporarily furloughed until the end of the government scheme and asked for a top up on his wages -albeit he accepted this was discretionary. This top up was not agreed and so the Claimant went on furlough from 1st April earning £2,500 per month.

37. On 7th May Mr Digwood sent the Claimant a message asking whether the Claimant was available for a call to *'discuss the current situation.'* On 8th May the Claimant and Mr Digwood had a brief conversation during which they discussed a number of issues including that redundancy may be an option.

38. Following the call the Claimant send Mr Digwood a message stating he would rather stay in the business but if not sought to negotiate an exit deal on the basis of a of payment in lieu of notice taking into account bonus and shares.

39. On 11th May the Claimant received a message in response stating there seemed no way forward other than termination.

40. On 18th May 2020 the Claimant was given notice of redundancy with 6 months' contractual notice, expiring on 18th November 2020, which is the effective date of termination. The reason given was the impact of COVID 19 on the travel industry. It stated the redundancy would take effect on 18th May 2020 and all monies would be paid over next 6 months to 18th November 2020. In fact, the effective date of termination was 18th November 2020.

41. Attached was a redundancy calculation where the Respondent was seeking to deduct £15,000 in respect of the loan agreement from the Claimant's notice pay.

42. The Claimant responded by email on 18th May at 18:19 asserting that that £10K of the loan had already been repaid by way of bonus allocation and stating he wanted to exercise his share option. He provided an alternative proposed calculation, which can be found at p. 204 of the hearing bundle, taking into account what he considered to be the remaining 5K of loan deductions.

43. By email of 19th May Mr Digwood states that the accountants confirmed that the targets for October 2019 were not met and so EMI share options could not be exercised and bonus was not payable.

44. On 21st May 2020 the Claimant submitted a formal grievance raising complaints about deductions from salary, bonus payments, share options and stopping car allowance in February 2020. In the grievance the Claimant did not assert that the redundancy was not genuine and did not raise any issues about an inadequate warning, consultation, or discussion of alternatives to redundancy. It did however complain that it was a *'flagrant attempt to avoid having to pay an agreed bonus payment and also a blatant attempt … to also try to avoid the provision of shares under the agreed EMI share scheme.'*

45. The grievance was dealt with by Hayley Digwood. Hayley Digwood had contracted Covid on 13th March 2020. At the time of conducting the grievance she was morning the loss of her mother who passed away on 5th April 2020. On 6th June 2020 Respondent wrote to the claimant confirming his grievance was not upheld. No grievance hearing was held on the ground that Hayley Digwood was on bereavement leave.

46. 14th June 2020 the Claimant submitted an appeal.

47. Darrien Lowe, financial controller, was responsible for conducting the appeal. The Appeal meeting took place on 15th June 2020 via Teams.

48. On 16th July the Respondent wrote to the Claimant confirming his original decision was upheld.

49. The Claimant issued proceedings in the Employment tribunal on 13th August 2020.

50. Brian Faint, Head of Operations, was made redundant in July 2020 and Darian Lowe, Financial Controller was made redundant in November 2020.

Law

Contract Construction

51. When considering the meaning of an express term the tribunal needs to consider what such a term would ordinarily mean to a reasonable bystander aware of the context in which the agreement was reached.

52. A tribunal cannot imply a term simply because it is a reasonable one. Nor can it imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the tribunal can presume that it would have been the

intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the tribunal must be satisfied that:

a the term is necessary in order to give the contract business efficacy
b it is the normal custom and practice to include such a term in contracts of that particular kind
c an intention to include the term is demonstrated by the way in which the contract has been performed, or
d the term is so obvious that the parties must have intended it.

Unfair Dismissal

53. Section 94 ERA states that an employee has the right not to be unfairly dismissed by their employer. Redundancy is a potentially fair reason to dismiss an employee under s. 98(2)(c)ERA. Dismissal is also potentially fair if it's done for the purpose of restructuring the company as this could be some other substantial reason permitted under s. 98(1)(b) ERA.

54. Under s.139. ERA *"an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

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

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

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

55. In this case it is for the employer to satisfy the tribunal, on the balance of probabilities, that the principal reason in the mind of the person taking the decision to dismiss the Claimant was a potentially fair one.

56. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, *Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298, James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 6*. Tribunals can question the genuineness of the

decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, *Orr v Vaughan [1981] IRLR 63*.

57. If the employer fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) ERA must be applied which states that:

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case".*

58. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The case of *Capital Hartshead Ltd v Byard [2012] ICR 1156* makes clear that in applying this test the tribunal should not be bound by rigid rules.

59. The EAT in the case of *Williams and ors v Compair Maxam Ltd 1982 ICR 156*, EAT, laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals, when asking whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors suggested by the EAT in *Compare Maxam* that a reasonable employer might be expected to consider were:

a whether the selection criteria were objectively chosen and fairly applied;

b whether employees were warned and consulted about the redundancy;

c whether, if there was a union, the union's view was sought; and

d whether any alternative work was available.

60. In *Taymech v Ryan [1994] EAT/663/94*, Mummery P said, 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 matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem.

61. However, the overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

62. The Court of Appeal in *Gwynedd Council v Barratt and anor 2021 IRLR 1028, CA* affirmed that a dismissal for redundancy will not automatically be regarded as unfair on account of the absence of an appeal procedure. The overarching question remains whether the employer's approach fell within the range of reasonable responses on the facts of the case.

63. *S.123(1) of the ERA* provides that the compensatory award shall be *'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal.'*

Unlawful Deduction of Wages

64. *Section 13(1) Employment Rights Act 1996* ("ERA") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to s.23 ERA.

65. If the employer establishes that the exemption applies, the Tribunal does not have jurisdiction to decide the legality of the deduction or whether the employer has deducted the correct amount because the deduction is authorised and Part II no longer applies: *Sunderland Polytechnic v Evans [1993] IRLR 196*.

66. The unlawful deduction of wages provisions do not allow an employer to set-off cross claims for damages against wages falling due: *Asif v Key People Ltd EAT 0264/07*; *New Centuriion Trust v Welch [1990] ICR 383*, EAT; *Murray v Strathclyde Regional Council [1991] IRLR 396*.

67. The Tribunal has jurisdiction to resolve any issue necessary to determine whether a sum claimed under *section 13 of the ERA 1996* is properly payable, including an issue as to the meaning of the contract of employment*: Agarwal v Cardiff University [2018] EWCA 2084*.

Conclusions

Unfair Dismissal

Reasons for dismissal?

68. On the evidence before the tribunal, it is more likely than not that the principal reason for the dismissal was redundancy. It was accepted by the Claimant that when lockdown began in the UK on 23rd March 2020 foreign travel stopped overnight. In the short term, bookings for Easter and spring and summer half term holidays were cancelled and there was uncertainty of what the position would be moving forward.

69. The Claimant's principal role was to drive sales. While there may have been some queries coming in about holidays later in the year at the start of lockdown before the Claimant went on furlough, it is clear that the need for someone to drive sales had significantly diminished and this need was reasonably expected to continue to diminish as time went on.

70. In addition, the fact that other members of staff were also made redundant further supports that this dismissal too was by reasons of redundancy. Significantly, also the Claimant did not seek to assert at the time that this was not a genuine redundancy situation, rather that the situation had been used rather opportunistically to prevent the Claimant coming into additional benefits of bonus and shares.

71. The tribunal finds that Mr and Mrs Digwood held a genuine belief that turnover was going to significantly decrease by reason of fewer people being unwilling or unable to go abroad due to the pandemic. This belief was subsequently born out in the Respondent's financial accounts, which show turnover of £3,574,893 for year-end October 2019 and £869,540 for year-end October 2020. The tribunal accepts that they felt a pressing need to swiftly reduce the company's outgoings and the tribunal accepts that there was a genuine belief on the part of Hayley and Jamies Digwood that the company could not afford to keep the Claimant on his current terms and conditions given his high salary, long notice period and predominantly sales role.

Did the Respondent act reasonably in all the circumstances?

72. When considering whether the Respondent acted fairly in all the circumstances, I take into account matters including:

a The Respondent was a relatively small organisation with only 4 employees and some staff working overseas as self-employed sub-contractors.

b All of these members of staff other than the directors were made redundant by the end of 2020.

c Even on furlough, staff were still costing the company money.

d The furlough scheme could only operate as long as employees agreed to the same. The Respondent only had the Claimant's agreement up until the end of the first government scheme. Albeit the Respondent did not go back and ask the claimant what his position would be after that.

e The Claimant also had a particularly long notice period of 6 months. Other employee's notice period were closer to 1 month.

f The directors were dealing with particularly difficult personal circumstances in that Hayley Digwood and her mother caught covid at a family birthday on 13th March 2020. Unfortunately, her mother was admitted to hospital on 27th March and passed away on 5th April 2020. It was not possible to attend the funeral due to travel restrictions.

g There was significant work to be done dealing with cancellations, queries and refunds in light of the pandemic. There were also the HR issues to contend with as a result of having to put people on furlough and consider redundancy. The directors were dealing with all these issues themselves having furloughed staff to cut costs. Albeit they had advice from their accountants.

73. Under the unprecedented circumstances prevailing at the time, it was not unreasonable for an employer to have followed a much more basic redundancy process than would otherwise be expected. That being said, the tribunals finds that the Respondent's approach did fall outside the range of reasonable responses on the basis that it failed to provide adequate warning, consultation and consider alternatives to redundancy.

74. The respondent did mention redundancy in emails of 26th March, but this was in relation to furlough. The Claimant was given no warning that the conversation of 8th May was going to be to discuss redundancy.

75. It is accepted by all sides that the conversation was brief and also dealt with a number of other issues. This was the only verbal discussion taking place on the issue of redundancy.

76. There were no discussions with the Claimant or information given about how the decision was being made, why he was being considered at that point when others were not, how pools had been chosen and why and whether any alternatives had been considered and discounted and why.

77. It is clear that in failing to carry out even a rudimentary consultation the Respondent did not collect basic information relevant to making the decision such as whether the Claimant would accept to continue on furlough or a reduction in wages. It was asserted in oral evidence by Mr and Mrs Digwood that no such enquiries were made because the Claimant would have refused.

78. This was an unprecedented situation, and whilst the Claimant was looking to negotiate a good deal for himself, the email correspondence shows he was also a man of compromise and pragmatism. Discounting alternatives to redundancy before taking the small but basic step of finding out what the Claimant was prepared to accept, fell outside the range of reasonable responses. The tribunal notes that such enquiries

would have only needed to have been made of a small number of people and so would not have been overly onerous in the circumstances.

79. Following the brief conversation on 8th May the Claimant did respond by text message providing some proposals for negotiating an exit agreement. The Respondent submits that this shows that the Claimant was looking for a severance package and not to be re-instated in the business. However the Claimant was not afforded the opportunity of a wider discussion around redundancy and his response is to be viewed in that context. Had proper consultation occurred allowing proper exchange of information when plans were in their formative stages then the Claimant's response may well have been different. This is exactly why a fair procedure -even a basic one- is so important.

80. Mrs Digwood very properly accepted that things should have been done differently such as having more than one meeting, proper minutes being taken and that the Claimant should have been given proper warning of what the meeting was about.

81. For these reasons the tribunal finds that the Respondent did not act reasonably in all the circumstances dismissing the Claimant.

82. However, to the extent that the Respondent's conduct fell outside of the range of reasonable responses open to an employer I do not find any nefarious intent behind this.

Would C have been dismissed in any event- to what extent and when?

83. I find that it is more likely than not that had an appropriate process been followed then the Claimant would have still been dismissed by reason of redundancy shortly after he in fact was. The points I have already noted in this judgement remain relevant to this issue. I accept that the Respondent wanted to act quickly and decisively to cut costs given the severe downturn in business. Advice had been received form accountants that terminating the Claimant's employment was an effective way of doing this and the Respondent would have sought to act swiftly on that advice. On that basis I find it more likely than not that a letter of redundancy would have gone out to Claimant in any event some 2 weeks later.

Deduction of Wages

84. It is accepted that the Respondent made a deduction from the Claimant's wages. The Respondent can only lawfully do so if the Claimant has previously signified in writing his agreement or consent to making that deduction: s. 13(b) ERA. The material question is therefore whether the Claimant had previously signified in writing his agreement or the consent to the making of the deduction specifically in, £15K of the loan being deducted from his 6 months of notice pay?

85. The Respondent argues that by not challenging the principle of the deduction but instead challenging the amount, the Claimant tacitly accepted that the deduction could be made. Furthermore, in providing his own calculation of the redundancy payment taking into account loan payment he is signifying in writing his agreement or consent.

86. Looking at the communications as a whole it is clear the Claimant was not consenting to payments being deducted from his wages in principle. Rather the Claimant's initial communications after being given notice of redundancy were seeking to clarify and number of outstanding matters and seeking to negotiate an exit on the best terms by putting forward alternative proposals. There was significant disparity in the £5K amount being offered by the Claimant when compared the £15K the Respondent was proposing to deduct. The Claimant was putting forward alternative offers which were not accepted.

87. The tribunal consequently finds that the claimant did not signify agreement or consent for any sums outstanding under the loan to be deducted from his wages and so the deduction of the £15K was unlawful.

88. While it is accepted that any sums outstanding under the loan agreement fell due on 16th December 2020. As the law currently stands set-off is not available in a claim for unlawful deduction of wages and so the tribunal cannot deduct any sums outstanding when making its order. Both parties accepted that.

89. Mr Islam-Choudhry however submitted that there was a mechanism to do so under *s. 25(5) Employment Rights Act 1996* when taking into account the Overriding Objective. The tribunal finds that it does not have the power to make such an order and even if it did it would not seek to exercise that discretion.

90. The principle that set-off cannot be awarded on an unlawful deduction of wages claim are well established in case law based on interpretation of the primary legislation being the Employment Rights Act 1996: *Asif v Key People Ltd EAT 0264/07*; *New Centuriion Trust v Welch [1990] ICR 383*, EAT; *Murray v Strathclyde Regional Council [1991] IRLR 396*. Ms Davies has also helpfully referred me to the case of *Richardson v Howards Garage (Weston) Ltd ET Case No.1401179/12*, whilst not binding it is a useful illustration of the principles in practice. The tribunal considers that it would be an error of law to seek to redefine its jurisdiction and substantive powers outlined in these authorities by reference to the overriding objective which is a procedural power.

91. I was helpfully referred by Mr Islam-Choudry in written submissions to the Law commissions report entitled *'Employment Law Hearing Structures'*, in which it recommends the defence of set-off be available in limited circumstances. If it were open to the tribunal to apply set-off by some other means, being what in effect the tribunal is being asked to do here, there would be no need for the law commission to make these recommendations.

92. Even if the tribunal could make such an order, I would decline make it. The purpose of the protection of wages provisions is to ensure that people get paid their

wages and prevent employers making deductions except in certain circumstances, even where there were sums due to them from the employee. In essence, an employer who is owed money needs to seek repayment of that through the proper channels be that the courts if necessary, and cannot use the employment relationship to gain an unfair advantage. Whilst this has the potential to give Claimants a windfall, it is open to employers to avoid that situation by ensuring they only deduct wages through the proper means and correct their mistakes promptly.

Repayment of the Loan

93. Both parties specifically asked me to make findings on the amount outstanding under the loan.

94. The tribunal does not find that the terms of the bonus scheme mirror those of the share option agreement in their entirety. Had this been the intention of the parties, this would have been expressly stated. Not only is there no contemporaneous evidence this was stated at the time, this was also not a position adopted in evidence of either party before the tribunal.

95. However, the share option and bonus scheme both formed part of an overall incentive scheme, and so the terms of the share option agreement form part of the wider context within which the terms of the bonus scheme fall to be considered. As such, the tribunal finds that whether bonus was to be achieved it was to be calculated with reference to the Respondent's accounts only and not with reference to the accounts of the Respondent and its sister company Complete Sport Solutions transport. It is clear from the correspondence between the Claimant and Mr Digwood that there was a mutual understanding that the same target needed to be achieved in respect of the bonus and for the exercise conditions under the share agreement to be met.

96. With the benefit of hindsight, consideration of the overall picture taking into account both companies' profits may have made more sense, but the tribunal needs to consider what was in the contemplation of the parties at the time of reaching agreement and it is not for the tribunal to interfere in an agreement simply because a person has made a bad bargain.

97. The tribunal does not however imply a condition that the accrual of bonus was conditional on accounts being signed off by accountants Mitten Clerk. The fleeting reference in Mr Digwood's email of 15th November 2020 that Darian was doing the finer details, is insufficient evidence to support Mr Digwood's assertion in oral evidence that the Claimant had been repeatedly made aware sign off from the accountants was a condition to bonus being achieved.

98. The requirement for accounts to be signed off by accountants was specific to when (and not whether) the share option could be exercised. The tribunal notes that clause 4.3 of the EMI share agreement itself states it is for the board to determine

whether the conditions to exercise the option had been satisfied and provides the option to the board to vary or wave any exercise condition under certain conditions.

99. One could expect such additional formality to be required in the context of a person's entitlement to a share of the business. The bonus agreement is however much less formal and the tribunal finds that it was a decision for Mr Digwood whether targets had been reached and bonus was payable.

100. The tribunal notes that there is no claim for the bonus payment and the question is merely whether any sums were written off the loan. In order to be deducted from the loan bonus sacrifice needed to be agreed between the parties in writing under clause 3.1.2 of the loan agreement.

101. The tribunal finds that no such agreement was reached and the amount of £15K remains outstanding. The tribunal notes the email correspondence passing between the parties in February 2020. Specifically, Mr Digwood stated in his email of 24th February 2020 that the net bonus *will* be deducted from the loan, but there is no evidence the Claimant agreed to this proposition in writing.

102. Furthermore, while the Claimant at points in subsequent correspondence asserts an agreement was reached in that regard he states in his grievance letter that it was not mutually agreed that the bonus earned for 2019 would be used to draw down a portion of the loan. This is also his pleaded case.

103. Given that the statement by Mr Digwood in relation to the loan went hand in hand with comments surrounding the bonus payment there was no binding agreement the bonus was payable either. It is clear from the Claimant's comments in his grievance as well as his other responses to the notice of termination that bonus payment and shares were still on the table for negotiation.

104. Entitlement to bonus was the decision of Mr Digwood with accountants having the final say in the event of a dispute. It was based on the Respondent figures only and not the figure of the Respondent and Complete Sports Solutions transport combined. It is clear from the accounts that the targets once all expenses had been taken into account had not been met.

105. The tribunal accepts the Claimant had a genuine belief he had met target due to the initial figures he had seen. The final accounts were produced by Mitten Clark with figures provided by Darian Lowe, Financial Controller. There is insufficient evidence before me to conclude that these figures lodge at company's house are anything but accurate. What disparity in the figures there is as a result of further expenses being put in reducing the gross profit.

Remedy

106. The Respondent had already accepted that the Claimant was due £5,000 gross on account of non-payment for the Claimant's car allowance subject to any deductions for income tax and national insurance and so this was ordered accordingly.

107. In light of the findings above, it was ordered that the Respondent shall pay the Claimant £15,000 on account of deductions made from his notice pay in regard to loan repayments.

108. The parties agreed the sum of £1,948.66 as compensatory award for unfair dismissal, which appears to the tribunal to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal and so order is made accordingly.

Employment Judge Grubb

Date: 10th February 2022

REASON SENT TO THE PARTIES ON 22 March 2022

FOR THE TRIBUNAL OFFICE Mr N Roche