EMPLOYMENT TRIBUNALS

Claimant: **Mr D Brooks**

Respondent: **Riverway Foods**

Heard at: **East London Hearing Centre (by CVP)**

On: **5 January 2022**

Before: **Employment Judge C Lewis**

Employment Judge F Allen (observing)

Representation:

For the Claimant: **In person**

For the Respondent: **Mr N Perry (Counsel)**

JUDGMENT

The decision of the employment tribunal is that:

1. **The claim for unlawful deduction from wages is dismissed upon withdrawal by the Claimant.**

2. **The claim for unfair dismissal fails and is dismissed.**

REASONS

1 By a claim form issued on the 16 July 2021 following a period of early conciliation from the 31 May 2021 to the 6 July 2021. The Claimant brought complaints of unfair dismissal and unlawful deductions from wages.

2 The Claimant was employed by the Respondent from the 20 February 2006 until the 30 April 2021, at the time of his dismissal, he was employed as the night shift manager. The Claimant started new employment on the 3 May 2021.

3 The Respondent relies on redundancy and/ or some other substantial reason as the reason for dismissal. The Respondent contends that the Claimant was redundant as a result of its decision to cease operation of the night shift at the Harlow site where the Claimant was employed. The Respondent case was that the Claimant had been warned that the night shift operation was likely to ceases prior to his acceptance of the permanent role as night shift manager on the 31 August 2020, and that was given formal notice of the redundancy on the 18 January 2021, although it agreed to extend his notice and accepts that this was formally given in writing on the 1 February 2021 to expire on the 30 April 2021. The Claimant was offered the position of production manager or an equivalent position on the day shift which he declined, due to the pay being less and the hours not fitting in with his domestic childcare arrangements. He was dismissed with three months' notice.

4 On the 3 March 2021, the Respondent made a decision to temporarily reinstate the night shift due to an unexpected need. The Respondent contends that the Claimant was offered temporary reinstation on the night shift on a rolling three-month contract from the 3 March 2021 which he declined to accept. The Claimant's position was as set out in his witness statement, he felt that once the night shift resumed, his redundancy should have been retracted and he denies refusing the offer made to him on the 3 March 2021. His position was that he simply asked for a conversation about this to take place after his grievance/ appeal had been concluded. He contends that he had not been provided with an opportunity to discuss the finding from his original grievance and appeal hearings and had not been provided with an opportunity to talk through the proposals for the offer made on 3 March 2021 after the appeal process was concluded. He only received the appeal outcome on the last day of his employment, that is the 30 April 2021, at 12:47pm.

5 At the start of the hearing, I outlined the issues for the tribunal which were those identified by the EAT in the case of *Williams v Compair Maxam Ltd* [1982] ICR 156. The Respondent's actions are to be judged against this range of reasonable responses open to a reasonable employer. It is not for the employment tribunal to substitute its own decision for that of the employer. In considering whether the dismissal lay within the range of reasonable responses, the questions the employer might be expected to consider were:

5.1. Whether the selection criteria were objectively chosen and fairly applied?
5.2. Whether the employees were warned about the redundancy?
5.3. Whether if there was union, the union's view was sought?
5.4. Whether any suitable alternative work was available?

6 The tribunal heard evidence from Christopher Garn, Andrea Brown and Caroline Stevens on behalf of the Respondent and from the Claimant and Andrew Michevic on behalf of the Claimant. The Tribunal was provided with written statements, a schedule of loss, a bundle of documents for the hearing and a copy of the decision in *Stacey v Babcock Power Ltd* [1986] IRLR 3

The facts

7 I made the following findings of facts so far as is relevant to the issues to be decided.

8 Riverway Foods Limited is owned by CPC Foods Limited which owns a number of meat processing businesses. The business of Riverway Foods is taking premium cuts of meats and processing them into sausage mix, filling the mix into sausage cases and packing the sausages which are then sold to retailers. CPC Foods limited also owns other companies including Direct Table Foods Limited which is a bacon and gammon processing business. There was no recognised union involved.

9 It was agreed that the factory where the Claimant was employed had operated a night shift on and off mainly on a seasonal basis up until 2020; that when the night shift was available, the Claimant was the only manager who volunteered to work on the night shift; the Claimant preferred to work on the night shift, the rate of pay was better and it suited his childcare arrangements with his wife also going out to work in the day time. There had been an occasion in April 2019 when a presentation by one of the managers had referred to the Claimant as a night shift supervisor, however, the Claimant agreed that his position had reverted to a day role in 2020.

10 In summer 2020 the Respondent decided it was necessary to have a night shift again and there were discussions about making the Claimants' role permanently based on the night shift. In the course of these discussions the Claimant was informed that the night shift work would not be available permanently. There were discussions about moving some of the workers who were on the night shift to Direct Table Foods Ltd, based 60 miles away in Bury St Edmunds. The Claimant was asked to keep this confidential, although his evidence was that this was already well-known within the workforce. The Claimant accepted the new role, with a new contract as night shift manager, knowing that the night shift itself was likely to have a limited duration. This is evidenced from the documents in the bundle.

11 The Claimant accepted that when he was invited to a consultation meeting about potential redundancy in August 2020, it was no surprise to him. The meeting took place on 26 November 2020, the Claimant was informed that it was in respect of a potential redundancy due to the anticipated cessation of the night shift. The record of that consultation meeting was in the bundle [pages 58-59]. The Claimant accepted that the discussion was mainly centred on when the night shift would cease as he was well aware of the proposal and the rationale behind it in advance of that meeting. There was also discussion in respect of the alternative job being offered to him, which was to return back to the day shift, and his decision to turn down that offer due given the lower rate of pay and his childcare arrangements.

12 The Claimant accepted that approximately 90 percent of the staff on the night shift were temporary workers employed through agencies. He also accepted that of the remaining 10 percent, i.e those who were permanently employed by the Respondent, all were happy to go back on the day shift; none of those staff had been given a contract which reflected that they were permanently allocated to the night shift, the Claimant was unique in that position. The Claimant did not dispute that the Respondent offered him an equivalent role on the day shift, however, this was at a lower rate of pay due to the lack of a night shift premium.

13 The rationale for considering the move to work from the night shift at the Harlow factory to Direct Table was twofold: the first was cost, the company had to pay employees a premium for working the night shift; the second was that the group considered that as a result of the pandemic it required two sausage manufacturing plants, so that in the event that one was heavily affected by COVID, the other would still be able to produce sausages. The only business within the group that was producing sausages at the time was the Respondent.

Direct Table was manufacturing bacon and gammon products and there were other businesses in the group that manufactured bacon and gammon products. The majority of the products that they manufactured during the night shift in the summer of 2020 were Jolly Hog products and some Aldi products. The Jolly Hog products were not manufactured on the daytime shift. In the summer of 2020, the directors of the Respondent were having exploratory discussions about moving the Jolly Hog work to Direct Table Foods Limited. As Direct Table Foods Limited was not a sausage manufacturing plant, it needed to get the equipment up and running in order to manufacture the Jolly Hog products.

14 Mr Garn wrote to the Claimant in November 2020 to commence formal redundancy consultation, at this stage, the business had made the decision that the Jolly Hog production was likely to go across to Direct Table Foods in January 2021. The Claimant did not put forward any alternative at that meeting and did not challenge the decision to cease the night shift, nor did he say he would be prepared to work days at Direct Table Foods. He stated that his preference was to work nights. Mr Garn was aware that the Claimant had already indicated that he was not prepared to travel on a regular basis, he could only do this very occasionally, and therefore, the possibility of moving to the factory in Bury St Edmunds was not considered to be an option. Mr Garn wrote to the Claimant again on the 14 January 2021, [page 60] to invite him to a further consultation meeting on the 18 January. At that meeting Mr Garn told the Claimant that they could offer him a day shift production manager role. The Claimant said that he would go away and consider his options and come back to Mr Garn. They met again on the 1 February 2021, at that meeting the Claimant explained that he could not accept the day shift production manager role because of the significant drop in salary. The Respondent wrote to the Claimant on the 3 February 2021 to confirm his redundancy, [66- 67].

15 The Claimant raised a grievance on the 1 February 2021 [61-62] in relation to his hours, claiming overtime or time f in lieu and alleging an unlawful deduction from is wages. The grievance was handled by Caroline Stevens, who sent her outcome on the 3 March 2021 [97] (the letter is incorrectly dated the 3 February 2021). The night shift ended in February and the Claimant was working out his notice on the day shift.

16 Towards the end of February 2021, the Respondent was told by Direct Table Foods that it was not ready to take over the Jolly Hog work due to engineering issues. The product that had been produced for Aldi was being discontinued and Aldi had put in an order for a new product, Cumberland chipolatas, on a three months trial period. This new product was packaged in trays, the day shift already had too many products that were packaged in trays and could not accommodate another new product which led to the night shift being reintroduced on a temporary basis. It was not proposed that the production would continue on nights if Aldi decided to continue with their order, it was a temporary solution while the business changed the machines on days from plastic packaging to trays.

17 Mr Garn met with the Claimant on 3 March 2021 to explain that the night shift would temporarily restart. The Claimant was offered ongoing employment on a temporary basis and was told that his redundancy would be delayed. Caroline Stevens was present at that meeting and took handwritten notes [99-100 and 100a]. After the meeting the Claimant was provided with a letter confirming the offer [101-102]. The Claimant told the tribunal that the letter was given to him at that meeting but that the contents of the letter was not consistent with what he was told at the meeting. He believed that he was told that he would be made redundant and would be employed on a rolling three-month contract, whereas the letter said that he was being offered to continue in employment on the night shift on the basis of a rolling three-

months' notice period and would retain his right to redundancy at the end of a new three month notice period.

18 The Claimant made it clear to Mr Garn and Ms Stevens at that meeting, that he would not consider this offer until his grievance had been resolved. The Claimant confirmed that was his position in evidence, he considered that his grievance outcome and appeal should be dealt with first, before he could go on to consider the proposal that had been made. He appealed the outcome of his grievance on the 9 March 2021, [103- 108].

19 Mr Garn gave evidence that he remembered speaking to the Claimant after the 3 March and asking him whether he had had a chance to think about the offer of temporary ongoing work on nights, he could not confirm how long this would last but there were still work available on the nights. The Claimant responded that he could not consider it until his grievance had been resolved. Mr Garn's evidence was not contested.

20 The Claimant did not approach Mr Garn subsequently to see if the offer of temporary work was still available. In response to Mr Garn inviting the Claimant to a meeting with Ms Caroline Stevens on the 12 March 2021 to discuss the offer of temporary work the Claimant sent a text message asking Mr Garn not to contact him [171]. I find that the Claimant made it clear that the Claimant did not want to be contacted by Mr Garn. The night shift recommenced at around the end of March/beginning of April. I was told that it is still ongoing because Direct Table Foods is still not in the position to take the work on due to the labour crisis as a result of Brexit, which has meant that Direct Table Food are operating with 45 percent less than the number of employees required to fill their existing orders and are not therefore in a position to manufacture the Jolly Hog product. Because Direct Table Foods were not able to take on the Jolly Hog work, the Aldi product continued to be made on the night shift until July 2021.

21 Mr Garn confirmed that the Respondent is still operating a night shift in January 2022. The Respondent is using a temporary night shift supervisor, rather than a production manager due to the lower volume of work than had been produced in the previous year. Mr Garn told me that the Respondent anticipated that the work carried out by the temporary night shift will move across to Direct Table Foods , the CPC Group had also invested 1.6 million to improve the capacity of the day shift, at which point the night shift will end. It is anticipated that this will be between March and June 2022.

22 The Claimant told me that had he been provided with the outcome of his grievance appeal earlier, that would have given him an opportunity to discuss the temporary night shift position before his employment ended, but that until the outcome was received he was not in a position to even consider that proposal. He also told me that he thought he would most likely have accepted that proposal whatever the outcome of the appeal, if he had been given the opportunity to have time between the outcome of his appeal and the date his notice expired. He believed that as result of the Respondent's action he was denied that opportunity.

23 The Respondent disputes denying him any opportunity and pointed to the letter offering him the temporary position, which indicated that he could accept that offer at any time before the termination of his employment., The Respondent contends that the fact the outcome to his appeal had not been received was not an impediment to accepting the offer and that the two were not mutually exclusive. The Respondent pointed to the fact the outcome was provided to him on the last day of his employment, then there was nothing to stop the Claimant from emailing or ringing someone at the Respondent to accept the offer which would

have meant that his employment would not have come to an end. I find that the offer of a temporary extension to the Claimant's contract was made in good faith, that the offer was open until the end of the Claimant's employment and at no point was it withdrawn.

24 I am satisfied that at the time the Claimant was given notice the reason for dismissal in the Respondent's mind was redundancy. The Respondent acknowledged that there was a change in circumstances during the notice period and offered the Claimant the position of the night shift supervisor on a continuing basis with an offer of three-months' notice from either side retaining all his redundancy rights at the end of that period. Having given notice, I am satisfied that they took steps to offer the Claimant the work that was temporarily available on terms that would have ensured he did not lose out on his redundancy payment as a result. The Claimant's explanation for declining to entertain that offer was that he did not think he could accept it until his issues about his working conditions had been resolved.

25 The Claimant did not appeal his dismissal but included complaints about his redundancy in his appeal against the outcome of his grievance. He was informed that he had not appealed his dismissal and was given the opportunity to do so on the 21 April 2021 and again on the outcome of the appeal of his grievance which he received on the 30 April 2021. The Claimant was critical of the Respondent for only informing him of the outcome of his grievance appeal on the last day of his employment. I am satisfied that the Claimant was clear at his appeal meeting, the notes of which are at page 122, that he did not want to accept the proposal of a temporary contract but would rather have a pay-out in addition to his redundancy. The Claimant accepted that he was looking for pay-out for the stress and upset that had been caused to him in respect of the way he believed he had been treated and the failure to pay him overtime for additional hours. The Respondent disputed that the Claimant was entitled to overtime, he was in a salaried managerial post where reasonable overtime was required.

The relevant law

26 Under section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within section 98(2).

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

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

29 It is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant; if fewer employees are needed to do work of a particular kind, there is a redundancy situation. See McCrea v Cullen and Davison Ltd [1988] IRLR 30. Thus, a redundancy situation will arise where an employer reorganises and redistributes the work so that it can be done by fewer employees.

30 There is no requirement for an employer to show an economic justification for the decision to make redundancies; see Polyflor Ltd v Old EAT 0482/02.

31 Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with equity and the substantial merits of the case.

32 In Williams v Compair Maxam Ltd [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:

(1) Whether the selection criteria were objectively chosen and fairly applied;
(2) Whether the employees were given as much warning as possible and consulted about the redundancy;

(3) Whether, if there was a union, the union's view was sought;

(4) Whether any alternative work was available.

However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in Williams v Compair Maxam will not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.

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

34 In R v British Coal Corporation [1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in Gwent County Council ex parte Bryant [1988] Crown Office Digest 19 HC, namely that 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. Also see Rowell v Hubbard Group Services Ltd [1995] IRLR 195; and King v Eaton Ltd [1996] IRLR 199.

35 The Tribunal must judge the question of redundancy selection objectively by asking whether the system and its application fell within the range of fairness and reason (regardless of the whether the Tribunal would have chosen such a system or apply it in that way themselves; see British Aerospace v Green [1995] IRLR 433. The Tribunal should only investigate marks in a selection exercise in exceptional circumstances such as bias or obvious mistake; see Dabson v David Cover & Sons Ltd UKEAT/0374/10; and Nicholls v Rockwell Automation Ltd UKEAT/0540/11.

36 If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM

37 The procedures to be applied and the criteria to be applied when selecting an employee for redundancy cannot be transposed to the process for deciding whether a redundant employee should be offered an alternative position. The principal test when examining the fairness of the process of selection for a new role is that set out in section 98(4) of the Employment Rights Act 1996. The criteria set out in Williams v Compair Maxam do not apply. See Morgan v Welsh Rugby Union [2011] IRLR 376.

Conclusions

38 I remind myself that it is the conduct of the Respondent that I am considering. I have found that at the time the Claimant was given notice the reason for dismissal in the Respondent's mind was redundancy. I am satisfied that the Respondent dismissed the Claimant because it expected the requirements of the business for a permanent Nightshift Production Manger to cease.

39 I am satisfied that the procedure followed was a fair one and was reasonable in all the circumstances. The Claimant accepted that he knew even before signing the permanent contract in August, that there were proposals to move the work away from the night shift and that the night shift was not going to be a permanent arrangement. He accepted he was the only person affected, that the majority of other employees on the night shift were temporary workers and that of the 10 percent who were employed by the Respondent, they all returned to the day shift and expected to do so. He was aware about the proposals and was consulted about alternatives in the meeting in November 2020 and again in January and in February 2021. I am satisfied that there was an adequate consultation and warning in the circumstances.

40 I am also satisfied that the Respondent made reasonable efforts to identify suitable alternatives for the Claimant. The Respondent acknowledged the Claimant's reasons for not wishing to return to the day shift but offered him the day shift in any event because it believed that was all that was available.

41 During the notice period when it became apparent that there was still a requirement to run a night shift for an unknown period into the future but not permanently. The Claimant was offered the option to remain as Nightshift Production Manager as a temporary arrangement, with a rolling three month notice period; this was not offered as an alternative

to redundancy but rather as a temporary postponement to redundancy. I am satisfied that at the time the Claimant's notice period came to an end the Respondent still expected the requirements of the business for a permanent Nightshift Production Manger to cease.

42 I am satisfied that the decision to dismiss for redundancy fell within the range of reasonable responses open to a reasonable employer and was fair within the meaning of section 98(4) of the Employment Rights Act 1996. The claim for unfair dismissal is therefore dismissed.

Employment Judge Lewis
Dated: 22 March 2022