EMPLOYMENT TRIBUNALS

Claimant: Miss L Murray

Respondent: Hudson Administration Services Limited

Heard by CVP **On:** 24, 25, 26, 27, 28 and 31 January 2022

Before: Employment Judge D N Jones
Mrs L Anderson-Coe
Mr D Fields

REPRESENTATION:

Claimant: In person
Respondent: Mr Nuttman, solicitor

JUDGMENT having been sent to the parties on 3 February 2022 and written reasons having been requested by the claimant by correspondence of 11 February 2022, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

1. The findings of the Tribunal are unanimous.

Introduction

2. These are claims for:

   2.1 Unfair dismissal;

   2.2 Less favourable treatment of the claimant as a part time worker in respect of her dismissal;

   2.3 Indirect sex discrimination and detrimental less favourable treatment of the claimant as a part-time worker in respect of the refusal to provide the claimant with equipment to work from home from 16 March 2020 as part of the respondent's emergency planning guide;

   2.4 Victimisation by only allowing a one stage rather then three stage grievance, instructing the claimant to apologise on 2 July 2020, unreasonably delaying or impeding the claimant's subject access request

and failing adequately to respond to issues raised on 10 July 2020 and failing to provide the claimant with a reference.

3. The claim was to be dealt with in two parts, the unfair dismissal clam being the first, but all other claims were withdrawn after judgment was given on the unfair dismissal claim.

The Issues

4. The issues were identified at a hearing on 8 April 2021 and supplemented in an email of the claimant dated 21 April 2021.

The Evidence

5. The claimant gave evidence. The respondent called Mr John Lee Thompson, General Manager and Mr Ian Anfield, Managing Director. It submitted a witness statement of Ms Chelsea Turner from the sales department in Manchester.

6. The parties submitted a bundle of documents which ran to 643 pages.

Facts/background

7. The respondent is a company which provides administrative services to contractors in the Construction Industry Scheme (CIS). In June 2020 it had 35 employees, 23 of whom were based at its Bridlington Head Office.

8. The claimant was employed by the respondent as a Payroll Administrator in Bridlington for 16 hours per week.

9. On 16 March 2020 the respondent issued an emergency planning guide for employees on coronavirus.

10. On 23 March 2020 the claimant had asthma and expressed concerns about her health and that of her two-year old son in the light of the pandemic. Mr Thompson informed her that she could remain at work or stay at home where she would not be able to work but would receive statutory sick pay and an enhanced payment in the same sum, effectively doubling statutory sick pay to £191.70. Her normal weekly wage was £218.40. There were 6 Payroll Administrators at Bridlington. From 23 March 2020, 2 other Payroll Administrators did not attend the office and were not required to work from home. They received remuneration calculated by the same formula as the claimant. Mr Jackson, the Chairman of the Hudson Group, had decided that the respondent would not operate the Coronavirus Job Retention Scheme (CJRS). The claimant was slightly better off under the arrangement the respondent implemented at that time.

11. From March 2020 the directors of the respondent formed the opinion that they would have to shed some staff as a consequence of the impact of the pandemic and the consequential reduction and expected continuing reduction in construction activity. Mr Thompson had calculated that would amount to a reduction of 2 days per week FT equivalent in the Administration department in Bridlington.

12. On 19 June 2020 Mr Thompson telephoned the claimant and informed her that the company intended to restructure because of the effects of the

pandemic and that Sam in the accounts department had moved on and Kara from the processing department was taking voluntary redundancy. They had a discussion about the proposals.

13. Shortly after that call, Mr Thompson wrote to the claimant by email to say he had formally launched the consultation in respect of the restructure the previous day. He set out the proposed selection criteria. They were length of service, attendance record, disciplinary record and performance. This was to be measured over weeks 24 to 50 by calls handled, wrap ups and contracts entered. He included indicative scores of all in the pool against the criteria. The claimant came last and was informed she would be selected on that assessment, but nothing had been finalised and he intended to explore whether there were any suggestions to avoid redundancy such as by way of a reduction in working hours. He said that he was willing to discuss changes to the selection criteria if the majority did not believe it appropriate.

14. Mr Thompson held individual consultation meetings with the claimant on 23 June and 30 June 2020. He employment was terminated by reason of redundancy by notice in a letter of 30 June 2020.

15. The claimant appealed the decision and it was considered at a telephone meeting with Mr Anfield on 10 July 2020. The appeal was dismissed.

The Law

16. By section 139(1) of the Employment Rights Act 1996 redundancy is defined:

> *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) 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.*

17. By section 98 of the ERA*, (1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*.

18. Section 98 (2)(c) includes a reason that the employee was redundant.

19. Section 98(4) provides, "*where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair*

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

20. In ***Williams and others v Compair Maxam [1982] ICR 156*** the Employment Appeal Tribunal held that it is not the Tribunal's function 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.

21. It also provided the following guidance about the correct procedure in redundancy situations.

> 1. *The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
> 2. *The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
> 3. *Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
> 4. *The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
> 5. *The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

22. The form and nature of fair consultation was explained in the administrative law authority of ***R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price*** **[1994] IRLR 72**:

> "*Fair consultation involves giving the body consulted fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely. 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 whom he is consulting."

This is the correct approach to the evaluation for redundancy cases, see *King v Eaton Ltd [1996] IRLR 199*.

23. In ***Mugford v Midland Bank [1997] IRLR 208*** the Employment Appeal Tribunal stated that it will be a question of fact and degree for the Tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the Tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

24. In ***Eaton Ltd v King [1995] IRLR 75*** the Employment Appeal Tribunal addressed how the Tribunal must consider a challenge to the assessment. It held that in "*selecting employees to be made redundant, a senior manager is entitled to rely on assessments of employees made by those having direct knowledge of their work. There is no material difference between the position of a senior manager who relies on such assessments and that of one who relies on information in company records. In both cases, the senior manager is relying on the proper performance of the work done by those appointed to do it and, in the absence of some reason to think that the work has not been properly done, there is no reason why he should not so rely*". "*In determining whether an employer acted reasonably in selecting an employee for redundancy on the basis of such an assessment, therefore, it was relevant to apply the guidance of the Lord President in* **Buchanan v Tilcon Ltd *[1983] IRLR 417***, *that all the employer has to do is to prove that the method of selection was fair in general terms and that it was applied reasonably in the employee's case by the senior official responsible for taking the decision to dismiss. It is not necessary for those who actually carried out the assessment to give evidence before the Industrial Tribunal to explain why the employee was marked in a particular way. If the view taken by the Industrial Tribunal in the present case was carried to its logical conclusion, there could be no alternative but to require the employer, in every case, to produce all the evidence bearing upon all the assessments out of which the redundancy decision arose*".

Analysis

What was the reason or principal reason for dismissal?

25. Redundancy. There was a reduced requirement for employees to undertake work of a particular kind throughout the offices but including in the Administration department.

26. That department was concerned with the processing of contracts which arrived in paper form, tagged to an email or completed electronically. Of the paper contracts, an average of 650 were processed a week in February 2020. By mid-May of the same year this had fallen to 200 and, although it started to rise, it never recovered to more than 600. The number of operatives paid weekly fell from an average of 8,500 to below 5,000 and then recovered to an average of

7,250, a 15% drop. In the Spring of 2020 the predictions of the respondent for a reduced requirement for employees was borne out by history.

27. In addition, by June the number of electronically submitted contracts had picked up significantly. Like many industries, the move to electronic ways or working had been forced upon the public by the pandemic and the belief that its transmission was possible on hard surfaces such as paper. That modernised how contracts were submitted and was unlikely to be reversed. Although processing such contracts initially had taken the same amount of time as paper contracts, as the claimant said, we are satisfied that the system as described would save a substantial amount of time when those who used it became familiar with it. The move to this system was referred to by Mr Thompson in the redundancy consultation meetings and we accept it was a factor in his mind and that of Mr Anfield, when they were projecting the business need over the coming two years. It is worth pointing out that the language of section 139 extends to include redundancies where the need for employees is expected to diminish, not simply when it has.

28. The claimant said that Mr Thompson could have anticipated capacity in the future, with Betty to go on maternity leave for a year from November 2020. Trish left the Payroll department in September 2020 and Ellice transferred temporarily to cover for her. A temporary employee, Beverley, was appointed to cover for Betty, and she left when Betty returned, but reduced her hours from 40 to 24.

29. Mr Thompson had anticipated Betty's absence on maternity leave and had factored that in. The forthcoming departure of Trisha was unknown to Mr Thompson in June. Betty's return was on reduced hours. We accept his evidence that the department now operates at a lower capacity and his proposals were soundly based.

30. For those reasons we reject the challenge that the reason for the dismissal was not redundancy.

<u>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.</u>
<u>Failure to forewarn the Claimant of the risk of redundancy</u>

31. This narrow point is part of the broader consideration of whether the respondent conducted a reasonable consultation exercise, which arises whether or not it is specifically raised by the claimant and, in any event, is referred to in the first case management order at paragraph 2.3.1.

32. In respect of the failure to forewarn the claimant the evidence demonstrates the claimant knew about the launch of the formal process on 19 June 2020. Mr Nuttman said the claimant admitted in cross examination that she first knew about the potential for redundancies earlier, he said on 10 June 2020, but we had no satisfactory material on which to find what precisely had been said about the restructure and its ramifications. That was doubtless because of an earlier ruling which had split the hearings and excluded our consideration of particular matters, but we are obliged to make determinations on the evidence before us. On that we find the only clear forewarning about the restructure and its impact was on 19 June 2020.

33. That of itself would not have been inadequate, even for a dismissal which took place 11 days later. But we find the compression of the exercise which then took place compromised its quality. By that we mean that to invite representations on the criteria at the same time as representations on the scoring of them significantly restricted the value of the process. That is because in addition to giving the impression the decision was a foregone conclusion, the breadth and depth of representations in respect of the criteria to be used was reduced to that of the claimant, because only she had a vested interest in changing them.

34. The guidance in *Comair Maxam* envisages a staged approach. In a case of this type the reference to consultation with the union requires the substitution of the group of affected employees. Mr Nuttman argued that the situation was distinguishable because a union has nothing personally at stake. We consider the problem is equally, if not more, acute when there was no union. That is because when none in the pool know of the outcome of the exercise, they are more likely to make better suggestions as to how the process should be fair to all but not when they do. They all have something to lose.

35. To compound the problem, Mr Thompson said that it would only be if a majority held a view that one or more of the criteria should be changed that he would be open to changes. In these circumstances, regardless of the merit of anything the claimant might say about their suitability, the formula would not have been changed. It is inconceivable that those 5 employees who knew their jobs were safe would suggest any revision to the process which might put them in jeopardy. This is reflected by a number of them asking for the decision to be made quickly. That was not a justification for a short process, as advanced by the respondent because of the unsettling and traumatic effect of the threat to their livelihoods. Fairness demands a reasonable opportunity to think about the proposals and make suggestions which will be considered with an open mind, genuinely and properly (*ex parte Price)*.

36. In her supplemental list of issues to augment those identified at the case management hearing, the claimant said that the outcome was prejudged in particular in regard to criteria, scoring and the link between voluntary redundancy and those who lost their jobs in the restructure. We agree with this in respect of the criteria and the scoring. As to the criteria, Mr Thompson had boxed himself into a corner by adopting the approach we have set out above. In respect of the scoring, which we address below, we consider he had closed his mind to representations, which is reflected in, at best, a failure properly and reasonably to analyse the data about contracts which was placed before him. This preconceived outcome is reflected in an email exchange he had with Mr Anfield on 18 June 2020. He stated, "*The process did reveal what we had suspected, that Lisa's performance was objectively below the other employees*". He added that she would have to be performance managed if the results changed and Mr Anfield agreed.

37. Mr Thompson then carried forward the same formula and scoring exercise upon which this belief had been based. The method adopted, of presenting the scores at the same time as the proposed formula, disabled him from conducting a fair and unprejudiced procedure. The outcome was, frankly, inevitable. It fitted comfortably with his assessment that he needed to lose 16

hours. Had a full-time worker come last in the scoring exercise, he would have to make a series of other changes which might have been complicated and problematic. He did not want to look at an alternative process or scoring mechanism which would disturb an outcome which perfectly met his reduced need for hours, which was of a part-time worker. We do not accept he had an open mind.

38. For these reasons the consultation process lay outside the conduct any reasonable employer would have adopted and was fundamentally unfair to the claimant.

Failure to consider adequately the Claimant's proposal for a job- share. Payroll processing, sales admin, marketing assistant

39. We do not accept that there was alternative suitable employment which was known about at the time. The respondent had contracted out marketing and shed jobs in other areas so there were no vacancies. The claimant would have required retraining had there been any vacancies, but that would have been possible in some areas such as payroll where she had some out of date experience.

40. Much time was spent in exploring whether requests for voluntary redundancy should have been offered across the office, because Trisha from Payroll had vouchsafed to the claimant in early June that she would have taken it. She left in September and had she left earlier the claimant could have moved and trained up in Payroll or another member of the team moved, as happened with Ellice, leaving work for the claimant in Administration. Mr Nuttman spent much time criticising the claimant for not telling her employer about this, but we accept that she felt a sense of duty to keep this confidential for fear of landing herself or Trish in trouble.

41. In the end the claimant's argument, though logical, was not a sound one when applied to the limited role of the Tribunal in assessing the reasonableness of the process. Because we, or another employer, might have undertaken the restructure in this way, it would not be outside a reasonable range for the respondent not to have done so. The respondent chose to deal with the departments separately. The pooling for selection of those in the Administration department is not one we could find was unreasonable against that test. Furthermore, there is no guarantee the respondent would have accepted Trisha's request for voluntary redundancy as it does not appear to have been an entitlement to anyone who requested it.

A failure to consider retaining the Claimant's employment on reduced hours

42. Reducing the claimant's hours alone was not viable to meet the required reduction of 16 per week.

43. The claimant said that a discussion across a number of departments, or the Administration department alone, might have led to individuals collectively agreeing to shed some hours.

44. For reasons we have expressed we did not find it unreasonable to consult more broadly within the office about this, but that was possible with respect to the Administration department. The consultation exercise we have criticised

above might have generated suggestions from a number in the group if they perceived they might have been at risk, in contrast to 5 of them knowing their employment was safe.

A failure to place the Claimant on furlough

45. The respondent took a decision not to use the CJRS in March and April. It later used it for operatives who worked for an associate company, Hudson Blue Limited, for a specific reason but not beyond May.

46. It agreed to pay double the amount of statutory sick pay to the claimant which was £15 per week more than 80% of her pay from 23 March. There was no obligation on the respondent to do this. Although the claimant could have refused, she would then have had to attend at work as a key worker, under the terms of her contract. If she chose not to go to the office because of her concerns about the risk to her with asthma, she could not work from home due to the lack of work and equipment to do it. She might then have taken sick leave or be at risk of redundancy. She agreed to what the respondent proposed.

47. There was no obligation on the respondent to use the CJRS. It required both employer and employee to agree to a variation to the contract of employment, temporarily, whereby the employee agreed to do no work and receive 80% of their pay and the employer could recoup those sums from the Exchequer. The reason it was signed up to in swathes was because employees would otherwise have faced the loss of their jobs through redundancy.

48. The claimant's complaint is not that the respondent did not use the CJRS in March and April, but that it did not resort to using it when she was selected for redundancy in June. The respondent says it was not available then, because it was closed to new applicants from 10 June 2020. To that the claimant says they were aware of the need for redundancies in early June and could have applied then. She faces a similar difficulty to that of Mr Nuttman in seeking to adduce some evidence of what had been said about the restructure and its ramifications at an earlier stage, which the Order about splitting the hearings precluded. We never saw that part of the Order but had to rely upon the parties to steer us clear of whatever the forbidden material was.

49. Regardless of this we did not accept the claimant's submission that in failing to use the CJRS the respondent acted outside any reasonable approach. In June it was a time limited scheme, which was expected to end in October 2020. We all know that never happened, but it could not have been predicted at the time. The scheme was to change, so that employers would not receive a complete indemnity for the wage costs from the beginning of August, with them having to pick up their share of national insurance payments and then a reduction in the amounts of the wages covered by the Exchequer. To use the scheme would come with a cost to the respondent.

50. Furthermore, and more significantly, the projected loss of work and need for staff in the department went well beyond October and was for two years. The fact the Government furlough scheme could have largely indemnified the respondent for that period and given life support to the claimant's job is a benefit of hindsight, against which the respondent should not be judged. We

recognise the sense of disappointment that the claimant has that the respondent was prepared to 'carry' Betty's employment to the point she took maternity leave from when it would receive the Government supported maternity leave provisions. These are difficult choices and we make no criticism of the respondent as to where it finds it must draw the line commercially in running its own business.

The use of a selection criteria that lacked objectivity

51. Disciplinary and attendance records and length of service are common and objectively measurable.

52. Telephone calls and wrap-ups were KPI's and had records which were a reasonable litmus test of performance and could be fairly measured.

53. The entering of contracts was not a KPI. If it could be objectively assessed, it would have been a sensible measure of performance. The claimant had reservations about how this could be done, which she raised in the consultation exercise. These had some legitimacy. There were difficulties, such as whether tagged contracts had been excluded initially, none of which is apparent from the disclosed documentation. The claimant said Wednesdays and Fridays were the busiest days which could have skewed the results for those who did not typically work these days. We were not satisfied Mr Thompson properly reflected upon the concerns the claimant had raised as to whether this was a suitable criterion because of the problems of evaluating it. He was satisfied with it because it was a measure which met his objective.

Favouring in the retention those employees who work from home which was not an objective selection criterion

54. Of the six in the pool Tracey and Sarah worked in the office because, following the lockdown, construction was part of the key worker provision. Although they had provisionally been earmarked as people who could work from home in the Emergency Plan created on 13 March 2020, that was never necessary.

55. Ellice worked from home and had been so categorised on 13 March 2020, because she had a young child.

56. The other 3, the claimant, Betty and Nichola, did not work from home and had young children so could not come to the office. The claimant also had asthma which precluded that. Only the claimant lost her job and so there is no apparent bias in the selection criteria against her. Nichola who fell into the same category came second.

57. The claimant draws upon a broader comparison of the Bridlington and Manchester offices and that all 5 who lost their jobs were in the group who were not required to work. All those who were required to work from home or otherwise retained their jobs.

58. We do not accept this establishes the causal link suggested. That is because 3 of the employees who were dismissed had less than 2 years' service. It was a decision to take advantage of the fact they did not have qualifying service to receive a redundancy payment rather than an application of the last in first out principle as suggested in cross examination or the fact they had been placed in the group who were not required to work. The other person who left took

voluntary redundancy which had no obvious connection to which group she had been in.

An unfair application of the selection criteria

59. Mr Thompson received an email on 9 June 2020 from Mr Petch, Head of IT based in Guernsey, which contained one table of rankings per day and another table in which he allocated scores of 5 to 0 to the rankings e.g. 5 for the number of times the candidate scored first in the rankings, 4 for the times the candidate was second etc. He concluded his email by asking if this approach worked.

60. A document containing 6 tables, marked A to F, was prepared by Mr Petch and sent to Mr Thompson at some stage before he prepared the indicative scores which he provided in his letter to all candidates on 19 June 2020. That document used the individual daily score and applied a multiplier of 5, to create a notional weekly score from which the weekly rankings were calculated. In fact, the same ranking outcome would have been achieved without applying a multiplier of 5. Table D included the ranking from 1 to 5 of each candidate for each week assessed, the ranking being of their respective number of notional contracts entered per week. Table F was an aggregate of the number of times the candidates came first to sixth and table F included the scores allocated of 5 to 0 for each candidate for their rankings.

61. An error is contained in table E in respect of the ranking of the claimant in respect of the number of times she came first each week. Table D shows she came first on 17 occasions, but Table E shows her as having been first on only 4. Had the scoring been applied correctly she would have received 107 and not 42 with the next candidate trailing at 75. When this particular criterion was measured in the application of the scoring against the selection matrix, the claimant would have been allocated 5 points and not 1, with the consequence that she would have come second to the top and not sixth, the last, in the pool. She would not have been selected for redundancy.

62. This was revealed in the cross examination of Mr Thompson. He agreed that table E should have reflected that the clamant had worked for 26 of the 27 weeks, when it only reflected 13 weeks and was wrong. He also agreed that the claimant should have received a score of 105 (although in fact it is 107) and it would have led to the claimant not being selected for redundancy. He said the spreadsheet in the bundle must have been an old version and that he believed the figures he ultimately used were correct. He said, *"I did check the figures, I stand by the process we have taken*". In re-examination he said that he had relied upon Mr Petch to run reports on all contracts which were entered and that he probably sent the document as it was. He then said there was a further discussion with Mr Petch in which he had informed him that the tagged contracts had not been included in the calculation and there were multiple versions of the spreadsheet. He said he had replicated the wrong table from the spreadsheet in the bundle in the letter he sent to the claimant on 19 June 2020.

63. The respondent's representative sent the Tribunal a further table after this evidence. Initially he asked to admit it in evidence but he withdrew the application the following morning because having taken instructions the

respondent accepted that it had used the information in the spreadsheet which had been disclosed and was in our bundle and it contained the error the claimant identified. That was explained as arising from an error in the formula because it had duplicated the ranking of Nicola Hartley in respect of the number of times she had come first and it applied that to the claimant rather than her own much higher figure. Mr Thompson was not recalled to explain this further.

64. In the light of this evidence we find that the spreadsheet which contained the acknowledged errors had been provided to Mr Thompson and he had used it to calculate the scores for this part of the exercise. In his letter to the candidate he said "***I*** *assessed and ranked each team member, …* ***I*** *then totalled up how many times they came first, second and third and gave each place [sic] a score from 0 to 5 based on how they ranked compared to each other*" [our emphasis].

65. In his closing submissions Mr Nuttman drew our attention to the line of authorities which addressed the approach to be adopted to individual assessments, which we have summarised above. He said that Mr Thompson could rely upon the information provided by Mr Petch and unless there was an obvious mistake, his genuine belief in evaluating the erroneous criteria could not result in a finding of unfair dismissal.

66. We accept that was a reasonable way of applying the case law to the facts of this case. This was not a case in which the claimant was individually appraised by Mr Petch. Mr Petch simply collated raw data and had no daily contact or involvement with the claimant. But the authorities make it clear that the Tribunal must consider whether a method of selection which was fair in general terms was reasonably applied to the claimant. We must not simply ask ourselves if we would have approached the matter differently. We must ask whether no reasonable employer would have applied the scoring of the claimant against the criteria in this way.

67. We are satisfied that there was an obvious mistake. Mr Thompson unreasonably failed to consider the data he had been provided with and then apply it to the selection criteria. It is clear from his evidence that he did more than simply rely upon the spreadsheets produced by Mr Petch, and properly so. He challenged them because all contracts had not been entered with tagged contracts having been omitted. His letter implies he had undertaken an assessment of the figures himself, not simply read from the final table F. Given the importance of the exercise, we find that was what any reasonable employer would have done. His letter to all candidates of 19 June made it clear he had totalled up and applied the figures; this was not simply someone else's evaluation of the claimant's performance. There were a number of spreadsheets, although we saw only the one.

68. No reasonable employer, in the form of the person conducting the assessment of the candidates against the selection criteria, could have failed to notice that the number of weeks upon which the claimant had been assessed was recorded as half the correct figure or that the period of times she had come first was head and shoulders above the next candidate. An employer might be excused for glancing at the statistics of those not at risk, but no reasonable employer would overlook the figures concerning the individual who was to lose

her job in the exercise. Despite his valiant efforts Mr Nuttman could not salvage these fundamental mistakes as being a task delegated to another which Mr Thompson was entitled innocently to rely upon. Mr Thompson had considered and applied the data himself and failed to pick up an obvious and profound miscalculation.

Conclusion

69. For the reasons we have identified in the deficiencies in both the consultation and also in the scoring processes we are satisfied that dismissal for the reason, redundancy, was not reasonable in all the circumstances having regard to the size and administrative resources of the respondent, equity and the substantial merits of the case.

70. One issue the claimant pursued in the hearing, but not identified initially at case management, was the refusal to allow a second appeal. Under the policy in the handbook, such an appeal would be allowed for a grievance. Mr Anfield said she could make such an appeal at the conclusion of the appeal hearing, but its ambit would be limited. When the claimant pursued that, it was not allowed.

71. We do not accept that this was a procedural error. The respondent's policy is not detailed and sophisticated. It is not a substantial employer in terms of employees, having 35 at the time of the exercise, and had no dedicated HR function. The claimant said that the disciplinary procedure which allowed only one appeal under the policy was confined to dismissal for gross misconduct.

72. We would not regard the claimant's request for a further appeal as constituting a grievance, in the ordinary sense that would be construed. It was connected to other complaints with which we are not currently seized, a grievance, in respect of which she might have been entitled to a further appeal. The appeal against dismissal is not properly categorised as a grievance. In spite of the lack of clarity in the handbook, we would not regard it as unfair to allow only one appeal.

Remedy

73. By section 123 of the Employment Rights Act 1996 the amount of a 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 insofar as that loss is attributed to action taken by the employer.

74. In this case the claimant says that she was out of work and suffered a continuing loss of earnings which she set out in a Schedule of Loss. Her weekly pay was £203.27 net and she also received a bonus quarterly of £201.25, which we calculate is £15.47 per week which would mean her weekly pay was £218.74. In her Schedule of Loss, the claimant seeks past losses and future losses for six months (past losses being £11,375 for a period of 12 months and continuing losses for six months). That schedule was prepared a little time ago.

75. The claimant gave evidence and was cross examined and that was the only evidence we heard save for considering two documents – one from her General Practitioner and one from a counsellor.

76. In respect of her claim, the claimant said she is in the process of becoming self-employed and that, we understand, concerns a property which she and her partner own which had been let on a residential tenancy which expired in June 2021. It has since been modernised and refurbished to let as a holiday let. We are told it has not yet produced a profit. The claimant said in evidence that she had not made any extensive search for work although she had registered with some agencies and considered some of the information from the agencies. She feels she is not qualified to apply for many roles, she, having worked for the respondent for ten years and not having any qualifications as such. One particular issue for her is that she worked on Mondays and Tuesdays and her partner worked Wednesdays to Fridays. They both self-school their daughter - the claimant doing that on Wednesdays to Fridays. Her partner has been able to look for some additional work on Mondays and Tuesdays, as the claimant has been free to teach her daughter then since being dismissed, but there has been little uptake in work for him. The claimant says that she had made an attempt to sell some clothing on-line but that was not successful and did not generate any money.

77. In respect of her health, her General Practitioner prepared a report dated 15 September 2021 and explained that on 17 June the claimant contacted him to say she had been made redundant. It is not clear if that date is an error because she was still employed and had to attend a meeting later that week. This made her very stressed and anxious and her abdominal symptoms flared up. The claimant had a history of abdominal problems and also nasal congestion problems.

78. On 2 June she had been reporting bouts of light headedness, feeling faint, drained of energy and her heart going fast and slow. She also saw the GP in June, July, August and September and had symptoms relating to stomach and heart issues and she was seen in October 2020 when she was having episodes as if the world was slowing down, irregular pulse and she felt if she moved she would be unsteady. She was sent for tests which came back normal and the ENT department diagnosed her as having migraneous dizziness. The GP agreed with the claimant when she believed her symptoms of the past fifteen months had been due to stress and he prescribed her Amitriptyline, which is an anti-depressant or anti-anxiety drug.

79. The claimant's Counsellor also prepared a report. She explained, in an email of 5 August 2021, that she had been referred by the GP for support when she had been suffering anxiety following the loss of her job and the pandemic. She was at an early stage of an Employment Tribunal case which was causing her undue stress. She had counselling sessions for a period of twelve weeks to regain self-reliance on managing difficult aspects of her life. The claimant tells us that she was to receive some further treatment. The sessions took place in April, May and June 2021.

80. Mr Nuttman submits that the claimant has completely failed to mitigate her loss, that she had two and a half months during her paid notice period when she could have obtained work, particularly given the opening up following the

first lockdown and opportunities in the hospitality industry with the eat out to help out scheme. He also says that the claimant has not produced any documentation to demonstrate that she has undertaken any real search and so he says that there should be no award for loss of earnings or, if there were to be any award at all, it should be limited to four and a half months from the termination of her employment on 30 June, which would be two months losses of earnings having factored in the paid notice period. In respect of loss of statutory rights he says that should be in the sum of £311 by reference to the case ***Cartledge v Dugdale*** in which he says the EAT stated the Tribunal should use a £100 from a date in the 1970's and add an inflationary increase.

81. In this case we find that the claimant was stressed and anxious following her dismissal. We do not accept that this could simply have been attributable to the process itself regardless of its outcome. Mr Nutman pointed out that the anxiety and stress commenced at the beginning of June coinciding with the time at which the claimant learned that the exercise for redundancy was launched. Having regard to the medical evidence and what the claimant has said we find the stress and anxiety continued for a significant period because of the circumstances the claimant found herself in upon losing her employment. Her condition was assisted by the prescription of her anti-depressant/anti-anxiety drugs and later counselling such that there was an improvement by June 2021.

82. We also are satisfied that the claimant's domestic circumstances would have enhanced the difficulties of obtaining suitable alternative for some time. That is because had she not been dismissed by the respondent she would have continued to work on Mondays and Tuesdays and that would have fitted in with schooling her daughter but that could not easily be replicated because of the limited availability of work on these days and the geographical area within she could be expected to find work. There was also some limitation by reason of qualifications and experience. We do not regard the opportunities in the hospitality arena as likely to have been particularly suitable for the claimant. She had no real experience in that area, was suffering from a number of symptoms of ill health which we have addressed above and was asthmatic. Moreover, she could only offer Mondays and Tuesdays, albeit there may have been some other evening opportunities.

83. We have no evidence whatsoever of what job opportunities there were in Bridlington or nearby regions either at the time of the claimant's dismissal or now. Mr Nuttman criticises the claimant for not producing any documentation to show she looked for jobs. It should be pointed out the respondent produced no documentation to demonstrate there was work available and it bears the burden of establishing the claimant has failed to mitigate her losses. The Tribunal is thrown back on its own experience of the job market.

84. We are satisfied that the claimant was in a particularly difficult position to mitigate her loss because of the combination of her poor health and being available only for two days per week, from Monday to Friday, or evenings and weekends. She did not fail reasonably to mitigate her loss in finding work to replace her weekly pay in its entirety. We consider that could only reasonably have been done by the end of June 2021. That is a period of forty-two weeks from the end of her notice period. Forty-two weeks multiplied by £280.74 is £9,187. We are satisfied there would have been opportunities to generate

some income by way of occasional or irregular work before that time which the claimant could reasonably have exploited, even having regard to the claimant's health and domestic arrangements. We reduce the sum of £9,187 by £1,500 to reflect that. The loss is £7,687. To that we add the sum of £400 for loss of statutory rights. The **Cartledge v Dugdale** authority is only one of a number of approaches to calculating this head of loss suggested by the EAT. A later authority of Elias J suggests an appropriate rate would be twice the weekly wage of the claimant up to the statutory weekly cap.

85. It follows that we award the claimant a compensatory award of £8,087.

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Employment Judge D N Jones
Date: 10 March 2022